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CALIFORNIA REPORTER

IN VOLUME

1 PACIFIC REPORTER

SECOND SERIES

212 Cal. 763

GILDERSLEEVE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14055.

Supreme Court of California.

June 15, 1931.

1. Master and servant 🔑385(16).

Employer's tender of medical treatment to injured employee must be unequivocal and one which employee can accept when made (St. 1917, p. 834, § 9 (a), as amended by St. 1925, p. 640, § 1).

2. Master and servant 🔑385(16).

Employer's promise to make tender of medical treatment if and when Accident Commission decided in favor of injured employee *held* insufficient tender (St. 1917, p. 834, § 9 (a), as amended by St. 1925, p. 640, § 1).

In Bank.

On rehearing.

Award affirmed.

For former opinion, see 295 P. 1033.

R. P. Wisecarver, of San Francisco, for petitioners.

G. C. Faulkner and Edward O. Allen, both of San Francisco, and Wallace Rutherford, of Napa, for respondents.

PER CURIAM.

In this case a rehearing was granted to give further consideration to the question whether there had been a valid tender of medical aid to the employee. We are, however, satisfied with our former conclusion, and we adopt and quote from the opinion, 295 P. 1033, originally rendered, as follows:

"This is a petition by an employer and his insurance carrier to review an award of the Industrial Accident Commission.

"The respondent O'Neill was employed by petitioner Gildersleeve as a laborer, and while so employed suffered a fractured spine. He received some medical treatment at the camp where he worked, and later was removed by his relatives to Napa. He placed his case in the hands of chiropractors, and received chiropractic treatment at the home of a private nurse. His recovery was only partial.

"Petitioners, the employer and his insurance carrier, instituted proceedings to be relieved of liability for medical expense under the Workmen's Compensation, Insurance and Safety Act, section 9(a) (St. 1917, p. 836, as amended), claiming that the employee had refused to accept a tender of medical and surgical treatment. The commission found this to be the fact, and made an order absolving petitioners from such liability. A writ of review having been obtained, the District Court of Appeal reversed the order, holding that from the record it appeared that 'no tender of medical or surgical treatment was ever made by either the employer or insurance carrier.' O'Neill v. Industrial Accident Commission, 91 Cal. App. 121, 266 P. 866, 868. New proceedings were then instituted by petitioners before the commission, and new testimony was taken on this issue. The commission concluded that the new evidence did not meet the conditions of a sufficient tender laid down in the opinion of the District Court of Appeal, and therefore made an order granting reimbursement to the employee for hospital and nursing expense. The cost of the chiropractic treatments was not included in the award on the ground that they were not proper treatment for the injury. Petitioners then sought a new writ from the District Court of Appeal, which was denied without opinion. Whereupon a hearing in this court was had.

"The holding of the District Court of Appeal was upon the ground that although the record showed some offers of medical attention made to the relatives of the employee, no offer was made to him personally. Petitioners contend that the evidence taken at the second proceeding before the commission established a tender to the employee and a rejection thereof by him."

[1, 2] In the petition for rehearing, it was urged that a later tender met all of the re-

quirements laid down by the District Court of Appeal. This offer, it appears, was made orally at a formal hearing before the commission on October 13, 1927, and confirmed by a letter dated October 18, 1927, addressed to counsel for the injured employee. The letter reads, in part, as follows: "Referring to the proceedings now pending before the Industrial Accident Commission, we understand that Dr. S. J. Hunkin, whose services we offered during the hearing, is in Europe. We are therefore listing a panel of three other surgeons in accordance with the Workmen's Compensation & Safety Act, one of which the injured may select in the event that it is found reasonable by the Industrial Accident Commission that applicant should be sent to San Francisco for medical and hospital treatment. * * *" The commission was apparently of the opinion that this tender was unsatisfactory, for the reasons, first, that it was not directed to the employee himself; and, second, that it was made contingent upon a determination by the commission in the employee's favor. We think this last point is sound. The tender (St. 1917, p. 834, § 9(a) as amended by St. 1925, p. 640, § 1), must be unequivocal; it must be an offer which the employee could and should accept, when made. The particular tender relied upon is really not a tender at all, but a promise to make a tender if and when the commission decides in favor of the employee. If he had accepted it when it was made, he would not have received medical treatment at all, but would have been forced to await the termination of the proceedings before the commission. Under these circumstances, the commission concluded that the failure to accept this tender was not unreasonable, and we are satisfied that this conclusion finds support in the record.

The award is affirmed.

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213 Cal. 81

IRVING v. STATE BAR OF CALIFORNIA.

L. A. 12673.

Supreme Court of California.

June 30, 1931.

1. Attorney and client 🔑53(2).

Finding that attorney violated rule prohibiting attorney from sharing with unlicensed person compensation arising out of professional employment *held* supported (Rules of Professional Conduct No. 3; Code Civ. Proc. § 287, subd. 4).

2. Attorney and client 🔑52.

Disbarment proceeding initiated by notice to show cause *held* to give State Bar and court jurisdiction.

3. Attorney and client 🔑54.

Finding that attorney violated rule and statute could not be sustained, where complaint charged no violation thereof, and no amendments were made, although at conclusion of hearing leave to amend was given (Rules of Professional Conduct No. 10; Code Civ. Proc. § 287, subds. 3, 4).

4. Attorney and client 🔑58.

That attorney shared with unlicensed person compensation arising out of professional employment justified attorney's suspension for one year (Rules of Professional Conduct No. 3; Code Civ. Proc. § 287, subd. 4).

In Bank.

Disbarment proceedings against Bert L. Irving.

On application by Bert L. Irving to review a recommendation of the board of governors of the State Bar of California that petitioner be suspended for one year.

Suspension sustained.

Will H. Anderson and Edward J. Cotter, both of Los Angeles, for petitioner.

P. E. Keeler, of Los Angeles (Philbrick McCoy, of Los Angeles, of counsel), for respondent.

PER CURIAM.

This is a proceeding to review an order of the board of governors of the State Bar of California recommending that the petitioner be suspended from the practice of law in this state for a period of one year.

The evidence upon which the sentence of suspension was based is similar to that in Howe v. State Bar of California (Cal. Sup.) 298 P. 25, decided April 1 of this year, in which the recommendation that Howe be suspended for a period of two years was followed by this court. Both Howe and petitioner were connected with the West Coast Claims Bureau, under which fictitious name one M. B. Rose conducted a business for the settlement of claims for personal injuries on behalf of injured persons against defendants who carried liability insurance, which practice is commonly known as "ambulance chasing." Howe was connected with the San Francisco branch of the bureau; petitioner with the Los Angeles office. Petitioner testified to receiving a percentage of the fee paid the bureau in some cases, while Howe stated upon his hearing that he was always paid a fixed sum for his services. Petitioner's connection with the bureau began in June, 1928, and continued to the time the present charges were filed against him in January, 1930. During that time petitioner was employed by the bureau in the majority of, if not in all, cases in the Los Angeles office in which the owner of the bureau deemed the services of an attorney necessary. For a complete statement of the agency's method of doing business and the capacity in which petitioner and Howe were employed by it, reference is hereby made to the statement of facts in the Howe Case, which we deem it unnecessary to repeat in the case herein.

On January 27, 1930, four verified complaints were filed against petitioner by the Los Angeles Bar Association, each charging a violation of rule III of the Rules of Professional Conduct adopted by the State Bar in regard to four separate claims for personal injuries. At the conclusion of the hearings held upon said complaints, the committee granted permission to its examiner to amend said complaints to conform to proof by charging that petitioner's conduct also violated rule X of the Rules of Professional Conduct and subdivisions 3 and 4 of section 287, Code of Civil Procedure, but the amendments were never made.

On May 13, 1930, after the hearings on the four complaints had been concluded, a notice to show cause was issued by the local administrative committee which charged petitioner with violations of rules II, III, and X of the Rules of Professional Conduct, and subdivisions 3 and 4 of section 287, Code of Civil Procedure, in connection with 162 cases, naming them, filed by petitioner in the superior court of the county of Los Angeles. Said proceeding was consolidated by stipulation and order with the proceedings initiated by the four complaints previously filed. No additional evidence was taken, but it was stipulated that all but two of the cases listed in the said notice arose out of the activities of M. B. Rose and his associates and were solicited cases, and were handled by the accused as attorney for the plaintiff because of his arrangements to that end with said M. B. Rose.

The local committee concluded that petitioner was guilty of violations of rules III and X and subdivision 4 of section 287, Code of Civil Procedure, in all proceedings and guilty of violations of subdivision 3 of said section in two of the proceedings initiated by complaint and in the proceeding commenced by the notice to show cause. It recommended disbarment. The board of governors of the State Bar adopted the findings of the local administrative committee except the finding that the accused employed other persons to solicit professional employment for him, and recommended suspension for one year.

[1] Petitioner urges the same reasons for the invalidity of his sentence of suspension as were urged in the Howe Case, supra. One of the attorneys for petitioner herein appeared on behalf of Howe, and the briefs in the two cases are largely counterparts so far as the argument on questions of law is concerned. By the decision in the Howe Case it is settled that rule III is constitutional, and that petitioner's conduct violated subdivision 4, section 287, Code of Civil Procedure, and that part of rule III which provides that no member of the bar shall directly or indirectly "share with an unlicensed person compensation arising out of or incidental to professional employment, nor shall he directly or indirectly aid or abet an unlicensed person to practice law or to receive compensation therefrom; nor shall he knowingly accept professional employment on behalf of a claimant in a personal injury or death case offered to him as a result of or as an incident to the activities of an unlicensed person who for compensation controls, directs or influences such employment." See, also, Smith v. The State Bar (Cal. Sup.) 294 P. 1057; Shaw v. The State Bar (Cal. Sup.) 297 P. 532; Smallberg v. The State Bar (Cal. Sup.) 297 P. 916. To here repeat our reasoning in the Howe Case and other cited cases would serve no purpose. The stipulation made in the case initiated by notice to show cause will sustain the finding as to a violation of said rule in that case.

[2] Petitioner's objection that neither the State Bar nor this court had jurisdiction of the proceeding initiated by the notice to show cause is answered by In re Herron (Cal. Sup.) 298 P. 474.

[3] The finding that petitioner violated rule X and subdivisions 3 and 4, section 287, Code of Civil Procedure, cannot be sustained in the proceedings initiated by verified complaints for the reason that said complaints charge only a violation of rule III. Although the committee's examiner, at the conclusion of the hearings, secured leave to amend to conform to proof, no amendments in fact were made, and the findings must rest on the charges filed. In the proceeding commenced by notice to show cause, a violation of rule X is charged, but the finding as to said violation cannot be sustained for the reason that the stipulation made is not broad enough, in the absence of other evidence, to support such a finding. We are further of the view that petitioner cannot be said to have violated said rule in those cases where the complaint in the personal injury suit was signed and verified in his presence and he was expressly or impliedly directed to file it.

[4] Petitioner's violation of rule III justifies the sentence of suspension for one year. This is the period for which the petitioners were suspended for similar infractions in Shaw v. The State Bar, supra, and Smallberg v. The State Bar, supra. In the Howe Case petitioner was suspended for two years, but he was shown to have been lacking in good faith in falsely representing that he had severed his connection with the claims bureau upon the filing of charges against him, when

in fact he went from the San Francisco office to the Los Angeles office and there continued his operations.

It is therefore ordered that petitioner be suspended from practice as an attorney and counselor at law of this state for a period of one year from and after the filing of this order.

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213 Cal. 58

PACIFIC STATES CORPORATION v. PAN-AMERICAN BANK OF CALIFORNIA et al.*

L. A. 12433.

Supreme Court of California.

June 30, 1931.

Rehearing Denied July 30, 1931.

1. Action 🔑6.

Complaint seeking declaratory judgment determining rights of parties under lease *held* to state cause of action (Code Civ. Proc. § 1060).

> Complaint alleged that plaintiff leased premises to bank; that lessee installed valuable fixtures in premises and was in default under terms of lease; that superintendent of bank assumed possession of property and was liquidating bank; that, under lease, personal property therein was required to be kept and maintained in leased premises; that defendants claimed right to remove property and dispose of same and threatened to remove property, by reason of which actual controversy has arisen between parties relating to rights with reference to lease, and prayed for judgment determining rights and duties of parties under lease.

2. Action 🔑6.

Complaint for declaratory judgment is sufficient if alleging facts showing actual controversy relating to rights and duties under written instrument and request that rights be adjudged (Code Civ. Proc. § 1060).

3. Landlord and tenant 🔑246(1).

Lien to landlord on fixtures and personalty on leased premises is valid as between parties and all persons knowing thereof (Civ. Code, § 2973).

4. Action 🔑6.

In action for declaratory judgment determining rights under lease, allegation that plaintiff gave notice necessary under lease before termination thereof *held* not necessary to statement of cause of action (Code Civ. Proc. § 1060).

> Code Civ. Proc. § 1060, provided that construction of written instrument or adjudication of rights and duties of parties thereunder may be had in cases of actual controversy or disagreement before there has been any breach of obligation in respect to which declaration is sought.

5. Action 🔑6.

Plaintiff suing for declaratory relief need not allege facts showing adverse party has breached terms of written instrument (Code Civ. Proc. § 1060).

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action for declaratory judgment by the Pacific States Corporation against the Pan-American Bank of California and others. From a judgment sustaining demurrer to complaint, plaintiff appeals.

Reversed, with direction to overrule demurrer.

Superseding opinion in 298 P. 155. See, also, 290 P. 609.

Robert Brennan, of Los Angeles, and Russell & Heid, of Tulare, for appellant.

Alf. L. Armstrong, Louis W. Myers, and O'Melveny, Tuller & Myers, all of Los Angeles, Elbert W. Davis, J. H. Hoffman, and Albert A. Rosenshine, all of San Francisco, and Chandler, Wright & Ward, of Los Angeles, for respondents.

PER CURIAM.

Plaintiff has prosecuted this appeal from a judgment of dismissal entered upon the sustaining of a general demurrer to the complaint without leave to amend. The action was brought under section 1060 of the Code of Civil Procedure to obtain a declaratory judgment determining the rights of the parties under a certain leasehold agreement, and more specifically in and to certain fixtures, furniture, safe deposit boxes, chattels, and other property of a personal nature located in and upon the leasehold premises. As ancillary to such declaratory judgment, the plaintiff prays that defendants be enjoined from removing, as they threaten to do, any portion of said property from the premises. So far as pertinent here, section 1060, supra, provides that any person interested under a deed, will, or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over, or upon property, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action for a declaration of his rights and duties in the premises, including a determination of any ques-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion denying rehearing, see 1 P.(2d) 981.

tion of construction or validity arising under such instrument or contract. The section further provides that such a declaration of rights and duties may be requested either alone or with other relief and may be had "before there has been any breach of the obligation in respect to which said declaration is sought."

The complaint alleges, in substance, that on or about December 30, 1926, plaintiff and the defendant Pan-American Bank of California, hereinafter referred to as the bank, entered into a written contract of lease under the terms of which plaintiff let and demised to the bank for banking and office purposes certain real property in the city of Los Angeles; that the lessee has since installed in the premises a large amount of valuable fixtures, furniture, safe-deposit boxes, chattels, and personal property; that the lessee is in default, under the terms of the lease, by reason of its failure to pay and discharge, as provided therein, all taxes and charges levied and assessed against the property in excess of $25,000 per annum, and also by reason of its failure to pay certain electrical bills; that the defendants Rosenshine and Ewing, as superintendent and special deputy superintendent of banks, have assumed control and taken possession of the property and business of the bank for the purpose of liquidating the bank and converting its assets into cash; that under and by virtue of the terms, covenants, and conditions of the lease, all of said fixtures, furniture, safe deposit boxes, chattels, and personal property are required to be kept and maintained in the leased premises and are not to be removed therefrom; that the defendants claim and contend they have the right to remove said property from the leased premises and to dispose of the same, and that they have threatened to and will, unless restrained, remove and dispose of such property; and that, by reason of the foregoing facts, an actual controversy has arisen between plaintiff and defendants relating to the legal rights and duties of the respective parties with reference to the lease and the described property. The complaint concludes with a prayer for judgment declaring and determining the rights and duties of the parties with respect to each other under the lease and with respect to the fixtures, furniture, safe deposit boxes, chattels, and personal property. It is also prayed that it be declared and adjudged that all of said property be kept and maintained in the leased premises, that plaintiff has a lien thereon, and that defendants be enjoined from removing any portion of the same.

The lease, a copy of which is attached to and made a part of the complaint, contains many provisions having to do with the property and fixtures referred to in the complaint. They read, in part:

"Fifth: * * * that all alterations, additions and improvements made in or to the premises shall, unless otherwise provided by written agreement or by the terms hereof, be the property of lessor and remain and be surrendered with the premises, and lessee hereby waives * * * all claims for damages to or loss of any property belonging to the lessee that may be in or upon the premises. * * *

"Eleventh: Upon any termination of this lease, or any renewal thereof without fault or default upon the part of the lessee, but not otherwise, the lessee may remove all furniture and fixtures installed by it in the demised premises, provided, however, that it must totally restore and refinish the portions of said premises occupied or used for said furniture and fixtures to the same condition as they were previous to the installation of such furniture and fixtures.

"All of the improvements by lessee in the demised premises shall at the termination of this lease be and become the property of the lessor. Lessee hereby gives and grants to lessor a lien upon, and hereby hypothecates to lessor, all fixtures, chattels and personal property of every kind and description now or hereafter to be placed or installed in said premises and agrees that in the event of any failure on the part of the lessee to comply with each and every of the covenants and obligations hereof, or in the event of any default continuing for three (3) days after notice of default as hereinafter provided for in the payment promptly when due of any rents herein specified, lessor may take possession of and may sell the same in any manner provided by law and may credit the net proceeds upon any indebtedness due, or damage sustained by lessor without prejudice to further claims thereafter to arise under the terms hereof. * * *

"Thirteenth: Lessee hereby agrees not to remove any fixtures from said leased premises during the term hereof, without the written consent of lessor first had, and further agrees that when said premises are surrendered to lessor, all injury and damage of any kind done to said leased premises or any portion thereof, or any additions, fixtures and appurtenances therein shall, if desired by lessor, be repaired by lessor, and the amount expended therefor shall be paid by lessee to lessor upon demand, reasonable wear and tear excepted. * * *

"Sixteenth: It is hereby covenanted and agreed that if lessee shall fail to comply with any of the covenants, terms or conditions of this lease or any notice given hereunder, or if it shall remove or manifest an intention of removing its furniture and fixtures, or any of them, from the leased premises while in arrears as to the payment of rent, or shall become insolvent, or shall make an assignment for the benefit of creditors, or if any of its property be attached and said attachment not promptly released, or if an execution be issued against it, or, if a petition be filed by or against it, to have it adjudicated a bankrupt, or if a trustee or receiver shall be created or appointed to take charge of its assets, or if it shall desert or abandon the leased premises for a period of twenty-four hours, then or at any time thereafter the lessor may at its option enter into said demised premises and remove any and all persons therefrom and take and retain possession thereof either with or without process of law. * * *

"Eighteenth: It is expressly understood and agreed by and between the parties hereto that if the rent herein reserved and agreed to be paid, or any part thereof, shall be unpaid on the day of payment whereon the same ought to have been paid, and for three days thereafter, or if default shall be made in any of the covenants or agreements herein contained, or if lessee shall become insolvent or make an assignment for the benefit of its creditors or shall be adjudicated a bankrupt, or a receiver or trustee appointed by lessee, or if lessee shall violate any of the terms of this agreement, it shall and may be lawful for lessor, its agent, attorney or assigns at its or their election to declare said term ended, and enter into said demised premises or any part thereof, either with or without process of law, and the lessee or any other person or persons occupying or being in or upon the same, to expel, remove and put out, together with the goods and chattels found therein, or to take possession of said goods and chattels or any part thereof as security as herein provided, * * * and lessee, except as to the written notices herein expressly provided for, hereby waives all right to any notice from said lessor of its election to declare this lease at an end under any of the provisions, or any demand for the payment of rent, or for possession of the demised premises. * * *"

[1-3] It is readily apparent that there is ample room for an attempted construction and reconciliation of these several provisions and an adjudication of the rights and duties of the parties thereunder. While the complaint in this action may not be a model pleading, we are of the view that the court below erred in sustaining a general demurrer thereto without leave to amend. As we understand section 1060, supra, it is sufficient if a plaintiff allege facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and request that these rights and duties be adjudged by the court. Oldham v. Moodie, 94 Cal. App. 88, 89, 270 P. 688. In opposition to this conclusion, and in support of the judgment on demurrer, respondents' principal claim is that the appellant is not entitled to any relief under the facts stated in the complaint because the provision of the lease purporting to create a lien in the lessor upon the fixtures and personal property referred to in the complaint is asserted to be insufficient for that purpose, in that no valid lien independent of possession can be created upon personal property except by way of chattel mortgage. We do not find it necessary to determine this point on this appeal, for the reason that all that this court now has before it is the complaint and demurrer. There can be no doubt, of course, that such a lien is valid as between the parties and valid against all persons who, before parting with value, had actual knowledge thereof (Civ. Code, § 2973), and whether the creditors represented by the superintendent of banks come within this category can only be made to appear by answer. Moreover, appellant not only asks for an adjudication of its rights under the lien provision, but requests that the respective rights of the parties be adjudged and determined under the several other provisions of the lease dealing with the fixtures and personal property installed by the lessee in the leasehold premises. By way of illustration, the fifth and eleventh clauses of the lease provide that all alterations, additions, and improvements made in or to the leased premises shall at the termination of the lease become the property of the lessor, and by the thirteenth clause of the agreement the lessee agrees not to remove any fixtures without the written consent of the lessor. In the sixth paragraph of the complaint the appellant alleges that all of the fixtures, furniture, safe deposit boxes, chattels, etc., added to or installed in the demised premises, are required to be there maintained, while the respondents claim the right to remove them. In the absence of an adjudication of the rights of the parties with respect thereto, it cannot be definitely determined which fixtures the lessee, or those claiming under it, may remove without doing violence to the provisions of the lease. The allegations of the complaint are sufficiently broad to require a determination of the rights and duties of the parties at least in this particular. Moreover, by the terms of the sixteenth and eighteenth clauses of the lease it is provided that, in the event the lessee shall become insolvent or make an assignment for the benefit of creditors, or shall be adjudicated a bankrupt, or a receiver or trustee shall be appointed for it, the lessor may declare the term ended, enter the demised premises, and take possession of the furniture and fixtures. We are of the opinion, in view of the liquidation proceedings and in the face of respondents' threat to remove said fixtures and furniture, that the complaint is sufficiently broad to warrant an adjudication and determination of the appellant's rights under these clauses.

[4, 5] Assuming, as respondents urge, that appellant has failed to allege the giving of the notice necessary under paragraph 15 of the

lease to work a termination thereof, and that such an allegation is essential to the statement of a cause of action, section 1060, supra, as already shown, expressly provides that the construction of a written instrument or the adjudication of the rights and duties of the parties thereunder may be had in cases of actual controversy or disagreement "before there has been any breach of the obligation in respect to which said declaration is sought." This being so, it is unnecessary, in an action for declaratory relief, that the plaintiff allege facts showing that the adversary party has violated or breached the terms of the written instrument. In conclusion, it might be said that appellant is not foreclosed, as respondents contend, from now urging any of the above points, for our only consideration on this appeal is whether the court below erred, and we believe it did, when it sustained the general demurrer without leave to amend.

The judgment must be, and it is hereby, reversed, with direction to the trial court to overrule the demurrer.

213 Cal. 65

PEOPLE v. LACANG.

Cr. 3417.

Supreme Court of California.
June 30, 1931.

Rehearing Denied July 30, 1931.

1. Criminal law 🔑1169(9).

In murder prosecution, permitting physician to give opinion that wounds were not self-inflicted, if error, *held* harmless, where defendant admitted he inflicted death wounds.

2. Criminal law 🔑1169(2).

In wife murder case, admitting evidence regarding conversations witness had with deceased and with defendant, showing motive, *held* not prejudicial, in view of unequivocal evidence of defendant's guilt.

3. Witnesses 🔑230.

Permitting witness to testify through interpreter *held* matter within discretion of trial court.

In Bank.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Tresco Lacang was convicted of murder in the first degree, and he appeals.

Affirmed.

John F. O'Sullivan, of Fresno, for appellant.

Glenn M. DeVore, Dist. Atty., and C. T. Walton, Deputy Dist. Atty., both of Fresno, U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

PRESTON, J.

In this cause defendant, charged by information with the crime of murder, pleaded not guilty, and also not guilty by reason of insanity. Trial was had upon the question of his guilt, and the jury returned a verdict of guilty without recommendation. His plea of not guilty by reason of insanity was thereupon withdrawn. Judgment of conviction imposing the death penalty followed, and from said judgment and the order denying his motion for new trial defendant now appeals upon the ground that the court erred in permitting the admission of certain evidence, in allowing an interpreter for witness Emoto, and in refusing to give to the jury certain requested instructions.

We find the record to be free from prejudicial error; hence but a brief statement is necessary. There is no question of the sufficiency of the evidence to support the verdict and judgment. In July, 1929, appellant, a twenty-four year old Filipino, and the deceased, an eighteen year old American girl, ran away and were married without the consent of the girl's parents. Appellant secured employment on a ranch in Fresno county, picking grapes and doing other labor, superintended by Roy Emoto. His wife, after returning to her parents for some six months, rejoined appellant in the spring of 1930, and thereafter, early in June, gave birth to a child. After her confinement in the hospital she convalesced about six days at the home of said Emoto under care of his wife. She then returned with her baby to appellant's house.

On the evening of July 2, 1930, after a quarrel, appellant took a butcher knife, stabbed her with it as she lay in bed, and killed her, also cutting his own body in several places in an alleged effort to destroy himself. The motive actuating the crime is shown by conflicting evidence. Some witnesses testified that appellant said he killed his wife because she was about to leave him and because of dissension between them, and a letter was admitted in evidence, written by the deceased on the day in question to her mother, stating that she was nervous and torn up, and asking her mother to send her money for her fare home. There was also testimony that the deceased had tried to get away, but that appellant had found her each time and induced her to stay with him. Appellant's final explanation, however, was that he caught said Emoto and his wife in the act of having illicit relations on the evening in question, and that, while still emotionally aroused over the situation and his suspicions of past indiscretions on the part of his wife with other Filipinos, he killed her. Witness Emoto denied intimacy or improper conduct with the deceased, stating that his presence on the premises was to see that she was not annoyed by a Filipino boy whom she feared. Witness Dr. Sciaroni testified that the physical condition of the deceased, due to recent childbirth, was such that sexual intercourse would probably have been prohibited. There is also other evidence tending to show that appellant's suspicion of improper relations between the deceased and Emoto was unfounded.

After committing the crime appellant called at the house of a neighbor, told what he had done, and asked that the sheriff be called. Later, when in custody, appellant again freely admitted the crime and gave a detailed account of his actions to the sheriff and other officers and to the doctor who treated him. He gave like testimony upon the trial.

[1] Appellant's first contention is that the court erred in permitting Dr. Sciaroni, who performed an autopsy on the body of the deceased, to testify that the death wounds were so placed that in his opinion they could not have been self-inflicted. Appellant argues that this expert testimony was inadmissible because it expressed a conclusion upon a subject within the common knowledge and observation of the jurors, who had before them photographs of the body of deceased, showing the position of the wounds and the position in which deceased and the said knife were found after the killing; hence they did not need the assistance of an expert to aid them in determining whether said wounds could have been self-inflicted. Without passing upon the question of admissibility of this evidence, it is enough to say that obviously appellant's cause was not prejudiced in any way by it, for the jurors knew that appellant himself inflicted the death wounds. Appellant admitted it many times and testified to it in detail. No doubt whatsoever remained as to the manner in which the death occurred.

[2] Appellant next contends that the court erred in permitting Roy Emoto to testify as to various conversations had by him with the deceased and with appellant, upon the ground that they were hearsay, formed no part of the principal transaction, and may have led the jury to believe that appellant killed his wife solely because she was going to leave him. This contention is without merit, as the statements complained of were practically all made in the presence of appellant himself at a time immediately preceding the killing and they bore witness to the existence of dissension between appellant and the deceased and to the motive which led to commission of the crime. Furthermore, if the admission of any of this testimony did constitute error, we would be constrained to hold that such error was not prejudicial in view of the unequivocal evidence of appellant's guilt. The latter statement applies also to appellant's contention that the court erred in admitting in evidence the above-mentioned letter written by the deceased on the day of the crime to her mother.

[3] It is equally clear that there was no abuse of discretion on the part of the court in permitting witness Emoto to testify through an interpreter. His examination was commenced without an interpreter, and, though he understood English to quite an extent, it soon became apparent that the calling of an interpreter would facilitate matters, as it later proved. This was a matter within the discretion of the trial court, and to our mind the record shows that here there was a wise use rather than an abuse of such discretion.

We likewise find no error in refusing certain instructions offered by appellant. Without setting them forth we will state that it is questionable whether they contained a correct statement of the law on the subject of the establishment of the corpus delicti prior to consideration of a confession by the accused. The charge as given by the court contained ample instructions on all matters necessary to a proper determination of the cause.

With greatest care we have examined all the contentions of appellant, but find the record to be free from prejudicial error of any character.

The judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

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213 Cal. 21

BERNSTEIN v. SIROTTA.

L. A. 11162.

Supreme Court of California.
June 24, 1931.

1. **Master and servant** ⚷70(3).

Under two-year employment contract entitling employee to share profits, percentage of losses for second year *held* not deductible from percentage of profits for first year.

> Employment contract provided in substance that during two-year period employee was to receive, in addition to monthly compensation, "twenty per cent of the net annual earnings or profits" of the business, and that "when the amount" of the "twenty per cent of the net annual earnings or profits shall have been ascertained, at least three-fourths thereof shall

be set aside and remain in said business until the time of the termination of this agreement, at which time it shall be due and payable to the party of the second part"; the other one-fourth being subject to withdrawal at any time at election of employee. During first year there was a profit, but during second year the business was operated at a considerable loss.

2. Joint adventures 🔑1.
Partnership 🔑20.

Contract employing buyer and salesman *held* not to create partnership or joint adventure so as to render employee liable for proportion of losses.

Contract by its very terms created relationship of employer and employee and merely made provision regarding rights of parties in case they decided to form a partnership. Contract gave employee share in profits as part of compensation.

3. Master and servant 🔑71.

Employee *held* entitled, upon termination of employment contract, to interest on share of profits left in business, only from date of termination of contract (Civ. Code §§ 3287, 3302).

Employment contract did not expressly provide for payment of interest on share of profits due employee but left in business at time contract was entered into. Provision of contract indicated intention of parties that compensation expressly provided therein was to constitute exclusive consideration for leaving share of profits in business.

4. Master and servant 🔑72½.

Employee under employment contract as buyer and salesman for wholesale business *held* not required to pay expenses incurred in performing authorized services.

5. Master and servant 🔑72½.

Employee upon termination of employment contract *held* entitled to recover advances made to employer.

In employee's action upon termination of employment contract, for accounting, contract of employment was alleged and also facts entitling employee to accounting in adjustment of rights under all provisions of contract. It was further alleged that moneys advanced were disbursed for and on behalf of employer's business. Advancements were entirely separate and distinct from contract of employment.

In Bank.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by Julius H. Bernstein against Henry N. Sirotta. Judgment for the plaintiff, and the defendant appeals. Pending the appeal the defendant died, and Dorothy Sirotta, administratrix of his estate, was substituted as defendant and appellant.

Judgment modified, and as modified affirmed.

Van Lee Hood, of Los Angeles, for appellant.

Philip Cohen and Alfred J. Smallberg, both of Los Angeles, for respondent.

SEAWELL, J.

Henry N. Sirotta, doing business under the name and style of Queen Ribbon Company, appealed from a judgment for plaintiff, Julius H. Bernstein, in the sum of $2,619.63. Pending said appeal Sirotta died, and Dorothy Sirotta, administratrix of his estate, has been substituted as defendant and appellant. References hereinafter made to the "defendant" are intended to apply to said Henry Sirotta, rather than to the substituted defendant and appellant.

By a contract entered into on January 20, 1926, defendant, the owner of a wholesale business dealing in laces, ribbons, and handkerchiefs, employed plaintiff, who then was and for a long time prior thereto had been in his employ, as a buyer and salesman for an additional period of two years, terminating on December 31, 1927, and plaintiff agreed to accept such employment. By the terms of the agreement plaintiff was to receive as compensation for his services $10,200 in cash, payable in semimonthly installments of $212.50, and, in addition thereto, "twenty per cent of the net annual earnings or profits of the above business, same to be based on a statement of account covering the annual fiscal years of said business beginning January 1st, ending December 31st"; said statement to be made and submitted by a certified accountant not later than January 31st of each year. The paragraph relating to plaintiff's right to a 20 per cent share in the profits further provides: "When the amount of the above said twenty per cent of the net annual earnings or profits shall have been ascertained, at least three-fourths thereof shall be set aside and remain in said business until the time of the termination of this agreement, at which time it shall be due and payable to the party of the second part [plaintiff]. * * * The other one-fourth may, at the election of the party of the second part, be drawn out at any time."

The agreement also recites that in accordance with an accounting had between the parties as of the date thereof, it was agreed between them that there was due plaintiff the sum of $1,000 on account of his share of the profits of the business accumulated prior to December 31, 1925, but that said

$1,000 should remain in the business until the termination of the contract of employment. Should the parties agree to form a partnership, said sum, together with the three-fourths of plaintiff's share of the profits which was not to become due and payable until the termination of the contract of employment, was to be applied by plaintiff as a payment for a one-fourth interest in the business.

In the action herein, brought after the termination of the contract of employment on December 31, 1927, plaintiff sued to obtain an accounting and judgment for his 20 per cent. share of the profits of the business, the amount of which he was unable to ascertain for the reason that defendant had denied him an inspection of the books; to recover the $1,000 due him which was to remain in said business until the termination of the contract, together with interest thereon; and also to recover the sum of $200, which plaintiff alleged he had advanced to defendant for and on behalf of defendant's business at different times and which defendant had agreed to repay. The semimonthly cash payments which plaintiff was to receive under the contract were alleged to have been duly paid to him.

The court found that 20 per cent. of the profits for the year 1926 was $1,648.39; that during the year 1927 the business suffered a loss, but plaintiff was chargeable with no part thereof; that plaintiff was entitled to recover the sum of $200 which he had advanced for and on behalf of defendant's business under an agreement that he should be reimbursed for advances thus made; and that he was entitled to the $1,000 which he had left in the business, with interest in the sum of $183.79. The court further found that of the amount of $1,106.93 which defendant claimed plaintiff had withdrawn and should be charged with, $694.38 represented withdrawals on account of travel and automobile expenses of the business, and only the balance of $412.55 should be charged against plaintiff's personal account. In accordance with said findings, the court entered judgment for $2,619.63, from which this appeal is prosecuted.

[1] As noted above, there was a profit for the year 1926, but in 1927 the business was operated at a loss of over $5,000. Defendant contends that the contract, equitably construed, permits a deduction of the losses for the year 1927 from the profits for the year 1926, and the calculation of plaintiff's 20 per cent. share on the balance of profits thus figured. By estimating plaintiff's share in such a manner defendant would charge him with 20 per cent. of the loss for the year 1927. The court below rejected this interpretation and we cannot disturb its conclusion. Indeed, the provision quoted above is subject to no other possible interpretation than that placed upon it by the court below. The contract provides that plaintiff shall receive "twenty per cent of the net annual earnings or profits, same to be based on a statement of accounting covering the annual fiscal years of said business, beginning January 1st, ending December 31st." This language clearly indicates that plaintiff was to receive 20 per cent. of each year's earnings. The fact that three-fourths of his share was not to become due and payable until the termination of the agreement, does not affect the provision that the amount then to be paid was to be computed on annual earnings. The authorization to plaintiff to withdraw the remaining one-fourth at any time, conclusively shows that the parties did not intend that plaintiff's share should be computed at the end of the two-year period on the profits thereof, since if that were the case it would have been impossible to have ascertained the one-fourth which plaintiff, at his election, was privileged to draw out "at any time."

[2] Neither any one provision, nor the agreement as a whole, can be construed as establishing a relationship of partnership or joint adventure which would render plaintiff liable for any proportion of the losses. By its very terms the contract creates the relationship of employer and employee. Although the parties had in contemplation the formation of a copartnership, in which event plaintiff was to have a one-fourth interest, this was a mere possibility dependent upon their subsequent election and agreement, which never eventuated. This being so, plaintiff was entitled to receive his 20 per cent. as compensation for his services.

[3] The defendant also objects to the allowance to plaintiff of interest on the $1,000 due him on account of his share of the profits of the business prior to December 31, 1925, which was, by the terms of the contract, to remain in the business until the termination of said contract. The court computed interest at the rate of 7 per cent. from the date of the agreement, to wit, January 20, 1926. We are of the view that plaintiff was entitled to interest on said $1,000 only from the date of the termination of the contract of employment, December 31, 1927, rather than from the date of the making of the contract. The contract does not expressly provide for payment of interest on said sum. Considered as a whole, its provisions indicate the intention of the parties that the compensation expressly provided therein for plaintiff was to constitute the exclusive consideration for plaintiff's permitting said $1,000 to remain in the business as well as for his future services. In consideration of defendant's employing him on the terms set forth in the agreement, plaintiff consented to allowing the $1,000 then due him to remain in the business without payment of interest. Interest figured from December 31, 1927, the date payment was due, to September 13, 1928, the date of judgment, is $49.11, or $134.68 less

than the sum allowed by the court below. Section 3302 and section 3287, Civ. Code; Puppo v. Larosa, 194 Cal. 717, 230 P. 439.

[4] Defendant further contends that the court erred in adjudging plaintiff entitled to recover the $200 which the court found he had advanced to defendant under an agreement for reimbursement, and in refusing to deduct from the amount of the judgment the sums withdrawn by plaintiff in payment of traveling and automobile expenses, on the ground that the contract sued on contains no provision for such items. Defendant does not contend that the $200 was not advanced or that the traveling expenses were not incurred. Although there is no express provision in regard to the payment of traveling expenses, we think it may fairly be implied from a consideration of the contract as a whole that plaintiff was not required to pay his own expenses incurred in performing authorized services for defendant.

[5] As to the allowance of said $200, plaintiff's right to recovery does not rest upon any provision of the contract of employment, but upon the understanding between the parties that plaintiff should be reimbursed. The pleadings sustain the recovery of this sum. The first count of the complaint sets forth the contract in haec verba and alleges facts which entitled plaintiff to an accounting in the adjustment of the rights of the parties under all provisions of the contract. Said count also contains allegations with reference to the advancement of $200, "disbursed for and on behalf of defendant's business." Plaintiff advanced said sum at different times during his employment for use in defendant's business. Under the circumstances the advancement was not an entirely separate transaction, but so closely related to the employment as to properly form an item in the action for an accounting.

The judgment for $2,619.63 is reduced by $134.68 to $2,484.95 on account of the improper allowance of interest. As thus modified it is affirmed.

We concur: RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.

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213 Cal. 86

EDWARDS et ux. v. GULLICK et al.

S. F. 14250.

Supreme Court of California.

July 1, 1931.

Rehearing Denied July 31, 1931.

1. Automobiles ⚷6.

Statute limiting automobile guest's right of action against host did not affect cause of action existing when statute took effect (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

2. Appeal and error ⚷1066.

Although direct evidence was introduced by automobile guest, suing host, showing cause of collision, giving instruction on res ipsa loquitur doctrine *held* harmless under circumstances.

> Circumstances disclosed that the negligence of the host in swerving from his side of the road to the other side at the time of the collision was clearly established by the evidence, and the instruction required that the doctrine should apply to the host and to him only, if the guest was injured in an accident on account of the manner in which the automobile was operated, thus confining the jury to the operation of the host's automobile, and excluding the operation of the other automobile.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Benjamin Edwards and wife, against C. M. Gullick and others. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Superseding 295 P. 372.

Rehearing denied; SHENK, CURTIS and LANGDON, JJ., dissenting.

Leo J. McEnerney, of San Francisco, Maurice J. Rankin, of San Jose, and J. B. Peckham, of San Jose, for appellants.

Bohnett, Hill & Campbell and L. H. Schellbach, all of San Jose, for respondents.

PRESTON, J.

This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff Huldah T. Edwards as the result of an automobile accident, which occurred about 8:30 p. m., April 1, 1927, just beyond the point where the Berryessa road intersects the Oakland-San Jose highway at an acute angle.

The night was dark, and the highway was wet and slippery from rain. Said plaintiff and her small daughter, as guests, and Mrs. Gullick, were riding in the rear seat of the closed car which defendant Gullick was driving southerly along said Oakland-San Jose highway. The automobile driven by defendant Murotsune was at the same time proceeding southwesterly along said Berryessa road; he reached the crossing and turned northerly into the highway. The headlights of his car shining on the wet road, or the allegedly wide turn made by him, misled defendant Gullick to believe that he intended to proceed straight across the highway in the path of the ap-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

proaching Gullick car. At any rate, defendant Gullick, in an attempt to avoid what he thought was an imminent collision, applied his brakes and swung to the left, and the two cars thereupon collided at about the center of the road.

As a result of the collision, plaintiff sustained the severe and permanent injuries for which she seeks to recover by this action. Her complaint alleged and she, throughout the trial, maintained that both said defendants were negligent in the operation of their machines. The evidence in this behalf was not entirely free from conflict. There was evidence that defendant Murotsune may have made so wide a turn into the highway as to mislead defendant Gullick, but there was more persuasive evidence that had defendant Gullick kept to the right, or his own side of the road, instead of turning to the left, and had he driven at a speed enabling him to keep his car more under control in traversing a wet road at night, the collision might have been avoided. At the conclusion of the trial, the jury returned a verdict for plaintiff and against defendant Gullick in the sum of $6,000, and also returned a verdict in favor of defendant Murotsune.

[1] From said judgment defendant Gullick has alone appealed upon the ground of errors in instruction and other alleged prejudicial errors occurring upon the trial. He also contends that plaintiff's cause of action has been abated by section 141¾ of the California Vehicle Act, as added by St. 1929, p. 1580. Said statute, however, is not retroactive, and does not affect causes of action existing on August 14, 1929, the date it took effect. Callet v. Alioto (Cal. Sup.) 290 P. 438.

The various alleged prejudicial errors complained of by appellant, errors in instructions, remarks which the jury was admonished to disregard, made by a juror and by counsel for plaintiffs, have all received consideration. It is our conclusion that none of these matters constitute reversible error nor do they merit detailed discussion.

[2] One of the main points urged by appellant is that the court erred in instructing the jury that the doctrine of res ipsa loquitur had application to the facts of this case giving rise to the legal presumption that defendant Gullick was guilty of negligence and shifting the burden of proof to him to meet plaintiffs' prima facie case. Appellant asserts that the giving of this instruction was error and cites Keller v. Cushman, 104 Cal. App. 186, 189, 285 P. 399, and other cases. In that case, no evidence was offered showing in what part of the intersection the collision occurred, nor which of the two entered the intersection first, nor which one had the right of way; no evidence was introduced showing which of the two drivers was at fault; they both admitted that they did not know whose fault it was or how the accident arose. With a record in this state, a refusal to apply the doctrine was proper. But here we have several eyewitnesses to the occurrence, and both plaintiffs and defendants gave in full their versions of the happenings which caused the collision. The objection to giving the instruction more properly lies in the fact that direct evidence was introduced by plaintiff showing the cause of the accident. But an examination of the instruction in the light of the evidence shows that its effect was harmless. First, the instruction required that the doctrine should apply to appellant, and to him only, if the plaintiff "was injured in an accident on account of the manner in which such automobile was operated, * * *" thus confining the jury to the operation of appellant's car, and excluding expressly the operation of the other car. In view of this qualification, the instruction did little more than to tell the jury that, if appellant was in fact negligent, they might presume that a prima facie case of negligence had been made out. For if the manner in which one drives a car causes a collision, negligence can hardly be absent. Secondly, we must always keep in mind that the negligence of appellant in swerving from his side of the road to the other at the time of the collision was clearly established by the evidence. No miscarriage of justice has resulted.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.

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213 Cal. 43

NEW YORK INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 13954.

Supreme Court of California.

June 27, 1931.

Master and servant ⚷361.

Newsboy *held* not "employee" within compensation statute, notwithstanding limited control which newspaper publishers undertook to exercise (Civ. Code, § 2009; St. 1917, p. 835, § 8 (a).

The newsboys daily purchased from district manager specified number of copies of daily issue for specific sum payable in cash or at the close of each day's sale, and undertook the retailing of such papers to such customers among the public at large as they were able to attract or procure, at a specified place and price fixed by the publishers.

[Ed. Note.—For other definitions of "Employé," see Words and Phrases.]

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Claude Eustace, employee, opposed by the Los Angeles Evening Herald and another, employers, and the New York Indemnity Company and Federal Mutual Liability Insurance Company, insurance carriers. To review an award of compensation by the Industrial Accident Commission, the insurance carriers bring certiorari.

Award annulled.

Superseding opinion, 294 P. 707.

B. E. Pemberton and Henry G. Sanford, both of San Francisco, for State Compensation Insurance Fund, amicus curiæ.

John Francis Neylan and Grove J. Fink, both of San Francisco, for Examiner Printing Company, amicus curiæ.

E. Herbert Herlihy and F. George Herlihy, both of Los Angeles, for petitioners.

E. Herbert Herlihy and F. George Herlihy, both of Los Angeles, for New York Indemnity Corporation and Federal Mutual Liability Ins. Co.

Flint & MacKay, H. S. MacKay and Edward L. Compton, all of Los Angeles (E. Herbert Herlihy and Edward L. Compton, both of Los Angeles, of counsel), for Evening Herald Pub. Co.

Edward O. Allen, of San Francisco, for respondent.

Lawler & Degnan, Alexander T. Sokolow, and John M. Hall, all of Los Angeles (John M. Hall, of Los Angeles, of counsel), amici curiæ and attorneys for Los Angeles Examiner.

PER CURIAM.

A rehearing was granted in this proceeding after decision by this court affirming the award of the Industrial Accident Commission, in order to devote further consideration to the somewhat novel question presented herein, in view of the very earnest and able briefs and argument of counsel for both parties and of the several amici curiæ, discussing pro and con the issues involved in this inquiry. The original applicant for an award before the Industrial Accident Commission was one Claude Eustace who, while of the age of thirty-four years, was within the numerous class known as "newsboys," and who at the time he received the injuries for which he sought compensation was engaged in selling the daily issues of the Los Angeles Evening Herald and of the Los Angeles Record upon the streets of the city of Los Angeles. He was injured while in the act of selling one or other of the instant issues of said newspapers to a passing customer in an automobile, having run out into the street for the purpose of making such sale, where he was struck and injured by another passing machine. The facts with reference to said injuries and with reference to the calling in which he was engaged at the time thereof and to the relation which he bore in the course of said calling to the publishers respectively of said newspapers were practically undisputed. The sole question presented to the Industrial Accident Commission and to this court is the question of law as to whether, by virtue of his said relation to them and each of them, he came within the category of a compensable employee within the meaning and intent of the Workmen's Compensation, Insurance and Safety Act, so as to be entitled to an award for his injuries, or whether at the time thereof he occupied the relation of or analogous to that of an independent contractor in the vending of said newspapers so as not to be entitled to an award under the provisions of said act. The preliminary facts may be briefly stated. Eustace had for some time prior to his injuries been accustomed to have delivered to him from a district manager, acting as the representative of both publishing companies in the daily distribution of their respective issues to the newsboys within the district of which he was in charge, the newspapers of said companies. As to the Herald each of these newsboys, including the applicant, paid 2 cents each for the daily issues of said newspapers, said payments to be made either at the time of receiving the specified number of papers, or at the close of the sales for the day. Eustace was accustomed to take 130 Heralds for each day. Any unsold portion thereof was not returnable. As to the Record, Eustace received as few or as many as he ordered, at the above price, and credit was given to him for returned copies thereof. The daily relations between Eustace and the publishers were created through his contact with the district manager. He was not upon the pay roll of either publisher and received no salary or compensation directly from either. His daily profits, if any, consisted in the difference between the price paid or to be paid by him for the papers received and the price at which he was permitted by the publishers to sell the same to the purchasing public. There was some dispute in the evidence as to just what amount of control or regulation was exercised over newsboys by the district manager; but the evidence in that regard seems to go no further than the following extent, to wit: That certain specified corners or places upon the public streets were allotted, when unoccupied, to particular newsboys applying for the same, who received instructions from the district manager not to intrude upon or interfere with the corner or place allotted to another. Each particular newsboy was expected and in fact required to be active and vigilant in making sales of a prescribed minimum number of each of said newspapers at or near his designated place; in short, to be a "hustler" in making sales. Otherwise his allotted place or corner would be given to another newsboy and he would be refused further copies by the district manager. The latter testified that one of his duties as such district manager in the employ of both publishers was to maintain a status of peace and harmony among the newsboys, and to so far supervise their daily conduct in the territory covered by his district as to promote the sale of the largest possible number of copies of each of said newspapers within the said district.

The sole question presented to the commission for its determination in making or in refusing to make an award to Eustace, and presented for our consideration in reviewing the award which the commission made, and in determining whether or not, in view of the practically undisputed facts, the commission had jurisdiction to make such award, was and is as to whether upon the facts above set forth it could be legally determined that Eustace at the time of his injuries occupied the relation of an employee of said newspaper publishers, respectively, and of their and each of their insurers, so as to render him entitled to compensation in his proceeding before the Industrial Accident Commission.

It cannot, we think, be seriously contended upon the basis of the foregoing undisputed facts that the relation of master and servant existed between Eustace and the publishers of said newspapers as that relation is defined and limited by the provisions of section 2009 of the Civil Code of California, which provides that: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter who is called his master." Nor do we think that, eliminating for the moment the question of control, it can be fairly concluded that under the provisions of section 8(a) of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 835), giving it its most liberal interpretation, Eustace could be held to have become and been at the time of his injuries an employee of said newspaper publishers. Section 8(a) of said act provides: "The term 'employee' as used in section six to thirty-one, inclusive, of this act shall be construed to mean: Every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written." The undisputed evidence discloses that aside from the question of control the relation created by the daily series of contacts between Eustace and the newspaper publishers, through their legal representative, the district manager, while somewhat difficult of definition as that of an independent contractor, was more nearly allied to the relation of a sales agent, under the authorities to which we have been cited, than to that of an employee and employer as these terms are defined in the Workmen's Compensation, Insurance and Safety Act. See Piper v. Oakland Motor Co.. 94 Vt. 211, 109 A. 911; Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558; Sinnett v. Watkins, 214 Ky. 76, 282 S. W. 769. Nor do we think that there is a sufficient analogy between the facts involved in this proceeding and those existing in the case of Globe Indemnity Co. v. Industrial Acc. Comm., 208 Cal. 715, 284 P. 661, to justify its application to the case at bar, since in that case the evidence showed that an express relation of agency for the distribution of the daily issues of the Oakland Tribune to its subscribers in San Rafael existed between the applicant for an award and the publishers of said newspaper, in pursuance of which the applicant not only received a percentage of the monthly price which the subscribers paid, but was also paid a regular sum in addition thereto to cover the cost of distribution in outlying territory. The evidence in that case disclosed that the relationship thus created was that of a month to month relationship rather than a daily renewed situation such as existed in the instant case, and with a much larger degree of control than that which is presented in the instant proceeding. A somewhat similar situation was presented to the Industrial Accident Commission in the matter of Servel v. Chronicle Publishing Co., 6 I. A. C. 23, wherein it appeared that the newsboy selling papers for the San Francisco Chronicle, in addition to a profit of 2½ cents received by him upon the sale of each copy of said newspaper, was paid the sum of $2.50 weekly by the publishers thereof for selling their newspaper exclusively upon a definite corner, the commission in that proceeding hold that "except for the payment for 'hustling' applicant was on the same footing as any other vendor of merchandise who buys goods to sell for profit and who assumes the risk of loss, and therefore in this respect was an independent contractor and not an employee; but that inasmuch as the defendant had paid him a definite sum for securing his exclusive services each morning, the arrangement constituted a contract of hire, and therefore the applicant should be considered as an employee in respect to any injury which might occur while selling defendant's papers." This case, while in no sense binding upon this court, is persuasive with relation to what the previous attitude of the Industrial Accident Commission for the last ten years or more has been with regard to what may be described as "newsboy cases."

We are thus brought to what we deem to be the essential inquiry in the instant proceeding, which is as to whether the nature and degree of control exercised by the publishers of the two newspapers involved in this proceeding, through their district manager, was such as would suffice to justify the finding of the commission to the effect that newsboys, by virtue of such control, stood in the relation of employees of the publishers of said newspapers, and as such have a compensable claim for an award arising out of injuries received in the distribution to the public at large of their daily product. In the case of Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570, it was held by this court that the essential test by which to determine whether in doubtful cases the relation between a workman and those for whom he was rendering service was that of an employee or of an independent contractor, was not so much dependent upon whether he received wages or whether he was to devote all or a portion of his time to the performance of his specified service, but was rather dependent upon the extent of control or right of control which the so-called employer was to exercise over its so-called employee. When we undertake to apply the reasoning of that case to the admitted facts of the instant proceeding, we are constrained to hold that the limited amount of control which the publishers of these two newspapers undertook to exercise over the newsboys, including Eustace, who daily purchased from their district manager a specified number of copies of their daily issues for a specific sum, payable in cash or at the close of each day's sales, and who undertook the retailing of the same to such customers among the public at large as they were able to attract or procure at a specified place and price fixed by the publishers, would not as a matter of law be sufficient to constitute such newsboys the employees of the publishers of said newspapers so as to entitle them to receive compensation at the hands of the Industrial Accident Commission in the event of injuries received by them in the course of their activities in making or attempting to make individual sales of the copies of said newspapers. We are satisfied that the finding of the commission upon the undisputed facts presented before it amounted to an erroneous legal conclusion which this court possesses jurisdiction to review.

The petitioners herein, both through their counsel and through the aid of amici curiæ, have presented much plausible argument as to the effect of upholding the legal conclusion and award of the commission upon the numerous army of more or less irresponsible persons of immature years, of physical infirmities, and of failures in other vocations, who come at length within the classification of newsboys in the far-flung daily or periodical distribution of newspapers and other periodicals to the public at large. The impossibility in the main of exercising any more than a very limited supervision or control over this promiscuous and ever-changing body of assorted individualities occupied from day to day in the vocation known by the title of "news boys" has been plausibly urged as a reason why the legislature in the adoption and limited application of the Workmen's Compensation Act could not have intended to embrace within its terms this promiscuous and in a sense large irresponsible class of persons, and that to impose upon the publishers of newspapers and other periodicals responsibility for their individual mischances while pursuing such vocation would work disaster to a very large number of persons who now receive a measure of their livelihood in the retailing of newspapers and other publications, but with respect to whom such publishers could not in reason be held to assume the responsibilities arising out of the established relation of employer and employee. While the foregoing course of reasoning could not be held to be conclusive in determining whether or not such a relation in clear cases existed, it is persuasive in such doubtful cases of asserted jurisdiction as those wherein, as in the instant proceeding, the commission has undertaken as a legal conclusion from undisputed facts to make and to uphold an award. We are of the opinion that it fell into error in so doing in the instant case and that as a consequence its award to the original applicant herein should be and the same is hereby annulled.

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213 Cal. 89

PEOPLE v. KING.

Cr. 3365.

Supreme Court of California.

July 1, 1931.

Rehearing Denied July 30, 1931.

1. Homicide ⚿253(1).

Evidence conclusively established accused's guilt of first-degree murder.

2. Homicide ⚿228(1).

In homicide prosecution, corpus delicti must be proved beyond reasonable doubt.

3. Homicide ⚿143.

Prosecution must first produce sufficient evidence of corpus delicti of homicide to send case to jury, and jury is first to be satisfied from evidence that crime has been committed.

4. Homicide ⚷228(1).

Evidence supported finding in murder prosecution that crime had been committed.

5. Criminal law ⚷778(9).

In murder prosecution, refusal of court to instruct that accused was presumed to have good reputation and character *held* proper, where accused did not attempt to refute prosecution's evidence impeaching his character.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Clarence L. King was convicted of first-degree murder, and he appeals.

Affirmed.

Mars F. Morrison, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SEAWELL, J.

This appeal is from a judgment of the superior court of the county of Humboldt imposing the death penalty for the commission of the crime of first-degree murder.

On March 24, 1930, the dead body of Minnie McCoy, a woman twenty-six years of age, was found near the side of the Redwood highway in a mountainous section of this state, by a highway workman, at a point within the county of Humboldt, two and one-half miles south of the Humboldt-Del Norte county line. Death was caused by a pistol bullet which had entered the left side of her head at a point one and one-half inches below the orbit of the left eye, crossed upward and forward and emerged from the right side of the head one inch back of and from one-quarter to one-half inch below the orbit of the right eye. Although the wound was fatal and rendered the victim immediately unconscious, the bullet in its course did not penetrate the brain cells and, according to the autopsy physician, death did not ensue until some time after the mortal wound had been inflicted. Whether the shot that killed Minnie McCoy was fired on February 18, or on February 20, 1930, is a matter of slight dispute, the defendant maintaining at the trial that it was fired on February 18, while several witnesses testified that they saw and talked with the defendant and deceased on February 20 on said highway and in the vicinity where the body of the deceased was found some five weeks after she met her death. By photographs the identity of the deceased was established as the companion of the defendant when she was last seen alive by any person other than the defendant. A Ford coupé was also identified as the conveyance in which defendant and Minnie McCoy were traveling. Other evidence of a convincing effect tends to establish the fact that the deceased was killed on February 20. So far as the proof of guilt against the defendant is concerned, the particular day—whether the shot was fired on the 18th, 19th, or 20th day of February—is of small consequence, as the earlier day at most would only tend, if the shooting occurred on that day, to give slight coloring to defendant's claim that he did not begin to withdraw or prepare to withdraw the funds of the deceased from the several banks wherein she had deposited them until after her death, rather than before her death. There is ample uncontrovertible evidence in the voluminous record which shows beyond a reasonable doubt that the defendant began making preparations to possess himself of the property of Minnie McCoy and rid himself of her at or before the time he surreptitiously fled the state with her, and that he had prosecuted with a marked degree of success the execution of his plan when he was arrested upon leaving the United States post office at Portland, Or., March 29, 1930, where he had gone in an effort to consummate, by forged signatures, a plan of withdrawing a pittance of $25.09, which remained on deposit in Minnie McCoy's name with the Missouri Valley Trust Company, located at St. Joseph, Mo. This money had been deposited by the deceased in her home state bank before she had ever seen or known of the existence of defendant. He attempted to gain possession of said funds by resorting to the air mail service, but the officers of said trust company became suspicious that the signatures of the deceased were forgeries and notified the officers of the law of their misgivings and also advised them of their reply by air mail delivery, as requested by the defendant, giving the fictitious name under which he was operating and the day he would call for the letter at the general delivery window. The discovery of the body of the deceased in the Humboldt county woods had been made four days before the appellant appeared at the Portland post office, where he was placed under arrest as above related.

Appellant has given no satisfactory account of himself. He claims that he has no relatives, and that his true name is Clarence L. King, but upon fleeing from this state in February, 1930, he assumed the name Clarence L. McCoy. He has also used the name Maynard. It appears that at one time he enlisted in the United States army from Idaho or Montana and served but one year of his enlistment. The reason of his brief service was kept out of the record by objection of his counsel. He admitted that he was "pinched" at Spokane, Wash., for bootlegging before he met the deceased. At the trial he

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

gave his age as twenty-six years, but in the narrative of his activities there is reason to believe that he may be several years older than his categorical reply would indicate. In his statement made shortly after his arrest he claimed that he had lived practically all his life in California, but from the transcript of testimony it appears that he spent much of his time in the states of Washington, Oregon, Idaho, Montana, and other northwestern states. The authentic information concerning the defendant begins early in 1928, at Yuba City, county of Sutter, where he and his companion were apprehended in the act of stealing gasoline at night from a wood and coal yard. During his detention in the Yuba City jail on that charge it developed that he had burglarized a garage located at Marysville, county of Yuba, and had stolen automobile tools and accessories aggregating several hundred dollars in value. Upon being formally charged with the crime of burglary he entered a plea of guilty of burglary in the second degree. Upon serving approximately one year and four months' imprisonment at the San Quentin state prison he was paroled, the terms of his parole being that he was to work in a garage at Marysville and be restricted in the use of automobiles to the district in which he was employed.

The first person upon whom he called upon his release from prison was a woman named Eunice Pardee, with whom he had a preprison association and with whom he intermarried at Mrs. Eunice Cooper's residence, located several miles easterly from Corvallis, Or., a few days after Minnie McCoy's death. Mrs. Eunice Cooper was the grandmother of Eunice Pardee, and during the former's quite extended but temporary residence at Sacramento Eunice Pardee resided with her until she returned to her Corvallis home in 1926. During the period of residence at Sacramento defendant was a frequent visitor at the Cooper home. His intimate associate and companion, Charles R. Lee, who figures quite closely with the defendant in his escapades in the Northwest, roomed at the Cooper house. The intimacy which existed between defendant and Eunice Pardee long antedated his acquaintance with the deceased. The latter, who seemed to have been a native of the state of Arkansas, where her mother and family reside, had not lived in California a great while before she met the defendant. He was then a paroled prisoner, working at a garage or automobile repair shop. Minnie McCoy, or Mickey McCoy, as she was also known, was, according to his frequent and too ready imputations, a sporting girl. The evidence shows that she was a very industrious, thrifty, sober young woman, and had formed the habit of saving. Before coming to California she had made deposits and investments in modest amounts in her home state banking and financial institutions and continued to save while in this state, but she did not stint herself as to her personal adornments and necessities. After meeting defendant she negotiated the purchase of a 1929 model Ford coupé on the usual sales contract plan and paid down quite a sum as the first payment. Defendant voluntarily gave her driving lessons and manifested an unusual interest in her personal welfare. According to the statement of the defendant, he, Minnie McCoy, and a man and woman whose names he could not recall, on a night early in June, 1929, drove from Marysville to Sacramento to attend a dance, and during the trip the man, who was driving a new Pontiac coupé, became so badly intoxicated that he could no longer drive, and defendant took the wheel and, after driving an hour, he collided with another car and the four were taken into custody by the law officers.

Defendant, so his story runs, being conscious that he had violated the terms of his parole, and fearing a return to prison as a parole violator, left Marysville with Minnie McCoy the following evening at 9 o'clock in her car, defendant driving, for the purpose of withdrawing himself from the jurisdiction of the state of California. Their journey was a long one, extending through the states of Oregon, Washington, Idaho, Montana, and into Utah. They traveled as man and wife from the day of departure in June, 1929, to the day on which deceased was killed, February 20, 1930. Many cities and towns in the above-named states were visited. The defendant claims that they were in search of work, which was difficult to obtain. He claims to have earned a considerable sum during that period as an automobile mechanic. That he worked but little and earned but a small amount of money while he was traveling with Minnie McCoy as her husband is given support even by his own discreditable story, which from beginning to end is a challenge to credulity and is impeached where evidence on the important facts is obtainable, and is discredited by contradictory and conflicting statements made by him in accounting for the death of Minnie McCoy, or else is so inherently improbable and unreasonable as not to be worthy of sober consideration. That she financed him during their nine months' stay in the Northwest is not even doubtful. Some trouble was made the deceased which threatened her ownership of the Ford coupé by forfeiture on account of having removed the same from the state of California without having notified the seller. That this was inspired by the defendant and was a part of his program to gain nominal ownership of the car, which he actually succeeded in doing, by deceit and subterfuge, is in accord with his other acts of obtaining by fraud and forgery everything of value which the deceased possessed. While at Pocatello, Idaho, defendant says that he worked at a garage and Minnie McCoy had rooms in a rooming house where she sold her body to men, while the defendant occupied an adjoining room connected by a door. He repeatedly referred to her in his testimony, with the evident purpose of bemeaning her, as a sporting girl, and volunteered upon several occasions to throw out the suggestion that she had contracted a venereal disease. He claims that she was a sporting girl at Marysville. That she did—certainly with the defendant's procurement and most likely in obedience to his demand—despoil her body for hire is told by the landlady of the house in which the defendant and the deceased lived from October 7, 1929, to February 9, 1930. During these four months the income of the deceased ran as high as $750 per month, and she did not leave the house to exceed six times while she was thus engaged. The landlady testified that she knew that she had in a Pocatello bank several hundred dollars. On February 9, without any previous notice to the landlady, defendant and Minnie McCoy left Pocatello in said automobile, taking with them a steamer trunk, phonograph, oil paintings, a new fur coat of the value of $97, and other personal effects, all the property of said Minnie McCoy, and after visiting with defendant's close friend and companion, Charles R. Lee, at Vancouver, Wash., with whom he had fraternized on two previous occasions while a fugitive in the Northwest, began the journey which led to the death of Minnie McCoy some ten days thereafter. During all the times the defendant was with Minnie McCoy he was secretly corresponding with Eunice Pardee.

It is indeed difficult to follow the defendant in his sinuous narrations of the events preceding the death of Minnie McCoy and the conversations which took place between him and the deceased immediately prior thereto, and the struggle which immediately preceded the firing of the shot by which she was slain. It would seem from a study of his many varying, equivocal and confusing stories that they left Vancouver, Wash., at 9 o'clock a. m. on the day before the homicide and drove a great distance, passing through Grants Pass, Klamath Falls, and Crescent City, and reached the point where the body of the deceased was found between 1 and 2 o'clock a. m. He stated that much of the time on the return trip was spent in registering protests on his part against returning to California, but the deceased insisted upon going to Eureka, Cal., and, although he was in command of the car, he proceeded against his will, bound for Eureka. In his first statement he said that the deceased had been threatening to turn him in as a violator of his parole. She had heard about the Pardee woman. She said if he would take her to the coast she would sign the car over to him and not bother him any more. She also said he was not going to marry any other woman. After leaving Grants Pass she had her gun where she could get her hand on it all the time. In other statements he admitted that he did not see a gun in her possession, but he had a "suspicion" that she had a gun. No credible evidence was introduced which tended to prove that she ever owned or knew how to use a pistol. He stated that they had been arguing all along the line, "when she pulled the gun and said, 'You son of a bitch, I will kill you right here,' and I slammed down on the pedals of the car and I pulled her left arm down with my right arm and swung my left arm around and caught her right arm with my left hand as she pulled the gun to shoot and it went off two or three times. [He afterwards admitted that but one shot was fired.] I shut my eyes when the shooting took place and the first thing I saw when I opened them up she had slumped down in the seat and blood was all over her face, she was bleeding hard. * * * I said, 'Good God, Mick.' By that time the car was stopped and I went around to her side after I got out of the car and I thought she was dead, and then when I got hold of her I knew she was dead and saw she was not breathing. * * * The car was stopped on the right side of the road headed into California. I just looked around and knew I had to do something and did not want to get caught with that mess on my hands. Then I took her by the legs and the back, her feet were on the running board, then I picked her up and half carried her and half dragged her off the highway about 15 or 20 feet. I remember the place because there was a little hollow place and a log. I hated like hell to leave her like that, but I wanted someone to come along and see her and I thought it was best for her to be left there, as someone would notice her. [The body was dragged from the highway and hidden from the traveled highway by logs, where it remained until it was discovered more than a month thereafter by a highway caretaker who was engaged in cleaning out drainage ditches.] I then went back up to the car and I saw the gun on the floor of the car. I picked the gun up and tossed it upon the shelf back of the seat. I turned around and started back and before I got to the Oregon line a car passed me, but I did not pay any attention to it. After I had driven about 15 or 20 minutes from the body I came to a place where there was some water along the edge of the road and I stopped and cleaned up the mess in the car, as there was some blood in the car and on the running board, there was some blood on the sleeve of my coat, and I washed that off. I cleaned everything up the best I could in the dark, and then I drove north back to Oregon. * * * I had her purse, as it and a watch were in the car, the watch was in the side pocket, as the wrist band was broken, and

I think it is there yet. [The wrist watch was probably torn from her wrist as she recently had been seen wearing it and it was given to Eunice Pardee by defendant soon after he arrived at the Cooper ranch.] The purse was lying upon the back at the time of the shooting and I think that I also have that at home. [The money in the purse, amounting to several dollars, was appropriated by the defendant and the purse was given to Eunice Pardee shortly after his arrival at the Cooper ranch.] I had in the car on my back all of our belongings, a hat box and a grip belonging to her which contained all her belongings."

The defendant then relates driving to the Cooper ranch near Corvallis without stopping except at some small town to eat and meeting Eunice Pardee, whom he told that he had just arrived from Eureka, where he had taken "this girl." He stated that he had told Eunice Pardee in his letters written at Wallace and Pocatello, Idaho, "about this woman Mickey McCoy, but had never told her what she was doing or what the circumstances were." Continuing, he said: "She was so darned glad to see me that she did not say any more about the woman. I knew there was nothing in the grips, that is that would incite her suspicion, and I told her I had a couple of grips that I told this girl [Minnie McCoy] I would take to her mother. Eunice just took it for granted that that was right." Continuing, he stated that he stayed at the Cooper ranch two or three days, went to Portland and rented an apartment under the name of Mr. and Mrs. Clarence King, and then went to Vancouver and from there expressed some used and worthless garments, old shoes and wearing apparel, belonging to Minnie McCoy, to her mother, Mrs. Flora Horn, whose residence was Malburn, Ark., without name or address of consignor, or note of explanation. They then returned to their apartment, and on March 1, 1930, they went to Vancouver and were married.

He further stated that while he and the deceased were together he made deposits of his money in the name of the deceased and made certain payments on her behalf. This contention was made to minimize the forgeries which he committed in drawing her funds from several banks, which will hereafter appear. That he completely dominated Minnie McCoy appears too plain by her submissions to him to require extended discussion. It is in evidence that she received from $700 to $800 per month for the four months she remained at Pocatello, and that she had been otherwise employed during their stay in the Northwest. This alone amounted to a fund of $2,800 to $3,200. The defendant was given sums of money by her to be deposited at the bank. How much he was given is not ascertainable, but several hundred dollars found their way to the bank. He was earning but a small amount compared with what she was receiving from the occupation in which she was engaged at his behest. In his effort to show that he had earned a sufficient sum to meet the expenses of his stay in the Northwest and to account for moneys which he claimed to have advanced on account of Minnie McCoy, upon making the most liberal allowance in his favor, it fell below the necessary figure, and he pieced out the deficiency by saying that he was paid $100 by his friend Lee and won money by gambling with cards. Returning to his said first statement, which he signed, he concluded it as follows:

"While living in Portland with my wife Eunice I had to get the title to the car straightened out and we drove to Boise, Idaho, and went to the License Department in the Capitol Building. I filled in the name of Minnie McCoy on the back of the certificate of title and signed my name transferring the car from Minnie McCoy to myself. In other words, I forged her name.

"The gun or automatic pistol that killed Mickey McCoy is home on the Cooper ranch laying on the side of an old dresser in my wife's and my bedroom. The purse which belonged to Mickey McCoy is still in our room also. I told my wife that it was one of Mickey's old purses. Mickey's wrist watch I think is still in the car at the Cooper ranch. At the time of the shooting we had between us, Mickey McCoy and myself, about $80.00." The defendant's attempt to arm the deceased with the thirty-two Savage automatic pistol with which she was shot to death and which was afterwards found in his possession is too absurd and incongruous to merit the serious consideration of court or jury. We herewith append a portion of his examination by the district attorney of the county of Humboldt, at the county jail, taken some six weeks after the homicide, as a fair sample of his attempt to divert the accusatory facts from himself:

"Q. When you first knew she had a gun on you this side of the checking station and above Klamath, where did she have this gun? A. She was sitting in the seat and had this pistol kind of pulled up around her as I remember the gun was here and she had it covered up with her hand. (Then the witness indicates.)

"Q. How long have you been carrying a gun? A. She had the gun in her possession, presumably in her wraps or purse. I can't say exactly, all the way from Vancouver, because I know she had not been into any of the grips where the guns could possibly have been previous to that time.

"Q. Where did she get the gun? A. That I do not know.

"Q. Did she have the gun when you first met her? A. I never seen the gun.

"Q. When was the first time you ever knew — A. The first time I ever suspicioned was in Pocatello, Idaho, when I seen some .32 calibre bullets in her possession.

"Q. You knew she had a gun? A. I didn't know for sure; I surmised as much, I cannot say.

"Q. You traveled with her and slept with her for a period of several months? A. I can't say I exactly slept with her. I was working daytimes and she was working practically all night. We had separate rooms.

"Q. At the time you were registering— A. At the times we checked into hotels I stayed with her; we checked in as man and wife.

"Q. You were sleeping with her, traveling with her, and didn't know she had a gun? A. the gun was never brought up. * * *

"Q. You got out and ate your supper or dinner at Grants Pass? A. Yes sir.

"Q. And then you didn't know she had that gun until you passed the checking station on the California line and had reached between Crescent City or the checking station and Klamath before you realized she had the gun? A. Yes, sir, that she had it in her immediate possession.

"Q. Just what was it that caused you to realize that she had that gun in her immediate possession? A. It was just sort of a suspicious movement, the way she would hold her hands, move it around in her coat.

"Q. She had been carrying it all the way from Vancouver for a period of 12 or 14 hours? A. she must have had it in her wraps or coat.

"Q. The only wraps was just the coat she was found in? A. Yes.

"Q. She didn't have a holster to carry it? A. It must have been in her purse then; it is the only thing I can recall, I am not sure, I cannot say.

"Q. Did you see her take the gun out from any place when you realized she had the gun? A. No, sir, I did not.

"Q. Well now, just what were those suspicious movements or what do you mean when you saw the unusual movement that led you to believe she had the gun? A. At the time I didn't see anything. When I first noticed the movements something kind of made me feel that she had a gun, but at the same time I didn't say anything to her.

"Q. Didn't ask her what she had? A. No.

"Q. Didn't ask her whether she had a gun or not? A. No.

"Q. When was the first time that you saw the gun? A When she pulled it on me I realized it was a gun right then because I seen it.

"Q. You had seen it? A. I seen it when she pulled it on me.

"Q. Where did she pull the gun from? She said, 'You son of a bitch I will shoot you now?' A. She said, 'You son of a bitch I will kill you now,' up flew her hands.

"Q. What did you do? A. I slammed down on the brakes, swung around in the seat.

"Q. Did you grab her? A. I grabbed at her more like this (indicating) kind of closing my eyes. If I ever felt like I was going to get shot I sure did then.

"Q. Did you get her gun hand? A. I didn't get her gun, I can't hardly say as to whether I grabbed her gun. Everything happened so quick it sounded to me as if there was a couple of shots or possibly the concussion from the shot."

The attitude of the defendant to the deceased as showing a totally abandoned heart and a want of the common human instincts which the situation should have awakened in the most cruel of mankind is well illustrated in his own statement which we hereafter quote. The autopsy physician testified that the deceased probably lived for a considerable period after she was shot, as the bullet in its course through the head did not come in contract with any organ which would cause instant death. His opinion is based upon the fact that the autopsy showed that the lungs had gradually filled with blood, and this would not have been so had death immediately ensued. His brutal treatment of her body, whether life was extinct or not, at the time he hurried away from her crumpled remains, concealed from public view by the irregular contour of the mountain side and the log behind which he had dragged her, is best illustrated by his own words:

"Q. When you got out you looked up and heard the sigh, you said, 'Good God Mickey?' A. Yes.

"Q. You didn't see any blood streaming from her face? A. No, there was blood all over her face, I know the blood was running on the dress and coat.

"Q. Did you see any blood streaming from the face after the shot and after you got out of the car, came around and opened the other door? A. She was bleeding, surely.

"Q. Was it flowing out of the face? A. Flowing from somewheres, her head was bent over, and the blood was running down around the front of her.

"Q. Did you know where she was shot? A. Not exactly.

"Q. Did you ever make any effort to find out? A. No.

"Q. After you got around and pulled her out of the car, there was no motion any place, she was just slumped there? A. Yes.

"Q. Where did you think she was shot? A. I knew she was shot somewhere in the head on account of the blood.

"Q. What part of the head did you think she was shot? A. I didn't know, I imagined she was shot somewheres around the front, because everything seemed all blood, just seemed to dawn on me that is where she was shot.

"Q. Did you look to see if the bullet had struck her in the head? A. No, I didn't.

"Q. Didn't examine to see whether the brains were flowing out or not? A. No.

"Q. Did you take her hat off to see? A. She didn't have a hat on.

"Q. Now listen, was she still bleeding when you dragged her down in back of the log? A. I suppose she was, because there was blood all over her; I can't say, I didn't see no blood gushing from her.

"Q. How did you seize her to bring her out of the car and drag her down back of the log? A. After I got her feet out first, I kind of got my arm under her legs and the other under the shoulder.

"Q. Carried her? A. Kind of half carried and dragged.

"Q. Feet dragging or head? A. If any part her feet were dragging.

"Q. After you got her out of the car did you lay her on the side of the road? A. The first place I laid her down was the spot I left her.

"Q. After you laid her down did you fool over her to see if there was any life? A. I suppose a few moments I will say.

"Q. A few seconds? A. Not exactly seconds, just stood there and looked.

"Q. Did you put your hands on her after you laid her down? A. After I laid her down I never touched her any more.

"Q. Did you look to see after you laid her down if there was any life? A. I had already taken for granted she was dead.

"Q. Did you feel any warmth in the body when you were carrying her? A. I don't recall getting my hands next to her body when I was carrying her.

"Q. Didn't you have, when you got your arms around her back, you had your hands under her arms? A. Kind of got one arm around her back and the other one down here.

"Q. Did you have your right arm under her back, or left? A. Left arm.

"Q. Did you feel any warmth then on either arm at all? A. Well, I can't say I left any warmth, possible a little, yes.

"Q. Did you get any blood on you? A. I did, yes.

"Q. On which arm? A. I got it on, some, a little bit on my left arm and some on this other arm.

"Q. Some on your right and some on your left? A. Yes.

"Q. When did you get the blood on your right arm? A. I don't know when I got it on my arms or overcoat at all, until after I laid the body down and I seen I had blood on my coat.

"Q. Is that the clothes you had on? A. This is the suit, yes, sir, but I had an overcoat.

"Q. Any blood on your suit or just the overcoat? A. Sent them to a cleaners in Corvallis, Oregon. * * *

"Q. Before you met Eunice? A. Afterwards.

"Q. Did Eunice see the blood? A. No, sir, I had taken my overcoat off.

"Q. Did she notice any on your trousers? A. No, very little on my trousers, I wiped the most of it off.

"Q. Did you notice whether or not the blood was streaming from her face and head when you were carrying her? A. No, sir, I watched more where I was going, watched my step in carrying her, everything seemed all blood around her face.

"Q. Did the blood seem flowing or coagulated? A. When I did look, it seemed more like it was flowing.

"Q. Did it stream on the ground in back of you? A. I didn't notice.

"Q. Did you notice when you came back on the road? A. I never looked."

The defendant was utterly unable to explain the manner in which deceased shot herself almost on a line directly through the head, the bullet entering the left side—the side which was next to the defendant—and passing out the right side of the head. The defendant made a number of explanations as to how the deceased, in attempting to shoot him shot herself in a most unnatural and improbable, if not impossible, manner. At the trial of the case he testified: "Well, after she threatened me and I turned I noticed her hands they were more in this position (illustrating) * * * and appeared as she had both hands on the gun and I don't know as she was holding the gun with both hands or which hand, but as near as I can remember, the best of my recollection, the gun would be in a position possibly a little bit higher (illustrating). The muzzel of the gun wasn't pointed directly toward me, like this would be more like—but I actually don't know which hand she had the gun in as far as that goes, it might have been her left, might have been the right, holding the gun something like this, so it looked as if in both hands, pointed not directly toward me, but more in the direction of the steering wheel. * * * I don't know which one (finger) she had on the trigger or which one she was actually gripping the gun with; I just noticed it at a glance."

The defendant disclaimed at all times that he grabbed or held the arm or hand which was directing the pistol or in any way deflected the pistol in any manner. His several attempts to account for the actual shooting are simply beyond human understanding. Beyond doubt he stripped from the person of the deceased everything of value, and took her steamer trunk and suitcases, with their contents, and removed from her clothing all marks that would serve to identify her.

According to his testimony, he drove from Vancouver, Wash., to the place where he disposed of the body of the deceased and drove back to the Cooper ranch, where Eunice Pardee had arrived from her Sacramento residence but a few days before, without rest or sleep. He gave all of deceased's clothing and articles of value to Eunice Pardee. Almost immediately upon his arrival and while his clothing and the cushion of the seat where Minnie McCoy had sat bore the stain of her blood, he began making trips in the car of the deceased in company with Eunice Pardee about the country. He forged the dead girl's name in at least four separate transactions, one of which he profited from to the extent of $300; another to the extent of $85, and the attempted third forgery led to his arrest. The forgery of her name purporting to transfer her Ford coupé constituted the fourth.

When he was arrested at Portland, June 29, 1930, he denied that he was with Minnie McCoy at the time she was killed. Upon being asked by Police Detective Tackaberry, of Portland, Or., if he knew she was dead, he replied: "Yes, Joe took her down the line and blowed her topper." The evidence connecting him with her in the journey became so overwhelming that the mysterious "Joe" theory was dropped as a defense.

On March 24, 1930, the defendant wrote from Portland to a friend, Ed. Dalton, at Wallace, Idaho, where defendant and Minnie McCoy had lived and where she had worked for some time, as follows: "Is Chris and Mott still with you? Give my regards to Earl and the boys. Will explain the reason for my flighty departure from that town when I see you. You probably know I had a dame working in a joint there. That is all over now." That Minnie McCoy was the person referred to in the above letter cannot be seriously contested.

The defendant and Minnie McCoy were seen by two or three travelers on the Redwood highway on or about February 20, 1930, who had occasion to converse with them.

William E. Martell, an automobile salesman, saw the defendant and the deceased in the highway late on the afternoon of February 20, not a great way from where the homicied took place. Both were on the highway engaged in a quarrel, and the defendant approached Minnie McCoy in a threatening manner. Martell told him to take his hand off the woman. The woman said, "All I want is my money." It should be noted here that defendant admitted in one of his statements that one of the last subjects heatedly discussed before the killing was money matters. In reply to the deceased's request for her money, the defendant said, "You will get your money in time." The girl repeated several times that all she wanted was her money and requested Mr. Martell to settle the argument. Defendant invited Martell to have a drink and as he opened the car to draw out a pint bottle half full of liquor, he noticed a pistol in a holster. As he touched the pistol he said he guessed, "We don't need that right now." The deceased had on a heavy fur coat, no doubt the coat she bought in Pocatello. He thought both showed the effect of liquor. The car was also identified as Minnie McCoy's car. Several other witnesses who were upon the highway gave evidence which either identified the defendant or tended to identify the automobile in circumstances which were unusual and need not be set forth.

[1] We have not set forth all of the facts and circumstances of an accusatory character with which the record abounds, and which conclusively establish the guilt of the defendant. The motives are apparent.

[2-4] Defendant and appellant insists that the corpus delicti has not been proved. We think the foregoing statement of the case fully answers appellant's contention. The corpus delicti must be proved like any other fact, that is, beyond a reasonable doubt. The people must first produce sufficient evidence to send the case to the jury, and the jury are first to be satisfied from the evidence that the crime has been committed. This the jury has done and its conclusions are substantially supported by the evidence.

[5] The defendant complains that the trial court refused to give an instruction to the effect that the defendant was presumed to have a good reputation or character, without stating the trait involved. However faulty in substance, the instruction was properly refused for the reason that the reputation of the defendant was directly assailed by showing that he had been convicted of burglary, stealing gasoline, and bootlegging. When his character was thus impeached, it was his duty, to avoid the force of the impeachment, to show, though convicted, nevertheless his character was good. This he did not attempt to do. He stood as an impeached defendant before the jury, and the court properly refused to instruct the jury as requested. The court did, however, instruct the jury that the law clothed the defendant with the presumption of innocence, and that the reputation of a person accused of crime is in law to be presumed to be good until the contrary appears from the evidence, and that the jury would not be justified in drawing any inference unfavorable to the defendant from the fact that he offered no testimony as to his good character on the case. Clearly the instruction as given was much more favorable to defendant than he was entitled to have under the law. The instructions were full, fair, and liberal, and the defendant was denied no substantial right either as to rulings of the court upon the admissibility of evidence or the law as given to the jury.

The judgment and order are affirmed.

We concur: RICHARDS, J.; PRESTON, J.; SHENK, J.

115 Cal.App. 50

FORTIER v. HOGAN et al.

Civ. 463.

District Court of Appeal, Fourth District, California.

June 16, 1931.

Rehearing Denied July 13, 1931. Hearing Denied by Supreme Court Aug. 13, 1931.

1. Evidence 🔑89.

Presumption is evidence and may, in certain cases, outweigh positive evidence adduced against it.

2. Evidence 🔑89.

Generally, disputable presumption has no weight against proved or admitted fact.

3. Evidence 🔑89.

Where endeavor is made to establish fact contrary to disputable presumption, fact in dispute remains to be determined on evidence including presumption.

4. Evidence 🔑89.

Presumption that one exercises due care for his safety disappears when contradicted or controverted by indisputable evidence of party relying on it (Code Civ. Proc. § 1963, subd. 4).

> This is so if the uncontradicted testimony of the party relying on the presumption, or of his witnesses, is wholly irreconcilable with the presumption sought to be invoked, where the circumstances afford no indication that the testimony was the product of mistake or inadvertence.

5. Evidence 🔑89.

Presumption that one takes due care for his safety does not disappear from case as matter of law, when contradicted or controverted by party against whom it is invoked (Code Civ. Proc. § 1963, subd. 4).

6. Automobiles 🔑245(74).

In action for death of child of eight, struck by delivery automobile while crossing intersection on scooter, whether presumption that minor took due care for his own safety was controverted, *held* for jury (Code Civ. Proc. § 1963, subd. 4).

7. Automobiles 🔑245(74).

Whether child of eight, struck by delivery automobile while crossing street at intersection on scooter, was possessed of such intelligence, foresight, and judgment, as to be chargeable with contributory negligence, *held* for jury.

8. Automobiles 🔑245(74).

Whether child of eight, struck by delivery automobile while crossing intersection on scooter, exercised such judgment as he possessed, or was contributorily negligent, *held* for jury.

9. Death 🔑99(3).

$9,275 damages for death of boy of eight years of age *held* not excessive.

10. Automobiles 🔑244(7).

Finding that driver of delivery automobile, striking minor child crossing intersection on scooter, was negligent, *held* supported (Code Civ. Proc. § 1963, subd. 4).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Louis Philip Fortier against Michael Hogan and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Stearns, Luce & Forward, of San Diego, for appellants.

Glen H. Munkelt, of San Diego, for respondent.

GRIFFIN, Justice pro tem.

This is an action by the father for damages for the death of his minor child eight years of age, occasioned by a collision between a delivery automobile of defendant corporation and the minor child of plaintiff. Said child was riding a scooter at the intersection of Dewey and Harrison streets in the city of San Diego. The jury rendered a verdict in favor of the plaintiff and respondent in the sum of $9,275. Judgment was entered thereon in the amount of the verdict and costs of action, amounting to the total sum of $9,404.30. From this judgment, defendants appeal.

A statement of the case discloses the following facts: The son of plaintiff and respondent, Joseph James Fortier, of the age of eight years, five months, and eighteen days, was killed on October 25, 1929, at 2:30 o'clock in the afternoon by coming in collision with an automobile delivery truck driven by the defendant Michael Hogan, who was at the time the agent and employee of the Exclusive Florists, Inc., a corporation. Harrison street was a street running approximately east and west, and was 70 feet wide at the intersection. Dewey street was a street running approximately north and south, and was 40 feet in width. The automobile delivery truck driven by defendant Michael Hogan was proceeding easterly on the south side or right-hand side of Harrison street towards the intersection of Dewey street. At the northwest corner of Harrison and Dewey streets was a house, a large palm tree, and a low cement wall, partially obstructing the view of the driver of the automobile delivery truck of other traffic proceeding southerly on Dewey street. At the time of the accident, the deceased boy was traveling south on Dewey street a few feet away from the west curb on the paved portion of the street. He had constructed for himself a small "scooter," being a piece of wood erected upon two skates with a small stand or rest extending upwards, upon which he rested his hands. The grade of Dewey street is downhill toward Harrison street. The boy was propelling the scooter with one foot on the scooter and one foot on the pavement, coming down the moderate incline. The driver of the truck was going easterly towards Dewey street at a speed variously estimated, and upon which there was a contradiction of testimony. There is no direct testimony that the speed was excessive. Respondent relies upon the circumstances disclosed after the accident to establish an unlawful and excessive rate of speed of defendant's delivery car. The driver of the truck testified that, as he approached the intersection, he looked first to his left, which would be the direction from which the child was approaching, and then looked to his right, and saw an approaching automobile going north on the east side of Dewey street close to the intersection of Harrison street. He, the driver, then directed his attention to this car, unable to determine whether it was going to stop and let him pass in front, or if it was going to pass in front of him. While he was thus proceeding, and his attention thus diverted, his car suddenly collided with the boy, who was proceeding south on Dewey street about 4 feet east of the west crosswalk of the intersection. The point of impact was at a point in the intersection just south of the center line of Harrison street and west of the center line of Dewey street about 4 feet east of the west crosswalk of this intersection. The testimony of the witnesses differ as to the actions and conduct of the boy after he arrived at the north crosswalk, and their testimony will be hereafter more fully considered. The boy collided with the left front fender of the truck. As the truck proceeded, the rear wheel ran over the child, and his death occurred. The boy's sweater was found about 7 feet east of the prolongation of the west curb line of Dewey street. The scooter was found 24 feet east of this line. There was a continuous skid mark of the right rear wheel of the truck extending from the spot where the scooter was found to a point 33 feet east, and of the left wheel, a skid mark of about 28 feet. The distance from the scooter to the truck when it stopped was 49 feet. The truck stopped about 71 feet from the point of impact. The deceased was a colored boy and was one of eight children of plaintiff, of more than average intelligence for his age, about 4 feet high, weighed about 88 pounds, his record in school was good, he was industrious and of an affectionate and lovable nature, helped his brother sell Sunday papers and a church magazine, he earned $6 a month, saved his money, and bought himself clothes.

The defendants and appellants specify the following as errors relied upon to justify a reversal of the judgment: (1) That the evidence is not sufficient to support the verdict and judgment for the following reasons: (a) That the uncontradicted evidence establishes that the deceased was guilty of negligence which proximately contributed to his injuries, (b) that at the time of the accident the deceased boy did not use ordinary care or caution, such as a boy 8 years of age would be reasonably expected to use under the same facts and circumstances, (c) that the deceased was guilty of contributory negligence which was the proximate cause of his injuries, in that he did not use ordinary care and caution to avoid the accident, and for his own protection, (d) that the evidence does not establish that the defendant was guilty of any negligence that was the proximate cause of the accident and injuries to the deceased; (2) that the damages are excessive and not supported by the evidence; (3) that the trial court erred in not granting defendants' motion for nonsuit and for a new trial.

As to the actions and conduct of the minor child, plaintiff's witness testified as follows (from a deposition of defendants' witness offered and read into the evidence by plaintiff before resting his case).

Arvilla Olson, who was seated in an approaching car about one-fourth of a block south of the intersection at the time of the collision, testified:

"Q. Did you see a green delivery truck belonging to the Exclusive Florists at that intersection at about that time? A. I didn't see it approaching, but I saw it just as it crashed because I was watching the boy.

"Q. You saw the boy approaching the intersection? A. Yes, I did. * * *

"Q. And when you first saw him where was he? A. He was coming down sort of an incline on Dewey, about half way up when I saw him. * * *

"Q. Now, at the time you first saw him, how long did you observe him after you first saw him? A. Until he got hit.

"Q. Now will you describe for us just exactly what you observed, as far as the boy on the scooter was concerned, from the time you first saw him until he was hit? A. When I first saw him he had both feet on the scooter, coming down, and he was sort of crouched down on the scooter and as he came almost to the intersection he stood up, having one foot on the board and the other off, and pushed his scooter toward the intersection, and I saw him just as he crashed into the front wheel, or the fender, and he was tossed over.

"Q. Now, did you notice in what direction the boy was looking as he came down Dewey Street? A. As far as I could see he seemed to be watching his scooter. I didn't notice.

"Q. Did you see what direction his head was turned? A. It was turned straight ahead, or towards the ground, more or less. * * *

"Q. Did he change the direction of his head at any time before he was hit? A. I couldn't tell you about that.

"Q. When he got to the north property line of Harrison Street did he look toward the truck, or west on Harrison, or westerly on Harrison Street? A. I don't think he did. * * * I don't think that he looked either way. * * *

"Q. Any time that you could see him, did you see him swerve in any direction? A. No, he came direct.

"Q. And did he slacken his speed in any degree, as far as you could observe? A. No. If anything, his speed was accelerated. * * *

"Q. Did you have a clear, unobstructed view of the boy? A. Yes, of the boy, but not of the truck."

On cross-examination, this witness testified as follows:

"Q. Now you testified at the preliminary hearing, did you not? * * * A. Yes.

"Q. I will ask you if you didn't testify in this manner in answer to these questions: * * *

"'Q. Now will you describe the accident as you saw it? A. I was watching the boy coming down the hill, and he had just taken his foot off of his scooter and had his foot on the pavement, and he seemed to go uneven from his path?' A. I didn't say that, 'uneven from his path.'

"Q. Just a minute until I finish the question. 'And I turned around and I didn't look again until I saw the car going over him. * * *' Did you so testify? A. Yes, except I can't remember saying anything about going uneven. * * *

"Q. You could not see whether he glanced to the right or the left with his eyes, could you? A. No, not with his eyes, I watched his head."

The only other eyewitness testifying in behalf of plaintiff was seated on her porch near the corner where the accident happened:

"Q. About how fast was he (the boy) coming when you saw him? A. When I saw him he was pretty slow, because he had stopped there * * * just like someone would walk.

"Q. Did you see him do anything as he approached the intersection of Harrison? A. What attracted my attention—he slowed down and kind of stood there to adjust his hat, and the next thing I saw him pull out and pass my eyesight. * * *

"Q. Did he stop any appreciable length of time there, or did he just slow down, or what did he do? A. He slowed down, kind of stopped, adjusted his hat and went on out."

Two other eyewitnesses, seated in the car with plaintiff's witness Arvilla Olson, testified for defendant to about the same facts; that they observed him approach and cross the intersection with his head down but could not say where his eyes were looking or whether or not he may have looked when they were not observing him. The defendant, the driver of the truck, testifying for the plaintiff, stated that he looked as he approached the intersection but did not see the boy until he collided with him in the intersection.

It is upon these facts that appellants would have us declare that the uncontradicted evidence establishes that the deceased was guilty of negligence as a matter of law, which proximately contributed to his injuries. Appellants also contend that by reason of the testimony of eyewitnesses, testifying for the plaintiff as to the conduct of the deceased, plaintiff may not invoke or take advantage of the disputable presumption "that a person takes ordinary care of his own concerns," citing subdivision 4 of section 1963, Code of Civil Procedure, and that by reason of that fact this presumption disappears, and plaintiff may not rely upon it to support his judgment.

[1-5] In the well-considered case of Smellie v. Southern Pacific Co., reported in (Cal. Sup.) 299 P. 529, this question was discussed. The point there raised and presented was as to whether or not the presumption "that the deceased exercised due care for his safety" has been overcome and dispelled as a matter of law by the testimony of a witness called to testify for the plaintiff under section 2055, Code of Civil Procedure. That a presumption is evidence and may, in certain cases, outweigh positive evidence adduced against it has long been the settled law of this state. People v.

Milner, 122 Cal. 171, 54 P. 833; Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 P. 1041. The general rule that, as against a proved fact or a fact admitted, a disputable presumption has no weight, is subject to the exception that where an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all the evidence, including the presumption. Smellie v. Southern Pacific Co., supra. In Mar Shee v. Maryland Assurance Corporation, 190 Cal. page 1, 210 P. 269, 272, the court has again said: "There seems to be some confusion in the decisions of this state with respect to the extent to which under various circumstances presumptions of law are to be regarded as evidence of facts. The Code expressly declares them to be evidence (Code Civ. Proc. §§ 1957, 1963), and admonishes the trial judge to instruct the jury on all proper occasions 'that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a * * * presumption.' Code Civ. Proc. § 2061, subd. 2."

In the Mar Shee Case, supra, it was held with approval, in the case of Smellie v. Southern Pacific Co., supra, that a fact is proved against a party relying on the presumption "by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case." This presumption does disappear when contradicted or controverted by the evidence of the party relying upon it, with the qualification stated in the Mar Shee Case, but it is not correct to say that under the Code section, and the effect given to it by the court, it vanishes from the case as a matter of law, when contradicted or controverted by the party against whom it is invoked.

The question then presented in this case is whether or not the presumption of law "that the deceased person did take ordinary care of his own concerns," was dispelled by the evidence herein enumerated. The fact in dispute was not a question of whether the deceased looked before or while crossing the street, but the question of whether or not he exercised ordinary care of his own concerns. Conceding, but by no means holding, that the evidence was sufficient to establish the fact to be that he did not look, we are of the opinion, when we take into consideration the fact that the child was only 8 years of age and all the other surrounding circumstances, that the evidence, notwithstanding the loss of the benefit of the presumption, would not be sufficient to hold that the deceased was guilty of contributory negligence as a matter of law.

In the case of Ryan v. Union Pacific Ry. Co., 46 Utah, 530, 151 P. 71, 74, cited in the case of Tyson v. Burton (Cal. App.) 294 P. 750, the Supreme Court of Utah, considering the question of presumptions, held as follows: "In the absence of evidence there is a presumption that the deceased used due care and, for his protection, did all that reasonably was required of him. * * * When, however, facts and circumstances are proven to show just what the deceased did, or failed to do, then his care, or the want of it, is to be determined, not on the presumption, but upon the facts and circumstances proven."

[6] Whether or not the presumption relied upon in the present case was controverted was a question of fact to be determined by the jury. Grantham v. Ordway, 40 Cal. App. 758, 761, 182 P. 73; Fanning v. Green, 156 Cal. 279, 104 P. 308; Moore v. Gould, 151 Cal. 723, 726, 91 P. 616.

[7, 8] We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight, and judgment as to charge him with contributory negligence in a case like the present. These matters, and the further question whether a minor duly exercised such judgment as he possessed, must, therefore, as a rule be left as considerations of fact for the jury's determination, and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court. Mayne v. S. D. Electric Ry. Co., 179 Cal. 173, 175 P. 690.

[9] Defendants and appellants claim that the amount of damages awarded are excessive. It is true, in all such cases it is difficult to fix the definite pecuniary loss resulting from the death of a minor child. Precise accuracy in that regard is not capable of being attained, either by a court or jury. Manifestly, there can be no fixed standard by which that loss can be determined. Necessarily the law committed its ascertainment to the discretion and sound judgment of the jury. Bach v. Swanston & Son, 105 Cal. App. 72, 286 P. 1097.

[10] The evidence of the skid marks for a distance of 33 feet, made by the truck equipped with 4-wheel brakes, and the fact that the truck traveled 71 feet before it stopped, the driver applying the brakes continuously, may be a circumstance showing the amount of care and control exercised by the driver, and sufficient to support a finding that the truck was traveling in excess of the speed limit of 15 miles per hour in the intersection, in violation of law. Seperman v. Lyon Fire Proof Storage Co., 97 Cal. App. 654, 657, 275 P. 980; Warner v. Bertholf, 40 Cal. App.

776, 181 P. 808. These facts, together with the fact of his failure to see the child in the intersection are sufficient, if true, to warrant the finding of negligence. Gonzales v. Davis, 197 Cal. 256, 261, 240 P. 16. The record contains sufficient evidence to support the judgment in the amount found. O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381.

The motions for nonsuit and new trial were properly denied. The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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115 Cal.App. 138

PEOPLE v. LA MARR et al.

Cr. 2073.

District Court of Appeal, Second District, Division 2, California.

June 22, 1931.

1. Criminal law ⚷274.

Where defendant claimed he pleaded guilty to charge of grand theft, rather than to violation of Vehicle Act, from inadvertence, court properly denied motion to set it aside.

> It appeared from record that codefendant pleaded guilty to charge, as stated, to him by court, that he did unlawfully steal and take away an automobile, and in same proceeding, and immediately thereafter, court asked defendant whether he pleaded guilty or not guilty to same charge, and defendant answered, "Guilty." Defendant subsequently offered no proof, except oral suggestion of substituted counsel, that he had not voluntarily pleaded guilty to charge of grand theft.

2. Criminal law ⚷1128(2).

Matters not properly part of nor included in record could not be considered on appeal.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Prosecution by the State against Percy La Marr and another, wherein Julian Raymus, after plea of guilty of grand theft, was denied probation, and he appeals.

Affirmed.

Marshall A. Stutsman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CRAIG, J.

Upon a plea of guilty, appellant was permitted to file an application for probation, which was denied, and he appealed upon oral notice following an unsuccessful attempt to obtain a modification of sentence.

[1] Said motion, and the ground of this appeal, arose from an alleged inadvertence, in that he pleaded guilty to a violation of the California Vehicle Act, but that judgment was entered upon a count of the same information charging grand theft. It clearly appears from the record that appellant's codefendant pleaded guilty to the charge, as stated to him by the court, that he did "unlawfully steal and take away an automobile." In the same proceeding, and immediately thereafter, the court asked appellant: "How do you plead, Mr. Raymus, guilty or not guilty to the same charge?" To which question Raymus answered "Guilty." He subsequently offered no proof, by affidavit or otherwise, except the oral suggestion of substituted counsel, that he had not voluntarily pleaded guilty to a charge of grand theft. There was no abuse of discretion upon the part of the trial court in denying a motion to set it aside.

[2] Other matters discussed by appellant are not properly a part of, nor included in, the record; and they cannot be considered upon appeal. People v. Cruse, 24 Cal. App. 497, 141 P. 936; People v. Petros, 25 Cal. App. 236, 143 P. 246.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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115 Cal.App. 765

PEOPLE of State of California, Plaintiff and Respondent, v. Mike RILEY, Defendant and Appellant.

Cr. 1156.

District Court of Appeal, Third District, California.

June 17, 1931.

Rehearing Denied July 1, 1931.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Clinton W. Johnson, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant in this case was jointly tried with Frank Countryman, J. D. Countryman, and Lige Taylor.

The jury found him guilty of operating a still for the manufacture of intoxicating liquor for beverage purposes. A motion for a new trial was made and denied by the court. Judgment was imposed and a separate appeal taken.

The points raised for a reversal of the judgment are identical with those presented on the appeal of Frank Countryman, J. D. Countryman, and Lige Taylor. On the 16th day of June, 1931, we determined all questions raised adversely to appellant's contentions. Therefore, upon the authority of People v. Frank Countryman, J. D. Countryman and Lige Taylor (Cal. App.) 300 P. 871, the judgment and order denying a new trial in this case are hereby affirmed.

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115 Cal.App. 145

WEINTRAUB v. SORONOW.

Civ. 6551.

District Court of Appeal, Second District, Division 2, California.

June 22, 1931.

Rehearing Denied July 22, 1931. Hearing Denied by Supreme Court Aug. 20, 1931.

1. Trial 🔑140(1).

Credibility of testimony of witnesses is for jury.

2. Trial 🔑140(1).

Inconsistencies in testimony of single witness presents conflict in evidence and question for jury.

3. Appeal and error 🔑1001(1).

Evidence must be insufficient to afford ground for honest difference of opinion between intelligent men as to its effect, before appellate court can determine evidence is insufficient as matter of law to support verdict.

4. Master and servant 🔑80(9).

In action to recover for services performed under employment contract, verdict for plaintiff *held* supported.

5. Action 🔑48(3).

Each cause of action on employment contract, one express and other implied, *held* properly united in one complaint, where nothing remained to be done under contract but to pay salary earned (Code Civ. Proc. § 427).

6. Frauds, statute of 🔑129(2).

Contract of employment for one year *held* not within statute of frauds where fully performed by employee (Civ. Code, § 1624, subd. 1).

7. Master and servant 🔑3(1).

Employment contract fully performed by employee *held* not void for uncertainty, since performance made intention sufficiently clear.

8. Usury 🔑16.

Employer's agreement to pay employee bonus for assisting in financing business *held* not usurious under circumstances.

Circumstances disclosed that employee not only advanced money on his own checks, for which no interest was charged, but used his credit at his own bank in securing loans for the employer, and that the contract was not one for the loan or forbearance of money, and that the compensation was not interest in any sense.

9. Witnesses 🔑275(7).

Refusing to permit defendant to cross-examine plaintiff as to certain checks after withdrawal thereof with defendant's consent *held* not error.

10. Appeal and error 🔑1067.

Refusing requested instruction that even if employee was to receive bonus for assisting in financing business, and if employee loaned money, only compensation recoverable was interest, *held* not prejudicial error, where evidence justified finding that something more than making loan was done by employee in performing services.

11. Trial 🔑349(2).

Submitting or refusing to submit particular questions of fact to jury is discretionary (Code Civ. Proc. § 625).

12. Appeal and error 🔑974(1).

Clear abuse of discretion in submitting or refusing to submit particular questions of fact to jury must be established to show error (Code Civ. Proc. § 625).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by M. Weintraub against Frank Soronow, doing business under the fictitious firm name of Soronow's Furniture Manufacturing Company, and Frank Soronow, individually. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. W. Kaye, of Los Angeles, for appellant.

Crail, Shutt, Penprase & Crail and Claude A. Shutt, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff's amended complaint is based on an alleged contract with defendant whereby the former was to have been employed for a period of one year commencing January 18, 1925, as general manager of the latter's furniture manufacturing establishment and to assist in financing said business. The first count alleges the contract to have been for an agreed compensation of $6,000 for services as general manager and $4,000 as a bonus for assistance in financing the business, or a total of $10,000 for the year; that the employment terminated February 8, 1926; and that no part of such compensation, excepting the sum of $2,195, has been paid. The amended complaint further alleges that the assistance in financing was to commence forthwith and that plaintiff was also to begin familiarizing himself with the conduct of the business and to take over active management upon the completion of a house which he was then building for defendant. The second count is for the balance due for the reasonable value of plaintiff's services alleged to be in the sum of $7,805. Defendant's answer denies generally the allegations of the complaint, except it admits that plaintiff was hired as an employee in said business at a salary to be mutually agreed upon, and that thereafter the parties mutually agreed that such salary was to be $50 per week until August 9, 1925, that it was then changed to $250 per month until October 9, 1925, and thereafter $300 per month until February 6, 1926, at which time, it is alleged, plaintiff refused to continue in said employment, a settlement was made and plaintiff fully paid for all services rendered. As a further defense the answer sets up the statute of frauds. From a judgment in favor of plaintiff entered on the verdict of a jury in the sum of $6,000 defendant has appealed.

Appellant contends: (a) That the evidence does not justify a recovery under the second count, as it shows that there was an express contract for one year and that plaintiff voluntarily terminated the employment; (b) that the contract is void for uncertainty, both as to the agreement for services to be performed as general manager and the assistance to be rendered in financing; (c) that the bonus agreement is usurious; (d) that the contract is within the terms of section 1624, subdivision 1, Civil Code, and void; (e) that the evidence shows plaintiff was employed at the pleasure of both parties and upon a fixed salary, which was paid; (f) that the court erred in refusing defendant the privilege of cross-examining plaintiff as to certain checks; (g) in denying defendant's motion for nonsuit; and (h) in refusing certain requested instructions.

(a), (d), and (e). It is appellant's theory that respondent voluntarily terminated his employment before the year was up and so cannot recover on the second count; that the contract, being made January 18, 1925, to commence in April of that year and continue for one year, is void under the statute of frauds; and that as the services rendered were fully paid for no recovery can be had. There is the same conflict in the evidence as there is in the pleadings as to when the employment began. The plaintiff testified to the following conversation between him and defendant: "'I tell you, Mr. Soronow, * * * if you will guarantee me $4,000 for assisting financing you, I will draw $6000 [he had already testified that defendant was drawing $6000] and that will give me $10,000 a year, and I will go with you.' He says, 'That suits me fine,' and that was the last we talked about it." Plaintiff had previously testified that the two had had many conversations about the same matter, their last one occurring on a Sunday morning. Asked as to when he first advanced money to assist in the financing, he said: "On the 18th day of January I gave him a check for $1000.00. He was short of money." The 18th of January, 1925, was on a Monday, and the witness testified that on said Monday, following the Sunday conversation, he went down to the plant, and that from then until in April, when he says he took complete charge, he was at the plant "pretty nearly every day. I was getting myself posted as to how he runs the business." Again he says: "I went down there—I remember it was on Monday. He came down after me, and I went down with him immediately after we transacted business; after I told him I would accept his proposition. I was constantly with him, with the exception of the morning I would go down to the buildings and attend to a little bit there. * * *" He also testified that he finished his building operations the latter part of March or the first of April, "but I didn't give my time entirely to the business until I went down either the first part of April or the latter part of March, I am sure."

[1-3] As to the termination of the employment, it is immaterial who is at fault in so doing, so long as there is evidence from which the jury could infer that the employment began on January 18, 1925, as the termination on February 8, 1926, would carry past the period of one year; although the jury could conclude from the evidence that the breach was due to appellant's action in countermanding some of respondent's orders in arranging the new plant into which they were moving. In this connection Weintraub testified that he "was to take charge of the concern and run it as general manager and credit manager * * * and nobody was to give me any dictation." He said appellant told him, "Mr. Weintraub, you can run the business to suit yourself, and I will assist you in bringing in the orders." Witnesses were also produced by respondent, consisting of salesmen and others who dealt with the Soronow Furniture Manufacturing Company, who testified to the effect that during the year 1925 all their

orders for materials and supplies were given by respondent, together with other evidence from which the jury could infer that the latter was acting in the capacity of manager of the business. Of course, there is evidence sharply in conflict with this, but the determination of the credibility of the testimony of the various witnesses was for the jury in the first place, and apparently the jurors have accepted the evidence in favor of respondent. Appellant urges that the testimony of respondent is so full of "glaring inconsistencies" and "irreconcilable contradictions" that no reliance can be placed upon it, and that under such circumstances it justifies the conclusion that it is insufficient to uphold the verdict, in which case a question of law arises which may be reviewed by the appellate court, citing in support thereof the case of Snyder v. Miller, 29 Cal. App. 566, 157 P. 22. We do not find such inherent weakness in the testimony of respondent that a question of law arises, and the so-called irreconcilable and inconsistent testimony is capable to a large degree of reconciliation. But even if it were not, our understanding is that in such a case "if the evidence is such as that different conclusions upon the matter can rationally be drawn therefrom—then the case presented is one for the jury." Firth v. Southern Pacific Co., 44 Cal. App. 511, 514, 186 P. 815, 816. In other words, it still presents a conflict in the evidence even though found in the testimony of a single witness, and appellant's arguments here were undoubtedly vigorously made in the first instance to the jury, which decided as to the credibility of the witnesses contrary to his contention, and in the second place to the trial judge, who heard the evidence and saw the witnesses and who likewise decided contrary to such contention. In view of these circumstances we cannot say that the evidence was not such as to afford grounds for an honest difference of opinion between intelligent men as to its effect, which we understand must be the situation before an appellate court can determine that the evidence is insufficient as a matter of law to support the verdict.

[4-6] So it appears that the evidence supports the allegations of the complaint as to the nature of the employment and that the employment began January 18, 1925, and continued for more than one year, the term which respondent contends was agreed upon. The contract having been fully performed, and nothing remaining to be done under it but to pay the salary earned, and each cause of action being based upon a contract, one express and the other implied, they would seem to be properly united in one complaint under section 427 of the Code of Civil Procedure. Respondent possibly having some doubt as to his ability to establish to the satisfaction of the jury that there was an agreed consideration of $10,000 as alleged in the first count, properly relied upon a count based on the reasonable value of the services rendered (Wilson v. Smith, 61 Cal. 209), and evidently the jury determined the amount due thereunder. As we have seen, there seems to be evidence to support their verdict, so contentions (a), (d), and (e) would appear to be settled thereby, under the evidence.

[7] (b) It is to be observed that this is not an action to enforce performance of the contract alleged, but to recover for services performed under it. As long as the parties performed it, it was made sufficiently clear what was intended to be done under it. We see no merit in this contention.

[8] (c) The allegation in the amended complaint is that "plaintiff agreed to * * * assist in financing said business." The complaint does not show what plaintiff was to do in so assisting, and the evidence shows that he not only advanced money on his own checks, for which no interest was charged, but used his credit at his own bank in securing loans on the Soronow Furniture Manufacturing Company's notes; so the agreement alleged is not usurious on its face, and the evidence shows that what was done by the parties under it consisted not only in advancing plaintiff's own money when needed, but in services rendered in securing money on obligations of the corporation, a very valuable assistance. It appears therefore that the contract alleged and proved was not a contract for the "loan or forbearance of money," and the compensation alleged was not interest in any sense, so we cannot say it was void on that ground, as appellant urges here for the first time—except as said question was raised in instructions requested bearing upon that contention and refused by the trial court, and in which refusal we see no prejudicial error.

[9] (f) Plaintiff offered in evidence some 469 checks as one exhibit. They were apparently not read or shown to the jury, nor was the total amount of money which they represented put in evidence, but they were marked "Exhibit 26." Counsel for defendant questioned some of them, and in order to save time counsel for plaintiff asked leave to withdraw those checks from the exhibit to which defendant said he would make no objection. Such checks were ordered withdrawn and were placed together and marked "Exhibit 26-x" for identification. Counsel for defendant proceeded to cross-examine plaintiff as to such checks after such withdrawal, to which plaintiff objected, the objection being sustained by the court. We see no error in so doing under the circumstances, nor (g) in denying defendant's motion for a nonsuit.

[10-12] (h) Defendant requested certain instructions, one of which instructed the jury to bring in a verdict for defendant and another was to the effect that the evidence did not warrant their finding plaintiff entitled to any compensation for assisting in financing defendant. In view of what we have already said regarding the evidence, we see no error in refusing such instructions. Another instructed the jury that even though they found from the evidence that defendant agreed to pay plaintiff the sum of $4,000 as a bonus for assisting in financing the business, if they should also find that defendant did not render any service other than the exchange of checks or the loan of money, the only compensation to which plaintiff would be entitled was interest. In view of the fact that the evidence is such that if a finding of fact had been requested as to the services rendered in such assistance it would have justified a finding that something more than the exchange of checks and the loan of money was done by plaintiff in performing such services, we fail to see where any prejudice resulted from the failure to give such instruction. Defendant also requested the court to instruct the jury to find upon certain questions of fact presented. Under section 625 of the Code of Civil Procedure it is discretionary with the court to submit or refuse to submit particular questions of fact to the jury. The exercise of the power and the extent of its exercise are left to the discretion of the court, and error cannot be maintained without at least a clear showing of the abuse of such discretion. Olmstead v. Dauphiny, 104 Cal. 635, 641, 38 P. 505. In the instant case we fail to see where there was any such abuse.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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115 Cal.App. 74

TOMS et al. v. HELLMAN et al.

Civ. 7671.

District Court of Appeal, First District, Division 1, California.

June 18, 1931.

Rehearing Denied July 18, 1931. Hearing Denied by Supreme Court Aug. 17, 1931.

1. Pleading 🔑428(4).

Objection that amended complaint did not state cause of action interposed to first question asked complainants' first witness *held* in effect general demurrer.

2. Contracts 🔑25.

Where minds of parties have met respecting more formal writing to be executed, and agreed terms are certain, obligatory contract exists, dating from making of earlier agreement.

3. Contracts 🔑25.

Unless agreement to execute future contract is definite and certain on all subjects, it is nugatory.

4. Contracts 🔑147(3).

Where contract, if any, was in writing, intention of parties was to be ascertained from it alone, if possible (Civ. Code, § 1639).

5. Contracts 🔑143.

Language of contract, if clear and explicit, is to govern its interpretation (Civ. Code, § 1638).

6. Contracts 🔑169.

Where no doubt appeared on face of offer, and none was alleged, surrounding circumstances were not to be considered in interpreting contract resulting from claimed acceptance of offer.

7. Corporations 🔑573(3).

Three items of procedure in offer to obtain reorganization of corporation's finances *held* interdependent; hence offerors were not liable for failure to cause levy of assessments on stockholders, where entire plan was not accepted.

The offer to obtain reorganization of the corporation's finances was conditioned on the floating of a new bond issue, due ten years from date, to be issued by the company and exchanged for bonds then outstanding, the providing of money to pay existing indebtedness, and, as means of raising such moneys, the offerors being willing to agree that the directors of the company would levy assessments on stockholders in the aggregate of $3 per share, and finally a partial distribution of assets. It appeared that the primary purpose to be accomplished in the reorganization was the issuance of new bonds, thereby postponing the maturity of the debt evidenced by them, and that, if the maturity of the debt were not delayed by issuance of new bonds, no reason existed for assessment on stockholders.

8. Corporations 🔑573(1).

Where offer to obtain reorganization of corporation's finances was a unit, uncertainty in any of its items would prevent formation of contract by its acceptance.

9. Corporations 🔑573(1).

Offer to obtain reorganization of corporation's finances *held* uncertain; hence acceptance of offer did not create contract.

The offer was uncertain in details of new bond issue, for, although the proposal fixed the principal sum, interest rate, and maturity of the new bonds, and provided that new issue should be secured by trust indenture approved by bondholders' reorganization committee, it was silent as to powers and duties of the trustee, as to what should constitute a default, and as to how trustee should foreclose.

10. Corporations ⟹573(1).

Where offer to obtain reorganization of corporation's finances contemplated subsequent execution of complete contract, acceptance of offer did not create contract.

11. Estoppel ⟹52.

Estoppels must be mutual.

12. Estoppel ⟹54.

Party asserting estoppel must be ignorant of true facts.

13. Estoppel ⟹52.

That parties offering to reorganize corporation treated their offer as binding on acceptance of stockholders did not create estoppel to deny existence of contract; it being unenforceable against stockholders for uncertainty.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by G. Parker Toms and others, as and constituting the Bondholders' Reorganization Committee of the holders of San Joaquin Valley Farm Lands Company first and consolidated mortgage serial 7 per cent. gold bonds, against Marco H. Hellman and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., not participating.

Bauer, Wright & Macdonald, Alexander Macdonald, and Fred E. Pettit, Jr., all of Los Angeles, and V. K. Butler, Jr., of San Francisco, as amicus curiæ (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for appellants.

Anderson & Anderson & Sheahan, of Los Angeles, for respondents.

GRAY, Justice pro tem.

[1] To the first question asked by appellants of their first witness, respondents objected on the ground that the complaint as amended (hereinafter referred to as the complaint) did not state a cause of action. This objection was sustained, and thereafter a judgment of dismissal was entered. The objection was, in effect, a general demurrer to the complaint. Moore v. Douglas, 132 Cal. 399, 64 P. 705. The parties agree that the sole question for determination upon this appeal is whether the complaint states a cause of action.

The complaint alleges that a named corporation, in December, 1921, had sold $1,500,000 principal sum of its bonds in accordance with a trust indenture, secured by its lands; that on May 29, 1926, $1,277,000 principal sum of said bonds was outstanding, which was subordinate to underlying liens of county taxes and bonds of certain reclamation and irrigation districts; that in May, 1926, the corporation was without cash and had defaulted in payment of the current installment of taxes, of interest on irrigation bonds, and of principal and interest on reclamation bonds; and that respondents at all times therein mentioned were the owners of the majority of the corporation's issued and outstanding stock. It is then alleged that on May 29 and June 9, 1926 (the latter clarifying the former), the respondents by letters addressed to the bondholders made a written offer to the bondholders, each letter being set forth in hæc verba, and that, prior to June 25, 1926, the holders of more than 75 per cent. in amount of outstanding bonds accepted in writing this offer, which acceptance is also fully set forth. In support of their complaint, appellants argue that the offer to execute, in the future, an agreement upon terms definitely and certainly set forth in the offer, became, by acceptance, an enforceable contract. On the other hand, respondents, in support of the court's ruling, contend that the offer, being uncertain, indefinite, and incomplete as to the details of the future agreement, amounted, when accepted, only to an agreement to agree, and further the offer, contemplating by its terms the execution of a future written agreement, is not binding prior to such execution.

[2, 3] The legal principles, which the respective parties claim are here applicable, are well stated and contrasted in the following excerpt from Fly v. Cline, 49 Cal. App. 414, 425, 193 P. 615, 620: "It may be conceded that where the minds of the parties have met respecting the terms and conditions of the more formal writing that is to be executed by them, and the agreed terms of the contract thereafter to be executed are certain and in all respects definitely understood and agreed upon in advance, either orally or by informal writing, there is in such case an obligatory contract dating from the making of the earlier agreement. 13 C. J. p. 290 et seq. But it also is elementary law that, unless the agreement to execute the future contract be definite and certain upon all the subjects to be embraced, so that nothing is left for future negotiation, it is nugatory. St. Louis & S. F. R. Co. v. Gorman, 79 Kan. 643, 28 L. R. A. (N. S.) 637, 100 P. 647."

The principle, which respondent claims is here decisive, is aptly expressed in the following language taken from Dillingham v. Dahlgren, 52 Cal. App. 322, 329, 198 P. 832, 835:

"'It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted ad idem.' Breckinridge v. Crocker, 78 Cal. 529, 536, 21 P. 179, 181. In this connection one of the rules governing the creation of contracts in general is stated in 13 Corp. Jur. 289, § 100, as follows: 'The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement; nor is there a binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing.' The same rule applies whether the preliminary negotiations were oral or in writing, if it manifestly appears that certain parts of the contract are later to be agreed upon and inserted in the formal draft. The writer has carefully selected all of the following cases as substantiating the foregoing proposition: Fuller v. Reed, 38 Cal. 99, 109; Los Angeles Immigration & L. Co-op. Ass'n v. Phillips, 56 Cal. 539, 545; Pacific Rolling-Mill Co. v. Riverside & A. Ry. Co., 90 Cal. 627, 633, 634, 27 P. 525; Talmadge v. Arrowhead R. Co., 101 Cal. 367, 371, 35 P. 1000; Spinney v. Downing, 108 Cal. 666, 668, 41 P. 797; Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 670, 117 P. 936; Las Palmas, etc., Distillery v. Garrett & Co., 167 Cal. 397, 400, 139 P. 1077; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 469, 168 P. 1037; Durst v. Jolly, 35 Cal. App. 184, 190, 169 P. 449. The rule is general in California whether the question arises in a case of specific performance (Los Angeles Immigration & L. Co-op. Ass'n v. Phillips, supra); or an action to foreclose a mortgage (Mercantile Trust Co. v. Sunset, etc., Co., supra); or an action to quiet title (Durst v. Jolly, supra); or an action for damages (Talmadge v. Arrowhead R. Co., supra; Jules Levy & Bro. v. A. Mautz & Co., supra; Las Palmas, etc., Distillery v. Garrett & Co., supra).

"An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906. See, also, Ridgway v. Wharton, 6 H. L. Cases, 263, 10 Reprint, 1297."

The rule for which appellants contend is thus stated in Levin v. Saroff, 54 Cal. App. 285, 289, 201 P. 961, 963, by the same justice who wrote the last-cited decision: "Whether an instrument is a lease in presenti or an agreement to execute a lease in future is largely a question of the intention of the parties. Jackson v. Kisselbrack, 10 Johns (N. Y.) 336, 6 Am. Dec. 341; Pacific Imp. Co. v. Jones, 164 Cal. 260, 128 P. 404. Nevertheless, where the parties have agreed upon all essential facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later. Jones on Landlord and Tenant, supra; Marcus v. Collins Bldg. & Const. Co., 27 Misc. Rep. 784, 57 N. Y. S. 737. The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material."

The rule as to the necessity of the execution of a subsequent written contract is well phrased in Conner v. Plank, 25 Cal. App. 516, 518, 144 P. 295, 296: "Counsel for appellant relies upon the proposition that, where parties have agreed to reduce an understanding to writing, it never becomes a binding agreement until it is written and is signed by the parties to it. The principal cases relied upon in support of appellant's position are Pacific R.-M. Co. v. Riverside, etc., Railway Co., 90 Cal. 632, 27 P. 525, Spinney v. Downing, 108 Cal. 666, 41 P. 797, and Las Palmas Winery & Distillery v. Garrett & Co., 167 Cal. 397, 139 P. 1077 (March 17, 1914). These cases go no further than to establish the rule that, when it is a part of the understanding between the parties in negotiating the terms of their contract that the same be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. The record in each of the three cases above cited showed that the parties understood that the agreements were not to become binding upon either until evidenced in the written form. When the facts are as last stated, the rule relied upon here by the appellant will apply; but where, on the other hand, the contract is of such a nature that the law does not require it to be in writing, and the terms of the contract are in the first instance definitely agreed upon and completed, then the mere fact that immediately thereafter they agree to evidence the contract by a written instrument does not interfere with the force and effect of the oral agreement."

[4-6] It now becomes our task to analyze the offer and apply the proper principle to the facts as so shown. Since the second letter merely clarified the terms of the offer embodied in the first letter, they will be considered as together forming but one offer. According to the theory of the complaint, such offer addressed to the bondholders, when accepted by the latter, became a contract between respondents and such accepting bondholders. The contract, if any, being in writing, the intention of the parties is to be ascertained from it alone, if possible (Civ. Code, § 1639), and its language, if clear and explicit, is to govern its interpretation (Civ. Code, § 1638). There being no doubt on the face of the offer, nor any alleged, the surrounding circumstances are not to be considered. United Iron Works v. Outer H., etc., Co., 168 Cal. 81, 141 P. 917.

Since, admittedly, the forepart of the first letter merely informed the bondholders, under these quoted headings, as to corporate "Organization," "Improvements," "Financial Structure," "Fixed Charges Per Annum," "Sales Policy," "Present Condition of the Property," "Present Financial Status," "Recent Appraisal," and "Estimated Requirements to December 1st, 1928," the terms of the offer are to be found under the heading "Proposed Reorganization of the Bond Issue." Under the caption "Partial Distribution of Assets," there is outlined a proposed scheme for the retirement of certain stock in exchange for certain corporate assets, but this containing no offer is important only in so far as it may form part of the bond reorganization plan. Under the heading "Proposed Reorganization of the Bond Issue" respondents first state: "The signers of this letter own or control over 136,000 shares out of a total of 213,585 shares outstanding and after numerous conferences with the underwriters of the bond issue *are willing to cause the company to subscribe to the following procedure upon the following conditions.*" (Italics ours.) The first item of the procedure was "that a new bond issue of $1,277,000 First Mortgage Seven Per Cent Gold Bonds, dated June 1st, 1926, due ten years from date, be issued by the company and exchanged bond for bond with the present outstanding bonds." The second item was the providing of money to pay existing indebtednesses due for taxes, reclamation, and irrigation districts assessments, and bond interest. As to raising these moneys, the letter stated (1) "*the undersigned* stockholders are willing to agree that the directors of the company will *levy assessments upon stockholders* payable between now and December 1st, 1928, *in the aggregate sum of $3.00 per share,* or so much thereof as may be necessary to pay charges last above mentioned and (2) will also agree to see that the irrigation districts are operated in an efficient manner in so far as these funds will permit; and (3) *will also agree severally to pay said assessments* upon our said stock. (4) *The undersigned will also cause to be paid the coupons falling due on June 1st, 1926,* if, on or before June 25th, 1926 75% of the bondholders file with the Trustee their assent to the reorganization plan, a copy of which assent is enclosed. * * * (5) *the undersigned will agree to have the company take the proper steps necessary* in the event there is a failure of any solvent stockholder to pay his assessment, *to enforce payment by suit.*" (Numerals and italics ours.) The third item was the partial distribution of assets. This is so because the partial distribution was expressly referred to and incorporated into the proposed reorganization, and because the amount paid by withdrawing stockholders for their proportion of corporate debt was to be given to bondholders in reduction of bond debt.

[7, 8] The present action is predicated upon respondents' failure to cause the levy of assessments to the full amount of $3 and seeks damages for such failure. In so doing, they treat this part of the offer as a separate and distinct promise. Reading all parts of the two letters together, it is clear that the three items of procedure were interdependent and together formed the whole plan, and that respondents promised that the company should subscribe to the plan as a whole, but assumed no commitment to cause the directors to levy assessments except as part of the whole plan. The primary purpose to be accomplished was the issuance of new bonds, thereby postponing the maturity of the debt evidenced thereby. To protect the existing bond debt and to obtain further credit, it was necessary to pay underlying charges by raising money through the levy of assessments. If the maturity of the debt were not delayed and foreclosure prevented by issuance of new bonds, no reason existed for the stockholders to agree to an assessment. It is apparent, therefore, that, unless the primary purpose of the offer, to wit, issuance of new bonds, were accomplished, no advantage accrued to the stockholders in the consummation of a subsidiary and auxiliary object. Since the offer was a unit, an uncertainty in any of its terms would prevent the formation of a contract by its acceptance. Meux v. Hogue, 91 Cal. 442, 27 P. 744.

[9] Conceding that the offer as to the levy of assessments and their payment is complete, yet it is vitiated by the incompleteness and uncertainty in the details of the new bond issue and the partial distribution plan. The proposal fixed the principal sum, interest rate, and maturity of the new bonds, and further provided that the new issue "be secured by a trust indenture in the customary manner as approved by the Bondholders Reorganization Committee." This sufficiently designated the

property to be conveyed as security. In the absence of any allegation as to what is the customary manner, this phrase is clearly uncertain. Burnett v. Kullak, 76 Cal. 535, 18 P. 401; Wineburgh v. Gay, 27 Cal. App. 603, 150 P. 1003. The offer possibly provides for the selection of a trustee by the committee, but it is silent as to his powers and duties; what shall constitute a default, except to negative any default as to interest, if land sales were inadequate for that purpose, and except to allow a default upon "proper" but unspecified notice for failure to pay underlying liens; and how he shall foreclose. The tentative nature of the offer is also shown by the provision for the approval of the committee to the form of the indentures. This uncertainty as to form also occurs in the provision for a release schedule of lands "which may be adjusted by a majority of the Bondholders Reorganization Committee" and in another provision that "the committee may enter into an arrangement with the company to exclude such amounts" from sales "as are necessary in their opinion for sales commission, etc.," because the number and method of selection of the members of the committee was undetermined. More uncertain is the offer as to distribution of assets, for here no details are given at all, but the hope and belief is merely expressed that the commissioner of corporations will approve the plan devised, and, subject to adjustments, a portion of the stockholders will accept. It would appear, therefore, that the offer was so incomplete and uncertain as to permit the formation of no contract by its acceptance.

[10] For another reason, the acceptance of the offer failed to make a contract, because the offer by its terms clearly contemplated that the complete contract should be embodied in a written contract to be subsequently executed. The word "subscribe" in the phrase "the signers * * * are willing to cause the company to subscribe to the following procedure" clearly implies a subsequent written contract. The sentence: "We are willing to say that the committee as tentatively selected is agreeable to us in working out the necessary arrangements to carry the plan through," shows that the letter was merely a tentative basis for negotiation, which was to culminate in a final written agreement. That the bondholders so understood it is proven by the following statement in their acceptance: "It is understood that upon receipt by you of written expressions of approval from the holders of 75% in face value of outstanding bonds of the above company that the June 1st, 1926, coupons will be paid and *the necessary steps will then be taken to effectuate this plan.*" (Italics ours.)

[11-13] In an attempt to plead an estoppel, the complaint alleges that the first letter was prepared by the company's secretary and counsel, submitted to the directors at a regular meeting, and forwarded to the bondholders, after consultation between appellants and a directors' committee appointed for that purpose; that one month later the directors granted the same committee full power to bind the company as to the details of the reorganization plan, especially as to the release schedule; that on August 9, 1926, with the knowledge and urging of respondents, 75 per cent. of the bondholders entered into a bondholders' reorganization agreement constituting appellants their agents to effectuate the reorganization plan; and that from May 29 to October 1, 1926, respondents treated the offer and acceptance as a binding agreement, and represented that they were obligated to perform the promises of the offer and suggested modifications, to which appellants replied that they were relying on the agreement. Appellants next alleged that, from the date of the offer to the filing of the complaint, they relied upon the promises of the offer, particularly as to levy and payment of assessments, and because of such reliance did forego the rights of the bondholders to foreclose, and that, after October 1, 1926, respondents did not in good faith attempt to perform the reorganization plan, but arbitrarily refused to perform. Then follow allegations as to accrual of damages because of the lessened value of the bonds, due to the financial crisis created by the failure to levy assessments. Parenthetically, this portion of the complaint convinces us as to the correctness of our previous conclusion as to the uncertainty of the offer. Estoppels must be mutual; and, since the contract was unenforceable against appellants because of its uncertainty and its contemplation of a subsequent contract, as pointed out above, and could have been repudiated by them, they cannot urge that respondents were estopped because of their attempted compliance with its terms. Spinney v. Downing, 108 Cal. 666, 41 P. 797. It is also an essential element of an equitable estoppel that the party asserting it must be ignorant of the true facts. Here the terms of the agreement were in writing, and therefore appellants cannot claim, nor have they so pleaded, that they were ignorant of the facts. Merely because respondents treated their offer as binding upon acceptance does not create an estoppel. Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1037.

Believing that the court's ruling was correct for the above reasons, it is unnecessary to consider further grounds urged by respondents to establish such correctness.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

115 Cal.App. 325

PEOPLE v. McDONALD.

Cr. 1160.

District Court of Appeal, Third District, California.

July 1, 1931.

Criminal law ⚷1130(4).

Conviction will be affirmed where no brief was filed and no appearance made for appellant (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Tom McDonald was convicted of attempt to commit robbery, and he appeals.

Affirmed.

A. M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Sacramento county of a felony, to wit, attempt to commit robbery.

The transcript on appeal was filed in this court May 15, 1931. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on July 1, 1931. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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115 Cal.App. 165

McCOLGAN v. SCOBLE.

Civ. 7422.

District Court of Appeal, First District, Division 2, California.

June 23, 1931.

1. Appeal and error ⚷757(1).

Points advanced without statement of case, with mere reference to certain portions of testimony, *held* not to demand consideration.

2. Appeal and error ⚷882(19).

Where defendant's own exhibit admitted certain amount to be due, including such amount in judgment *held* not error on defendant's appeal.

3. Interest ⚷22(1).

Sum awarded plaintiff being due upon written contract and readily ascertainable, interest on judgment *held* properly allowed.

4. Partnership ⚷258(6).

Surviving partner could sue, upon written contract for payment of money to partnership, without joining representative of deceased partner.

5. Pleading ⚷237(6).

In action upon written contract for payment of money, allowing plaintiff to amend by pleading supplemental contract, so as to conform to proof, *held* not error.

It appeared that partnership which plaintiff represented had agreed to pay to defendant one-twelfth of any money found necessary to settle with defendant's creditors, not exceeding $500, and that defendant agreed to pay to partnership, in event of compromise of certain pending litigation, one-sixth of all moneys received in settlement. Thereafter supplemental contract was executed, at which time partnership paid to defendant $500 under terms and conditions of first contract.

Appeal from Superior Court, City and County of San Francisco; George H. Thompson, Judge.

Action by R. McColgan against Alice G. Scoble. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Alice G. Scoble, in pro. per.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued as the surviving partner of the partnership known as Daniel A. McColgan. The suit was upon a written contract for the payment of money. Plaintiff had judgment for $2,298.36. The defendant appeals upon typewritten transcripts.

In the month of May, 1919, defendant became involved in litigation over certain real property. Pending the litigation, claims of certain creditors of defendant's husband were asserted, and defendant deemed it advisable to adjust these claims prior to the termination of the litigation. For this purpose she entered into a written contract with the McColgans (which will hereafter be referred to as the partnership) whereby it agreed to pay to defendant one-twelfth of any money found necessary to settle with the said creditors not exceeding $500, and defendant agreed to pay to the partnership in the event of a compromise of the pending litigation one-sixth of all moneys received in settlement. Thereafter a supplemental contract was executed, at which time the partnership paid to the defendant $500 under the terms and conditions of the first contract. The litigation was settled for $18,500 after the creditors' claims had been adjusted in the amount of $7,000. On the trial the issues between the parties were these: Plaintiff claimed that he was entitled to one-sixth of the full sum of $18,500, and the defendant claimed that he was entitled to only one-sixth of the sum of $11,500, that being the amount received after the settlement of creditors' claims, plus eleven-twelfths of the advance of $500, making a total liability on the part of the defendant of $2,298.36. The trial court adopted the theory of the defendant and entered judgment accordingly.

[1] The appeal is taken by the defendant in propria persona. She advances certain points without a statement of the case and with but a mere reference to certain portions of the testimony. Points so presented do not demand consideration. Duncan v. Ramish, 142 Cal. 686, 690, 76 P. 661; Mercantile Trust Co. v. Reay, 96 Cal. App. 568, 571, 274 P. 401.

[2] However, as the appeal is not presented by counsel, we may briefly refer to these points in order. It is argued that the court erred in allowing judgment for more than $1,840.03, "the amount due the partnership shown by Exhibit C." The point is that the court should not have allowed recovery in the sum of $458.33, eleven-twelfths of the amount advanced by the partnership to the defendant. Exhibit C was offered in evidence by the defendant and admits this amount to be due; hence under defendant's own evidence the amount admitted to be due is the same sum which was allowed in the judgment.

[3] It is stated that the trial court erred in allowing interest on the judgment. No argument is made upon the point, and, inasmuch as the sum awarded became due upon a written contract and the amount due was readily ascertainable, the interest was properly allowed.

[4] It is argued that the court erred in overruling the demurrer because it appears that Daniel A. McColgan is deceased. As heretofore stated, the suit was brought by the surviving partner. The demurrer did not specify a failure to join a representative of the decedent, but, even if it had, the demurrer would have been without merit.

[5] Finally it is stated that the court erred in allowing an amendment to the complaint. The amendment consisted merely in pleading the supplemental contract heretofore referred to, and was allowed for the purpose of permitting the pleading to conform to the proofs. There is no error in the record.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App. 201

THORPE v. LOS ANGELES GAS & ELECTRIC CORPORATION.

Civ. 7687.

District Court of Appeal, First District, Division 1, California.
June 26, 1931.

Rehearing Denied July 25, 1931.

1. Vendor and purchaser ⚿72.

Where land abutting on street is described by lot number and recorded maps, and purchase is at stipulated rate per acre, street area is not included in reckoning price.

2. Vendor and purchaser ⚿72.

Under contract, street area could not be considered in determining total purchase price at stipulated rate per acre.

> The contract specifically included other street areas in a paragraph enumerating the property to be purchased and paid for, in which the street in question was unnamed, thus showing that the area of the street in question was not to be considered.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by A. C. Thorpe against the Los Angeles Gas & Electric Corporation. From the judgment, plaintiff appeals.

Affirmed.

D. A. Stuart and Edward A. Stuart, both of Los Angeles, for appellant.

Paul Overton, S. W. Guthrie, Samuel Poorman, Jr., and Douglas Van Dyke, all of Los Angeles, for respondent.

MURPHEY, Justice pro tem.

This is an appeal by plaintiff upon the judgment roll, from a judgment in his favor for $653 and interest and costs. The controversy arises over the construction of a written contract for the purchase by defendant from plaintiff of certain parcels of real property, and the sole question for determination is whether or not, in reckoning and determining the total purchase price at the rate per acre stipulated in the contract, the area of the public street known as Old South street, whereon certain of said parcels abutted, should be included. The trial court in the making of the award to the plaintiff excluded such area and rendered a judgment accordingly.

The contract by way of recital states: (1) The defendant "is desirous of acquiring title to a strip of land one hundred ten (110) feet in width over and across said Carlton Tract, said strip being that portion of said tract (and including the present South Street) lying between the southerly line of the present right of way of Pacific Electric Railway and a line 110 feet southerly from * * * said southerly right of way line, and being parallel therewith; and all that portion of Texas, Maryland and Virginia Streets within said strip. * * *" (2) That "it is the desire of both parties" that defendant "shall acquire such land as may be owned by plaintiff and included within said strip, together with certain other lands hereinafter specified. * * *" (3) Defendant agrees to pay therefor "at the rate of Three Thousand Five Hundred ($3,500) dollars per acre as hereinafter provided. * * *" (4) Plaintiff agrees to convey within thirty days "all of said lands described in paragraph 'First' hereof. * * *" Defendant shall pay to plaintiff "at the rate of Three Thousand Five Hundred ($3500) dollars per acre for all of the land described in paragraph 'First' hereof, to which it can secure satisfactory title, as aforesaid, * * * also to pay at the rate of $3500 per acre for all contained in portion of Tex. Md. and Vir. Sts. in said strip when vacated and satisfactory title derived through" plaintiff, which said description does not include any reference to the South street area above mentioned.

After enumerating certain provisions not here involved, the contracts continue: (4) Defendant shall endeavor to purchase certain parcels owned by said parties and agree for a stipulated price to convey to plaintiff all such parcels as are not included in the 110-foot strip. (5) Defendant "agrees to endeavor to secure the vacation of and legal title to old South Street in Carlton tract, from the easterly line of Texas Avenue to the westerly line of Michigan Avenue and will, if required so to do as a condition precedent thereto, dedicate * * * in lieu thereof, a new South Street forty (40) feet in width between said easterly line of Texas avenue and the southerly boundary line of said Carlton Tract * * * adjacent to, the southerly line of the one hundred ten (110) foot strip. * * *" (6) Plaintiff agrees to execute all instruments required "to secure the vacation of South Street, that portion of Texas, Maryland and the 40 ft. between Blocks 36 and 37, Virginia St. as herein provided for, and not to oppose * * * such vacation, and, as may thereafter be necessary, to secure to" defendant title satisfactory to it to said 110-foot strip at $3,500 per acre "as herein provided." In this section the words "Texas, Maryland and Virginia Streets" were interlined, and the trial court found that such interlineations were made before the signing.

It will be observed that there is no specific provision for the payment of the area in Old South street unless it is contained in paragraph 6, but there is a specific provision for payment at an agreed price for all the area contained in Texas, Maryland, and Virginia streets when vacated. The sole question then to be determined is whether the area embraced in Old South street should be included in determining the gross purchase price to be paid plaintiff. The court determined this adversely to the plaintiff, and the correctness of this conclusion is the sole question in issue. The appellant contends, first, that it is unfair and unreasonable; and, second, that the words in paragraph 6 should be given their usual and ordinary sense and meaning, which it contends was not done by the trial court, that provision had been made for all parts of lots, streets, and alleys except South street area, and that, if it was not the intention to pay for that area, there was no reason to refer in paragraph 6 to the acre purchase price figure at all; third, that any uncertainty, if such exists, should be most strongly construed against the promissor.

[1] It is our opinion that these contentions are fully disposed of both in law and logic, and that the determination of the trial court is correct. The weight of authorities sustains the position that, where land fronting or abutting on a street is described by lot number and recorded maps, if purchased at a stipulated rate per acre, the gross price is to be reckoned on the area of the lots exclusive of the street.

In the case of Earl v. Dutour, 181 Cal. 58, 183 P. 438, 6 A. L. R. 1163, the plaintiff had a decree quieting his title to a strip of land 15 feet wide adjacent to the center line of lot 17 of the Hilliard tract, of which lot plaintiff and defendant owned respectively the easterly and westerly half. The question in dispute was whether the center line of the lot formed the eastern or western boundary line of the strip of land in suit; its solution depending upon the construction to be placed upon the word "lot" in the deed by which was conveyed to defendant the westerly one-half of lot 17 of the Hilliard tract as per map recorded. The map indicated that the western boundary of lot 17 was the center line of an avenue 60 feet in width. Plaintiff successfully contended in the trial court that the 30-foot strip covered by the avenue was part of the lot within the meaning of the deed and that therefore the eastern boundary of defendant's line was a line half way between the center line of the avenue and the eastern boundary of lot 17. The Supreme Court rejected this contention, saying: "However clearly it may appear that the owner of a lot holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the lot is technically, therefore, the center of the street, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street, we are of the opinion that the word 'lot,' as generally and customarily used, does not include such portion of the street. Wegge v. Madler, 129 Wis. 412, 109 N. W. 223, 116 Am. St. Rep. 953. As stated by the Supreme Court of Indiana: 'Lot and street are two separate and distinct terms, and have separate and distinct meanings. The term "lots," in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy. While the term "streets" means that portion set apart and designated for the use of the public, and such is the sense in which such terms will be presumed to have been used, unless it be made to appear that a contrary meaning was intended.' * * * In the absence, therefore, of any circumstance indicating that a more unusual and technical meaning of the word 'lot' was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of the lot or parcel of land which is set apart for private use and occupancy."

In Joens v. Baumbach, 193 Cal. 567, 226 P. 400, 401, the court says: "* * * When a grantor describes his land, as was done in this case, as fronting on the county road, and running 'thence northerly nine hundred (900) feet,' it will be presumed that the grant conveys the given number of feet of land which is set apart for private use and occupancy."

In 4 Cal. Jur. 379, in discussing the presumption declared by section 831 of the Civil Code that "an owner of land bounded by a road or street is presumed to own the center of the way, but the contrary may be shown," and the rule (Civ. Code, § 1112) that, if land be described in a conveyance as so bounded, the line is presumed to be the center of the street or road, unless a contrary intention appears, it is said: "If lots are sold by number, and not by metes and bounds, reference being made to a registered map and plat, the conveyance carries title to the center of the street. * * * And in conveying a certain quantity of land in a block, the quantity is not measured from the center line of the street; it is measured exclusive of the street."

The only case in which the principle here involved is reflected in the actual gross purchase price paid is in Pratt v. Law, 9 Cranch, 456, 490, 3 L. Ed. 791. In that case where a large area of land was purchased at 5 cents per square foot, which land had been divided into squares and lots, it was contended that in computing the areas the lots were not chargeable for their proportion of the internal alley in the square in which they were situated, laid out for the common benefit of those lots. In sustaining this contention, the court adverts to the circumstance that, under the president's instructions, there was reason to think that these alleys were rights of way appurtenant to the lots of each square respectively, and then proceeds: "If this claim of Law's [the purchaser] extended to the alleys in those squares of which the whole was conveyed to him, there would be some ground for disputing it. But as it is confined to those squares only in which the right could not be merged, because some one or more of the lots were the property of another, we think the allowance ought to be made; for Law certainly has not acquired a title in fee simple in those alleys."

[2] The law as indicated by the authorities hereinabove stated has to do with determining the area embraced in real estate transactions involving land abutting upon public streets or highways, and is persuasive argument in support of the conclusion of the trial court that the plaintiff should not be paid, except upon conclusive evidence that the parties so intended, for the land to which he had no right of use or occupancy in any other degree or manner than is accorded to the public generally. Such being the law with respect to an area of land abutting upon a public street, it was incumbent upon plaintiff in contracting for payment for the area embraced within Old South street to have his contract, to that effect, worded in such unmistakable terms as to foreclose any doubt on that question, in the place of which we have a contract that by its terms industriously negatives that purpose. The other street areas are specifically included in the paragraphs enumerating the property to be purchased and paid for in which South street is, as we take it, significantly unnamed. In paragraph 6, after outlining the duties of the parties with respect to the abandonment of street areas, the section concludes with the statement: "To secure to defendant title satisfactory to it to said 110-foot strip at $3500 per acre as herein provided." This is not a promise to pay for South street, but is merely a recital of matters determined in the preceding paragraph of the agreement as to payments. The words "as herein provided" are indicative of that understanding by the parties to the contract. There is no price fixed in paragraph 6; the price fixing having been accomplished in the preceding paragraph wherein no mention is made of South street.

So far as the contract itself is concerned, there is nothing unfair or unreasonable in the construction placed upon the contract by the court. By the terms of the contract the defendant was obliged to supply a 40-foot street in the place and stead of Old South street, and he did so, and this circumstance is not without significance. In differentiating in the manner of payment between Old South street and Texas, Maryland, and Virginia streets, the parties no doubt took into consideration that with respect to Texas, Maryland, and Virginia streets, there was no compensation by way of substitution of other streets.

From the foregoing we are satisfied that the construction placed upon the contract by the court is correct, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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115 Cal.App. 187

McINTIRE v. CHEVROLET MOTOR CO. OF CALIFORNIA et al.

Civ. 494.

District Court of Appeal, Fourth District, California.

June 25, 1931.

1. Conspiracy 🔑6.

Conspiracy is not actionable unless combination results in perpetration of unlawful act or of injurious act by unlawful means.

2. Conspiracy 🔑1.

Elements of civil conspiracy action are formation and operation of conspiracy and damage resulting to plaintiff from acts done in furtherance of common design.

3. Conspiracy 🔑18.

Complaint alleging conspiracy which destroyed business of corporation in which plaintiff claimed to be entitled to interest *held* not to show actionable conspiracy.

Complaint contained no allegations that plaintiff had any interest in the business of the corporation, but the real substance of the complaint was that he had bought and paid for stock in the corporation which he did not receive, and there was no allegation that the plaintiff was induced to purchase or failed to receive the stock as a result of the conspiracy.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by A. W. McIntire against the Chevrolet Motor Company of California and others. From the judgment, plaintiff appeals.

Affirmed.

Jas. W. Bell, of Los Angeles, for appellant.

Flint & MacKay and Robert B. Jackson, all of Los Angeles, for respondents.

JENNINGS, J.

Plaintiff appeals from a judgment of dismissal by the superior court after the demurrers of defendants to his amended complaint were sustained by said court, without leave to amend.

Appellant makes no point of the refusal of permission to amend, and bases his appeal solely on the sufficiency of the complaint.

The action was instituted to recover damages arising from an alleged conspiracy between defendants by means of which the business of defendant H. I. Langworthy, Incorporated, in which corporation appellant claimed to be entitled to an interest, was destroyed.

The facts alleged, upon which the cause of action is based, are pleaded substantially as follows:

That for more than a year prior to September 1, 1927, respondent H. I. Langworthy was the duly authorized distributor of Chevrolet motor cars in the town of Compton, Los Angeles county, and was sole agent, in said town, of the respondent Chevrolet Motor Company of California, for the sale of Chevrolet automobiles.

That on July 14, 1927, said respondent H. I. Langworthy organized a corporation under the name of H. I. Langworthy, Incorporated. The said corporation had a capital stock of $20,000 divided into 20,000 shares of stock of the par value of $1 each. Articles of incorporation were duly filed with the secretary of state and the corporation received a charter authorizing it to engage in the business of buying and selling automobiles and automobile accessories at wholesale and retail and to do a general automobile repair business in the state of California. H. I. Langworthy and two other individuals, Bart F. Wade and Walter L. Fowler, were named as directors of the corporation thus organized.

That on August 26, 1927, the corporation, upon application to the commissioner of corporations of California, received a permit to issue to respondent H. I. Langworthy 7,500 shares of capital stock of the corporation in exchange for the business and assets of H. I. Langworthy, and on September 1, 1927, H. I. Langworthy transferred all the assets of his business to the corporation in exchange for 7,500 shares of stock of the corporation and there was at that time issued to Walter L.

Fowler 2,500 shares of stock of the corporation.

That on December 16, 1927, appellant, on the representation of H. I. Langworthy that the stock in trade of the corporation was of a value in excess of $10,000 and that the interest of Walter L. Fowler could be purchased for $2,500, agreed to purchase said interest for said sum and paid H. I. Langworthy $1,500 as part payment of the purchase price of said interest and at the same time H. I. Langworthy agreed to cause Fowler's stock to be transferred to appellant and that Walter L. Fowler would resign as director of the corporation and that Langworthy would cause appellant to be elected to the office of director of the corporation.

That respondent H. I. Langworthy thereupon purchased Fowler's interest for less than $1,500 and Fowler indorsed the stock certificate representing his interest in the corporation in blank and resigned as director of the corporation. Respondent H. I. Langworthy then caused the Fowler stock to be transferred to one Gradoville, an employee of the corporation, who was elected a director of the corporation. Respondent Langworthy represented to appellant that the transfer of stock to Gradoville and his election as a director were only temporary expedients. That, during all the time when appellant was carrying on the negotiations which resulted in his acquisition of the Fowler stock in respondent H. I. Langworthy, Incorporated, the respondent Chevrolet Motor Company of California was insisting that respondent Langworthy secure additional capital to carry on the business of the corporation and in all dealings with appellant the respondent H. I. Langworthy acted with the advice and encouragement of said Chevrolet Motor Company of California; that thereafter and on December 31, 1927, respondent Chevrolet Motor Company of California delivered to the respondent H. I. Langworthy, Incorporated, four Chevrolet motorcars on which payment of $1,000 was due; that on said date appellant paid to the respondent H. I. Langworthy, Incorporated, an additional sum of $1,000, which sum was used to pay the respondent Chevrolet Motor Company of California for the automobiles thus delivered to the corporation, but that the shares of stock which appellant had agreed to purchase for the sum of $2,500 were never transferred to appellant nor was he ever elected to the office of director of H. I. Langworthy, Incorporated; and that appellant never received any consideration for the money which he paid.

That on March 12, 1928, respondents Chevrolet Motor Company of California, H. I. Langworthy, and H. I. Langworthy, Incorporated, conspired together to make it appear that H. I. Langworthy, Incorporated, did not have sufficient capital to carry on the agency for the sale and distribution of Chevrolet motorcars and that the agency should be terminated to enable respondent Chevrolet Motor Company of California to appoint a new agent without incurring any liability to respondent H. I. Langworthy, Incorporated, and that pursuant to said conspiracy and to effectuate its purpose, the respondent Chevrolet Motor Company of California, on March 12, 1928, wrongfully and unlawfully removed from the place of business of H. I. Langworthy, Incorporated, the four Chevrolet motorcars theretofore delivered to said corporation, for which the Chevrolet Motor Company of California had received the sum of $1,000 paid by appellant, and wrongfully and unlawfully converted said automobiles to its own use; that about the same time respondent H. I. Langworthy, acting with the consent and upon the advice of the respondent Chevrolet Motor Company of California, and in pursuance of the conspiracy, stopped payment on a check drawn by respondent H. I. Langworthy, Incorporated, in favor of General Motors Acceptance Corporation; that at said time the respondents induced the Compton National Bank to bring suit on a past due note of respondent H. I. Langworthy, Incorporated, and to attach all assets of the said corporation to secure payment of said note; that in pursuance of the conspiracy respondent H. I. Langworthy permitted judgment to go against respondent H. I. Langworthy, Incorporated, by default and all of its assets to be sold to satisfy the judgment. And the respondent Chevrolet Motor Company of California, pursuant to the conspiracy and with the consent of respondent H. I. Langworthy and without authority of H. I. Langworthy, Incorporated, canceled the agency of H. I. Langworthy, Incorporated, whereby the business of H. I. Langworthy, Incorporated, was completely destroyed and all the corporate assets were lost; that all of the acts of the said respondents were malicious and done with the intent and purpose of evading liability to appellant for the money expended by him under his agreement to purchase Fowler's interest in H. I. Langworthy, Incorporated.

That although appellant invested the sum of $2,500 in stock of H. I. Langworthy, Incorporated, with the understanding and agreement that he should succeed to the interest of Walter L. Fowler and become a director of said respondent corporation, he did not in fact become such director and the act of respondent H. I. Langworthy in the surrender of the automobile agency was unauthorized by respondent H. I. Langworthy, Incorporated.

From the foregoing averments, it is clear that appellant has attempted to allege a conspiracy between respondents to defraud him of the interest in H. I. Langworthy, Incorporated, which he had agreed to purchase and for which it is alleged he had in fact paid the agreed purchase price.

[1, 2] Conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or of some injurious act by unlawful means. Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 683, 200 P. 601; Menner v. Slater, 148 Cal. 284, 83 P. 35. The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. Mox, Incorporated, v. Woods, 202 Cal. 675, 677, 262 P. 302.

[3] An analysis of the facts hereinabove narrated fails to disclose the perpetration by the alleged conspirators of an unlawful act or of an injurious act by unlawful means. It is not alleged that appellant was induced to purchase the stock as a result of the conspiracy or that appellant failed to receive the interest in the respondent corporation which he purchased as a part of the plan of the conspiracy. It is charged that H. I. Langworthy alone brought about the purchase of the stock and that it was through his dereliction alone that the stock was not issued to appellant and that appellant was not made a director in the respondent corporation. It is alleged that respondent Chevrolet Motor Company of California was, during all of the time when appellant was negotiating for the purchase of stock in H. I. Langworthy, Incorporated, and after he had agreed to buy said stock, insisting that respondent H. I. Langworthy should secure additional capital and that in all dealings between appellant and respondent H. I. Langworthy the latter acted with the advice and encouragement of the former. But this was neither unlawful nor did it amount to an injurious act accomplished unlawfully. There was nothing unlawful or injurious about the delivery of the four Chevrolet automobiles to H. I. Langworthy, Incorporated, by the Chevrolet Motor Company of California. There was nothing unlawful in the inducement by the alleged conspirators, of the action instituted on the past due note by the bank that owned it, and while the bringing of the suit may have resulted injuriously to H. I. Langworthy, Incorporated, it was not, so far as appears, brought about by unlawful means. It can hardly be maintained that permitting judgment in the suit to go by default was unlawful, since it is alleged that the note was overdue. Neither can it be maintained that there was anything unlawful in permitting the assets of H. I. Langworthy, Incorporated, to be sold on execution to satisfy an obviously just judgment. Stopping payment of the check drawn by H. I. Langworthy, Incorporated, which is alleged to have been done in pursuance of the conspiracy, was not of itself an unlawful act, nor can it be discovered from the allegations of the complaint that any injury was occasioned thereby to appellant. It is alleged that as a part of the plan of the conspiracy to destroy the business of H. I. Langworthy, Incorporated, the Chevrolet Motor Company of California on March 12, 1928, wrongfully and unlawfully took and removed the four Chevrolet automobiles delivered to H. I. Langworthy, Incorporated, on December 31, 1927, partial payment for which had been made by H. I. Langworthy, Incorporated, from the final payment of $1,000 made by appellant for purchase of stock in H. I. Langworthy, Incorporated, and that the Chevrolet Motor Company of California wrongfully converted the automobiles to its own use. It is also further alleged that pursuant to the conspiracy and with the consent of respondent H. I. Langworthy, and without the consent of H. I. Langworthy, Incorporated, respondent Chevrolet Motor Company of California canceled the agency of H. I. Langworthy, Incorporated, for the sale and distribution of Chevrolet automobiles in the town of Compton, whereby the business of H. I. Langworthy, Incorporated, was entirely destroyed, and that the various acts of respondents in carrying out the conspiracy were done maliciously and with the intent of evading liability to appellant for the money paid by him under his agreement to purchase an interest in H. I. Langworthy, Incorporated. With respect to the alleged seizure and conversion of the four Chevrolet automobiles, it may be conceded, for the purposes of this case, that it resulted in injury to H. I. Langworthy, Incorporated, and that the allegations of the complaint show that it was accomplished unlawfully, but since it does not appear that appellant was a stockholder or the owner of any interest in H. I. Langworthy, Incorporated, the averments of the complaint fail to indicate that appellant was injured thereby. The same reasoning applies to the cancellation by the Chevrolet Motor Company of California of the agency which H. I. Langworthy, Incorporated, had for the distribution of Chevrolet automobiles in the town of Compton. It may be conceded that the allegations of the complaint are sufficient to show that by taking away the agency, the respondent Chevrolet Motor Company of California accomplished the complete destruction of the entire business of respondent H. I. Langworthy, Incorporated, and that this manifestly injurious act was accomplished unlawfully, but this does not make out a case of injury sustained by appellant through the unlawful combination of respondents. There are no allegations in the complaint indicating that appellant had any interest in the business of H. I. Langworthy, Incorporated. Indeed, when the whole story is told, it is clear that appellant's complaint is that he bought and paid for stock in H. I. Langworthy, Incorporated, which he did not receive. But he made this agreement with H. I. Langworthy and paid

the greater part of the purchase price directly to H. I. Langworthy. There is no pretense that respondent Chevrolet Motor Company of California or the corporation of H. I. Langworthy, Incorporated, had anything to do with the making of the agreement for the purchase of the stock. There is, to be sure, an allegation that H. I. Langworthy, Incorporated, was a one-man corporation, controlled and operated by H. I. Langworthy, but other allegations of the complaint negative this statement, for it appears that two other individuals owned stock in H. I. Langworthy, Incorporated, and that one of these individuals, Fowler, had a substantial interest in H. I. Langworthy, Incorporated. Furthermore, if it be conceded that appellant's contention that H. I. Langworthy, Incorporated, was in fact the mere corporate double of H. I. Langworthy, who dominated and controlled it, the complaint is fatally defective in that there is no allegation that the Chevrolet Motor Company of California participated in any way in the fraud alleged to have been perpetrated upon appellant.

It follows, therefore, that the complaint, drawn as it is on the theory of actionable conspiracy, does not meet the test required of such an action. Moropoulos v. C. H. & O. B. Fuller Co., supra.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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115 Cal.App. 103

PEOPLE v. ACOSTA.

Cr. 51.

District Court of Appeal, Fourth District, California.

June 18, 1931.

1. Criminal law 🔑511(1).

In prosecution for possessing still, evidence *held* to sufficiently corroborate witnesses claimed to be accomplices (Pen. Code, § 1111).

2. Criminal law 🔑511(1).

Corroboration of accomplices required by statute need only be slight (Pen. Code, § 1111).

3. Criminal law 🔑507(2).

Where defendant was charged with possessing still, one living in house containing still who was not shown to have anything to do with possession of still could not be considered "accomplice" (Pen. Code, § 1111).

[Ed. Note.—For other definitions of "Accomplice," see Words and Phrases.]

4. Criminal law 🔑982.

"Conviction" of felony which prevents granting of probation in subsequent case is legal proceeding of record which ascertains guilt of party upon which sentence or judgment is founded and includes plea of guilty (Pen. Code, § 1203).

[Ed. Note.—For other definitions of "Convicted; Conviction," see Words and Phrases.]

5. Criminal law 🔑982.

Provisions of statute respecting effect of completing probation *held* not in conflict (Pen. Code, § 1203, subd. 4).

Pen. Code, § 1203, subd. 4, provides in first part that after defendant has completed his probation and action has been dismissed, he shall thereafter be relieved from all penalties and disabilities resulting from offense of which he has been convicted, and last part of section provides that in any subsequent prosecution for any other offense, prior conviction shall have same effect as if probation had not been granted or action dismissed.

6. Criminal law 🔑982.

Where defendant pleaded guilty to violation of vehicle act and was granted probation, and later action was dismissed, he could not be granted probation after subsequent conviction for possessing still (Pen. Code, § 1203; St. 1923, p. 564).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Jesus Acosta was convicted of possessing a still, and he appeals.

Affirmed.

Duckworth & Harrison, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was convicted by a jury of the crime of possession of a still, a felony, and was sentenced to imprisonment at Folsom. He appeals from the judgment and from an order denying his motion for a new trial.

It appears from the evidence that on January 7, 1931, certain officers raided a house in San Bernardino, Cal., and found therein a still and coil which were still warm, a hydrometer (an instrument usually used to measure the content of alcohol in liquor), a quantity of intoxicating liquor, and several barrels of mash. The barrels of mash were setting in an excavation below the floor, and were covered by the floor boards, which had been loosened. When the officers entered the house, between 7 and 8 o'clock in the evening they found Mr. and Mrs. Moreno in bed in one of the bedrooms and a Mr. Bejarano in bed in another bedroom. All of these parties denied having anything to do with the still. Moreno testified that he had been promised work at picking oranges by a man named Rivera, and that Rivera told him he could live in his house, rent free. He had been living there some two weeks before the raid. Bejarano testified that he had come to San Bernardino to look for work and had slept in the house three nights, being absent in the daytime in his search for employment. Moreno testified that Rivera and this appellant had been making liquor in the house on the morning of January 7, 1931; that on the evening of January 7 he saw the appellant working with the still; and that "they made liquor." A police officer testified that some days later he took Rivera into the presence of Moreno and Bejarano and asked them if this was the man who had the still in the house, to which both answered, "No." They were then confronted with this appellant and both said he was the man who had the still there. Moreno was tried jointly with this appellant, was found guilty and released on probation, and has not appealed. Bejarano was held to answer on the same charge, but on motion of the district attorney, the charge was dismissed as to him on the ground of the insufficiency of the evidence.

While appellant concedes that the evidence is sufficient to show that he had possession of the still in question, his first contention is that this evidence is largely that of Moreno, Mrs. Moreno, and Bejarano; that they were all accomplices; and that their testimony is not sufficiently corroborated under the provisions of section 1111 of the Penal Code.

Aside from these three parties, who are claimed to have been accomplices, testimony was given by Barlota Torres and Mrs. Pasquel Torres. Barlota Torres testified that he went to the house in question on January 7, 1931, at about 5 o'clock in the evening; that he saw appellant and Rivera in the back room of the house making liquor; that they were both around the still; that Rivera was measuring or testing the liquor with a tester to see how high it was getting; and that he sent the appellant on an errand, from which he later returned with a hundred-pound sack of sugar. He also identified the still and the liquor in evidence as being similar to those he saw in the house that night. Mrs. Pasquel Torres stated she had gone to the house on January 3, 1927, where she had seen appellant and Rivera distilling liquor; that she saw the still on the stove; that this appellant was distilling; and that she saw the liquor dropping from the coil.

[1-3] We think the testimony of the two witnesses last above referred to constitutes sufficient corroboration of the other witnesses, even if they be deemed to be all accomplices. The corroboration required by section 1111 of the Penal Code need only be slight. People v. Viets, 79 Cal. App. 576, 250 P. 588, and cases there cited. In addition, it may be said that Bejarano was not "liable to prosecution for the same offense" in the sense of there being any hope of success in such a prosecution, and he should not be considered as an accomplice. There is absolutely no evidence in the record which even tends to show that he had anything to do with possessing the still.

[4-6] Appellant next contends that the court erred in refusing to grant him probation. It appears that in 1927 appellant was charged with the violation of section 146 of the California Vehicle Act (St. 1923, p. 564), and that after a plea of guilty he was granted probation. It also appears that in December, 1929, in accordance with section 1203 of the Penal Code, he was permitted to withdraw this plea of guilty and enter a plea of not guilty, after which the action was dismissed. In the instant case, the court stated that the application for probation was denied for the reason that it could not be granted under the provisions of section 1203, since the appellant had previously been convicted of a felony. That section provides that probation "shall not be granted to any defendant unless the court shall be satisfied that he has never in any place been previously convicted of a felony." Subdivision 4 of said section reads as follows: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time prior to the expiration of the maximum period of punishment for the offense of which he has been convicted, dating from said discharge from probation of said termination of said period of probation, be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

Appellant argues that there can be no conviction until sentence is imposed, relying on the case of Ex parte Rosencrantz (Cal. Sup.) 297 P. 15. That case involved a violation of section 476a of the Penal Code. Under that section the nature of the offense, as to whether or not it is a felony or misdemeanor, is determined by the sentence actually imposed. On the other hand, section 146 of the California Vehicle Act provides that the violation thereof will constitute a felony without any alternative. The word "conviction" is usually defined as the legal proceeding of record which ascertains the guilt of the party upon which the sentence or judgment is founded. People v. Rodrigo, 69 Cal. 601, 11 P. 481. This includes a plea of guilty as well as conviction by a jury, and the language used in section 1203 of the Penal Code plainly shows that such an interpretation is contemplated thereby. Appellant argues that there is a conflict between that part of subdivision 4 of section 1203 which provides that after a defendant has completed his probation and the action has been dismissed, he shall "thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted," and the last part of the section, which provides that in any subsequent prosecution for any other offense, such prior conviction shall have the same effect as if probation had not been granted or the action dismissed. We see no conflict here. The provision that the defendant shall be released from all penalties and disabilities resulting from the offense of which he has been convicted, applies to the previous offense which resulted in his being released on probation. It does not apply to any subsequent offense which may be committed by him. The provision that such prior conviction may be considered in any subsequent prosecution for any other offense is in no way a penalty for the first offense, upon which probation was given. It is simply one of the circumstances surrounding the commission of the second offense. It is usual to make the degree of punishment for any offense dependent upon the circumstances surrounding its commission. For instance, burglary in the nighttime is punished differently from burglary in the daytime. In the granting of probation, many circumstances are to be considered in order to determine whether or not the defendant is one to whom such a privilege should be extended. In such determination, whether or not a defendant has or has not profited by a previous lesson and a previous leniency granted, may be much more important than whether or not he has complied with certain instructions during his probationary period. The provision we are here considering merely considers the fact of previous conviction for a felony in connection with the question as to whether a privilege should be granted in connection with a new offense, and it is in no way a further punishment for the former offense, the action in which has been dismissed. The very act providing for such a change of plea and dismissal after a period of probation also provides that such action shall not prevent such a prior conviction being considered upon any subsequent prosecution for any other offense, and that in any such subsequent prosecution, the prior conviction shall have the same effect as if probation had never been granted and as if the action had never been dismissed. In People v. Rosencrantz, 95 Cal. App. 92, 272 P. 786, the court said: "The defendant denied this conviction and, the issue having been joined, the jury found against the defendant. She now argues that, because she was given probation following that conviction, it might be possible that the plea of guilty had been withdrawn and the charge dismissed. Aside from the fact that it was for the defendant, and not the state, to prove those circumstances if they existed, it is sufficient to say that they are wholly immaterial here. The code section (Pen. Code, sec. 644) relates to a prior conviction of a felony, and not to the manner in which the judgment on the conviction has been expiated. (Pen. Code, sec. 1203, subd. 4)." See, also, People v. Payne (Cal. App.) 289 P. 909, and People v. Superior Court, 208 Cal. 688, 284 P. 449.

In our opinion no error is here shown.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

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115 Cal.App. 252

WASHBURN v. KELTZ.

Civ. 403.

District Court of Appeal, Fourth District, California.

June 27, 1931.

1. **Executors and administrators 🔑443(7).**

Complaint against estate, not averring that contract claim sued on has been presented to administrator, fails to state cause of action (Code Civ. Proc. § 1500).

2. **Executors and administrators 🔑228(3).**

Filing claim in proceeding before Division of Labor Statistics and Law Enforcement, and service of unverified copy thereof on administrator, *held* not to comply with statute relating to claims against decedent's estate (Code Civ. Proc. § 1500).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Lillian M. Washburn against E. E. Keltz, administrator of the estate of Emily M. Whiting, deceased. From an order sustaining the demurrer to the amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Karl F. Kennedy, of Coalinga, for appellant.

D. B. Roberts, of El Centro, for respondent.

GRIFFIN, Justice pro tem.

The allegations of the amended complaint recite the following facts:

That respondent was the duly appointed, qualified, and acting administrator of the estate of Emily M. Whiting, deceased. That on or about February 8, 1929, letters of administration upon her estate were issued to defendant. That defendant caused a notice to creditors of said deceased to be published in the manner required by law, requiring all persons having claims against said deceased to exhibit them to said administrator at El Centro, Cal.; said place being specified therein as his place of business, within four months from February 28, 1929, the last day for filing claims in said estate being June 28, 1929. That on June 15, 1929, appellant filed an original affidavit or verified claim (a copy of which was attached to the original complaint, marked "exhibit A," and referred to in the amended complaint by reference only) with the Division of Labor Statistics and Law Enforcement in California, at its regular office in the Rowell building, Fresno, Cal., setting forth certain items of wages due her from said estate for services performed in the city of Fresno.

A portion of the purported claim contains wording as follows: "Bureau of Labor Statistics of the State of California. Mrs. Lillian M. Jordan, Applicant, v. E. E. Keltz, Administrator of the Estate of Emily M. Whiting, Deceased, Respondent. Affidavit of Applicant." Then follows an affidavit setting forth the alleged facts supporting her claim for wages before the Bureau of Labor Statistics. The affidavit closes with this prayer: "Wherefore affiant prays that the wages claimed of $570.63 may be adjudged and decreed in these proceedings to be due and payable against the estate Emily M. Whiting, Deceased," etc.

That on June 15, 1929, a full, true, and correct copy of said affidavit and claim, unverified, was served upon defendant administrator. On July 12, 1929, appellant attempted to file a claim, apparently in proper form, with respondent as such administrator, but, the time for filing claims having expired, respondent refused to receive or file said claim, and so notified appellant.

The only allegation in plaintiff's complaint as to the presenting or filing of a creditor's claim against the estate is the allegation of filing the affidavit or claim with the Division of Labor Statistics and serving a copy thereof on respondent administrator.

The only question involved in this appeal is whether or not the filing of such an affidavit or claim in a proceeding before the Division of Labor Statistics and Law Enforcement, and the service of a copy thereof, unverified, upon the administrator, complied with the statute relating to the presenting and filing of claims against the estate of a decedent.

The statute provides that all claims arising upon contract must be filed or presented within a time limited in the notice to creditors, and any claim not so filed or presented is barred forever. Code Civ. Proc. § 1493. It further provides that no holder of any claim against an estate shall maintain any action thereon unless the claim is first filed with the clerk (of the court) or presented to the executor or administrator. Code Civ. Proc. § 1500.

[1] A complaint against an estate, stating a cause of action founded on contract, which does not aver that a claim for the cause of action sued on has been thus presented to the administrator, fails to state a cause of action. Morse v. Steele, 149 Cal. 303, 86 P. 693; Morrow v. Barker, 119 Cal. 65, 51 P. 12; Burke v. Maguire, 154 Cal. 456, 463, 98 P. 21.

[2] Appellant claims that the filing of her verified claim with the Bureau of Labor Statistics in Fresno was a sufficient compliance with the statute, and relieved her of the necessity of filing a verified claim in the estate with the clerk of the court, or presenting a verified claim to the administrator of the estate, and cites as her authority Griffith v. Lewin, 129 Cal. 596, 62 P. 172; Guerian v. Joyce, 133 Cal. 405, 65 P. 972. We see no merit to this contention.

Appellant relies upon the case of Doolittle v. McConnell, 178 Cal. 697, 174 P. 305, 310, holding that a court may properly refuse "to hear minute technical objections based upon the supposed faulty verification of a claim made long after the commencement of an action and after the time for presentation of claim has expired." We do not believe the allegations of the complaint before us are similar to the facts in that case. The administrator, as a reasonable man, had a right to assume that the service of this copy of the affidavit and claim, as it was worded, was but a process of the Bureau of Labor Statistics, notifying the administrator of his right to be present and contest the claim before the bureau, and that a claim for the amount found might be subsequently filed in the estate.

Under the circumstances, we are of the opinion that appellant has neither alleged, nor can she allege, facts sufficient to bring herself within the requirements of the statute.

The order of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

115 Cal.App. 1

BENNETT v. CENTRAL CALIFORNIA TRACTION CO.

Civ. 4151.

District Court of Appeal, Third District, California.

June 13, 1931.

Rehearing Denied July 13, 1931. Hearing Denied by Supreme Court Aug. 10, 1931.

1. Appeal and error 🔑1002.

If there is sufficient testimony in record supporting judgment, reviewing court will not say that jury should have accepted testimony conflicting therewith.

2. Evidence 🔑492.

Witness' opinion, based on hearing sound of street car, that street car was proceeding at very rapid speed, *held* competent.

3. Street railroads 🔑113(5).

Evidence that street car traveled at speed exceeding that limited by municipal ordinance may be introduced to support charge of street railway's negligence.

4. Street railroads 🔑113(5).

Distance which street car traveled after collision *held* proper fact for jury's consideration in action against street railway company for injuries.

5. Street railroads 🔑113(4).

Motorman's testimony that he did not see automobile until after stopping street car *held* proper for consideration of jury in determining whether motorman neglected duty immediately preceding collision.

6. Street railroads 🔑90(2, 3).

Motorman approaching intersection must be vigilant in his watch for approaching automobiles and must have street car under control.

7. Street railroads 🔑90(2).

Fact that street car at time of collision with automobile was not exceeding speed limit does not excuse negligent operation thereof.

8. Street railroads 🔑90(2, 3), 98(6).

There is common duty incumbent upon street car motorman and driver of automobile to keep careful lookout and use due precaution in crossing intersection of busy street.

9. Torts 🔑22.

All tort-feasors are liable if injury is result of concurrent tort.

10. Appeal and error 🔑1004(3).

Action of trial court in modifying verdict cannot be accepted as proof that trial court considered verdict to have resulted from passion or prejudice.

11. Damages 🔑132(14).

$25,000 to 18 year old girl for injuries to face and body and to jawbone and chin bone, teeth, and eyes, causing distortion of face and defective vision, *held* not excessive.

> The evidence showed that plaintiff's lower jawbone was broken in three places, chin bone was splintered, two teeth had been driven into nasal cavity, and four upper teeth driven into upper jawbone; that for a long time plaintiff was unable to masticate food; that defect in her vision would prevent her from using her eyes for reading or work of any kind; and that plaintiff's face was hardly recognizable.

12. Appeal and error 🔑1002.

Where there is conflict of testimony, jury's verdict is binding upon reviewing court.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Helen P. Bennett, by her guardian ad litem, against the Central California Traction Company. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

See also 1 P. (2d) 53.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Albert E. Sheets and J. Q. Brown, both of Sacramento, for respondent.

PLUMMER, J.

The jury in this action awarded the plaintiff the sum of $47,000 as damages for injuries sustained by her when a street car belonging to the defendant collided with an automobile in which the plaintiff was riding as a guest. The verdict was reduced to the sum of $25,000 by the trial court and judgment entered for that sum. From this judgment the defendant appeals.

The record shows that the collision between a street car belonging to the defendant and the automobile in which the plaintiff was riding occurred at the intersection of Fifteenth and X streets in the city of Sacramento, at approximately 9 o'clock p. m. The evening was clear and the intersection was well lighted. Fifteenth street runs northerly and southerly, and X street easterly and westerly. The automobile in which the plaintiff was riding was traveling in a southerly direction, and the street car with which it came into collision was traveling eastward. On the evening in question the plaintiff and four other young people left the Y. W. C. A. building in Sacramento, where the plaintiff resided, in a five-passenger Pontiac sedan automobile, to attend a dance at the William Land Park clubhouse—a clubhouse situated a short distance south of the city of Sacramento. The plaintiff seated herself on the right-hand side and in the rear seat of the automobile. To the left of the plaintiff was a Miss Elizabeth Bivens. The automobile was driven by a young man by the name of Walter Thorr. At his right was a Miss Schilling and at her right a Mr. Aungst. The automobile proceeded west on M street to Fifteenth street, turned south on Fifteenth street, and traveled southerly on that street until it reached the intersection of Fifteenth and X streets. The defendant maintains a double track on X street, on which it propels street cars carrying passengers, and also during certain hours, cars carrying freight. The car belonging to the defendant which came in collision with the automobile in which the plaintiff was riding was being propelled easterly on the southerly line of tracks maintained by the defendant. The collision occurred at or near the center of the intersection. The momentum of the street car carried the automobile a distance of 97.5 feet and practically demolished it. Both Fifteenth and X streets are 48 feet in width. The exhibits and the testimony show that a street car traveling easterly on X street can be seen from a point on Fifteenth street approximately 150 feet north of the intersection of Fifteenth street with X street, and likewise that a motorman propelling a street car easterly on X street can see an automobile approaching from the north on Fifteenth street from a point approximately the same distance west of the intersection of X and Fifteenth streets. There is no building on the lot at the northwest corner of the intersection of the two streets.

Upon this appeal it is contended by the appellant: First, that the court erred in permitting the plaintiff to introduce certain testimony as to the speed of the street car; second, that the evidence is insufficient to support the verdict; third, that the evidence shows that the negligence of the driver of the automobile was the sole and proximate cause of the collision; and, fourth, that the amount of damages awarded is excessive. The answer of the respondent to these contentions is that the street car was being propelled at a negligent rate of speed, and in excess of 20 miles per hour, the speed limit fixed by ordinance of the city of Sacramento; that the motorman failed to keep a lookout for approaching automobiles; that the testimony to which we shall hereafter refer was properly admitted; and that the injuries sustained by the plaintiff show that the award was and is not excessive. The testimony introduced on the part of the plaintiff is to the effect that preceding the collision the automobile was being driven southerly on the right-hand side or westerly side of Fifteenth street; that it was proceeding through the intersection at a speed of from 10 to 15 miles per hour. Mr. Thorr testified that when he first saw the street car just outside the intersection it was traveling at a speed of from 30 to 35 miles per hour. The testimony of the plaintiff was to the same effect. The testimony of Thorr also was to the effect that upon perceiving the approach of the street car he swerved the automobile to the left. In the collision which followed, Miss Schilling and Mr. Aungst lost their lives. The motorman of the street car testified that he at no time saw the automobile until he had stopped the street car and opened one of the car windows. This, after the street car had carried the automobile a distance of a trifle over 97 feet from the point of collision. The occupants of the automobile also testified that no gong was sounded nor warning given of the approach of the street car.

[1] On the part of the appellant there was testimony introduced that the automobile in which the plaintiff was riding was being propelled southerly at a very high rate of speed, and much attention is given by appellant to the testimony, from which it might be concluded that the automobile driver was extremely careless and negligent in the operation of the machine; but with this phase of the question, although it is argued at length in the briefs of counsel, we are not concerned upon this appeal for the simple reason that if there is sufficient testimony in the record supporting the judgment, and accepted by the jurors, it is not for the court to say that the jury should have accepted and acted upon the testimony conflicting therewith. As we have stated, the night was clear; the intersection where the collision occurred was well lighted; both the driver of the automobile and the motorman on the street car could have seen each other at a distance approximately 150 feet from the intersection; what one could see the other could see. The testimony of the driver of the automobile is to the effect that he did not see the street car until just preceding its entry into the intersection. The motorman testified that he did not see the automobile until after he had stopped his car a trifle over 97 feet from the point of collision. The motorman did testify that the force of the collision jarred him from the stool on which he was

sitting. This, however, did not affect his failure to see the automobile during the intervening distance which we have mentioned from the point of possible vision to the point of collision.

Appellant stresses the point that while the witnesses for the plaintiff testified that preceding the collision the car was traveling southerly on the right-hand side of Fifteenth street, the marks made by the automobile upon the intersection, after the collision, indicated that it was on the easterly side of the "button" located at the center of the intersection. Respondent's contention is that the force of the collision by the rapidly approaching street car lifted the automobile some distance and prevented it making any marks upon the pavement for a few feet. The testimony of the driver of the automobile also is called to our attention, that he swerved the car to the left in the hope of avoiding the impact. Be this as it may, we do not regard the exact location of the automobile on Fifteenth street as having any particular bearing upon the issues involved herein, for the simple reason that there was nothing upon Fifteenth street requiring the automobile in which the plaintiff was riding, to be driven southerly on the right-hand side thereof, other than the California Vehicle Act (St. 1923, p. 557, § 122), which requires it to be so driven. No can it be said that the alleged negligence of the defendant is in anywise affected or excused by reason of whether the automobile was actually on the right-hand side, on the left-hand side or the medial line of Fifteenth street at the instant of the collision.

[2] As the main force of appellant's argument relative to errors in the admission of testimony is directed against that given by the witness Checchetini, we set it forth somewhat at length:

"Q. Where do you live? A. At 2320—15th Street in Sacramento.

"Q. How long have you lived there? A. I have lived in Sacramento all my life; I have lived there over two years. I am now City Fireman, Fire Department of the City of Sacramento; have been such 5½ years. My employment previous to that time was with the Zellerbach Paper Company for 3 years; prior to that I worked for the Western Pacific Railroad in its shops, for 6½ years.

"Q. Have you observed these cars of the Traction Company on X Street as they traveled back and forth? A. For 20 years.

"Q. With the exception of an intervening lot, you live on the corner of 15th and X? A. Yes, sir.

"Q. Have you ridden on street cars as they travel back and forth? A. I ride on these cars every day.

"Q. Have you ridden on car No. 103, the car involved in the collision on the night of February 14th? A. Many times.

"Q. Have you watched the cars going past the intersection? A. Well, I have watched it for days before.

"Q. Now, on the night of February 14th, what were you doing at the time of the accident? A. Well, I had just gone to bed and heard a big crash.

"Q. That is, you had gone to bed in your house? A. Yes, sir.

"Q. And heard a crash? A. An awful crash.

"Q. By the way, had you heard anything previous to the crash? A. Yes, sir.

"Q. Could you tell from the sound whether or not, at what rate of speed the car was going? A. Yes, sir.

"Q. You say you could tell from hearing how fast the car was going? A. Yes, sir.

"Q. How fast?

"Mr. Butler: Now, we object to that as calling for conjecture and opinion. I don't know of any rule by which speed can be ascertained from sound.

"The Court: I think what he could do would be to testify whether or not it was going, from sound, at a high rate of speed, or moderate or slow.

"Mr. Sheets: Q. Could you tell in that way how fast the car was going?

"The Court: I only suggest the question. The question I asked you, could you tell from the sound of the car as you heard it that night?

"A. I know from the sound of the car it was going at an awful speed.

"Mr. Butler: Just a moment; we would like to interpose an objection to that.

"The Court: Yes; the objection will be sustained and that part of the answer stricken out.

"The Court: Now, just answer this question in a limited way, just the way it is asked: Could you tell whether or not—and I am not asking you how fast it went now—I just want to know whether or not you could tell whether it was going very slowly, whether it was going moderately, whether it was going very rapidly?

"Witness: Well, I would say it was going very rapidly, very fast."

The witness then stated that after the crash he stepped to the window and saw the street car just as it was coming to a stop.

In support of its contention that the admission of this testimony was error, appellant relies upon the cases of Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38, 39, and Rosander v. Market St. Ry. Co., 89 Cal. App. 710, 265 P. 536, 537, where similar testimony was considered other than as to the question of sound. These cases, however, we think are readily distinguishable from the facts of the case with which we are dealing. In the Diamond Case the plaintiff relied for its proof of negligence upon speed alleged to be in excess of that fixed by a municipal ordinance, the only testimony in support thereof being that the car was going very fast, or at a good speed, etc. This is illustrated by the following excerpt taken from the opinion: "Nor, looking to the specific averment of violation of the ordinance, did the evidence sustain the charge that the automobile was being propelled at an unlawful or otherwise excessive rate of speed. The plaintiff testified that the machine was coming 'very fast'; another witness, that its speed was decreasing before it reached the milk wagon, but that it was still going 'at a good speed.' The only other witness who testified for plaintiff on the subject said that it looked to him as if the automobile 'was going pretty fast.' These statements are entirely too uncertain to serve as a basis for a finding that the speed was over 20 miles an hour, or that it was in excess of the maximum rate which would be dictated by the demands of ordinary prudence." This case does not hold that testimony that a vehicle is moving very fast, is inadmissible; it simply holds that such testimony does not furnish the basis for concluding, when standing alone, that a vehicle is being driven in excess of a certain fixed speed limit.

In the Rosander Case the court instructed the jury as follows: "You are instructed that in considering the weight to be given to testimony of witnesses as to the speed of vehicles involved in the collision, such expressions as 'slow,' 'very slow,' 'fast,' 'very fast,' 'speeding,' 'crawling,' and the like are merely relative, and their meaning and effect must depend upon the unknown factor of the witnesses' personal views regarding standards of speed, and such expressions, *standing alone*, are entirely too uncertain to serve as a basis for any finding that the speed of the vehicle was in excess of or within the rate which would be dictated by the demands of ordinary prudence." It will be noticed that both cases rest upon the basis of such testimony, standing alone, being insufficient to sustain a verdict. Neither one of the cases just referred to hold such testimony inadmissible, nor does either one of the cases referred to limit or in anywise seek to modify the ruling announced and adhered to in the case of Johnsen v. Oakland, etc., Ry., 127 Cal. 608, 60 P. 170, 171. We take therefrom the following: "In view of the fact that they were regular travelers upon this line of cars, and that the schedule and statutory time was eight miles per hour, there can be no question that the testimony given by these witnesses to the effect that the car was going very fast, and at an unusual rate of speed, was proper evidence to go to the jury; and, indeed, the law recognizes a very broad and liberal rule in the reception of opinion evidence of nonexperts as to the rate of speed cars may be traveling. As before suggested, these witnesses had been in the habit of traveling upon this line of road, and had, at least, made casual observation as to the speed of the cars at other times. They were fairly intelligent, and only gave an approximate opinion as to the rate of speed the car was going at the time. The fact that they were passengers upon the car, rather than by-standers, does not bar them from testifying in this regard. The reported cases rejecting the class of evidence here offered are few indeed, while there is an abundance of authority to support its admission." Citing Thomas v. Chicago, etc., Ry. Co., 86 Mich. 496, 49 N. W. 547; Walsh v. Missouri Pac. Ry. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; and Ward v. Chicago, St. P., M. & O. Ry. Co., 85 Wis. 601, 55 N. W. 771.

That the overwhelming weight of authority supports the doctrine just stated will appear from the following citations: In Dawson v. San Diego Electric Ry. Co., 82 Cal. App. 141, 255 P. 215, 218, we find the following: "It is also contended by appellant that the trial court erred in permitting certain witnesses to testify that at or immediately preceding the time of the accident the street car was traveling at a speed 'faster than the ordinary rate,' and that the street car 'was going the faster of the two vehicles.' No authorities are cited by appellant to sustain its position. On the other hand, the authorities are numerous in principle which uphold the admissibility of such evidence." Citing Overtoom v. Chicago & E. I. R. Co., 181 Ill. 323, 54 N. E. 898; Illinois Central Ry. Co. v. Ashline, 171 Ill. 313, 49 N. E. 521, 522; Ottofy v. Mississippi Valley Trust Co., 197 Mo. App. 473, 196 S. W. 428; Johnsen v. Oakland, S. L. & H. E. Ry. Co., 127 Cal. 608, 60 P. 170; Scragg v. Sallee, 24 Cal. App. 133, 140 P. 706; Cargall v. Riley, 209 Ala. 183, 95 So. 821; Schultz v. Starr, 180 Iowa, 1319, 164 N. W. 163; Parker v. Boston & M. R. R., 84 Vt. 329, 79 A. 865.

In L. R. A. 1918A, beginning on page 662, is an extended note dealing with the admission of nontechnical testimony. On page 705 of L. R. A. 1918A, the rule is thus stated: "In order to be admissible, an opinion as to the speed of a street car need not be stated in miles per hour, it being competent merely to state that the car was running at the usual, or at an unusual, rate; or that it was going at an excessive rate, or 'going pretty fast;' or that it was going much faster than an automobile going at a certain rate of speed. And even assuming that, in such testimony, the standard employed for comparison was not sufficiently definite, such testimony has been held not to amount to prejudicial error, where other witnesses have testified without objection to the rate in miles per hour." In the case at bar other witnesses testified without objection as to the rate per hour. The citations in support of the rule which we have just stated are too numerous to be set forth herein. The competency of the witness whose testimony we are considering appears to be unquestioned. He had ridden upon street cars of the defendant company, upon the identical car, a number of times; had lived in close proximity to the street car line for many years, and his line of employment for a number of years gave him an opportunity to consider railroads and their operation. It is further urged, however, that testimony as to speed, based upon sound, is inadmissible. No authorities, however, are cited in support of this contention. Disregarding, for the moment, what we think is common knowledge possessed by every intelligent person, that the sound made by rapidly moving vehicles differs very materially from that made by those moving slowly, and that this fact is brought home to every one who walks the streets of our cities and hears the sound of passing vehicles, a person knows whether they are speeding by or proceeding at a moderate rate, we will cite a number of decisions supporting the ruling of the court in the instant case.

Referring again to the annotation in L. R. A. 1918A, on nontechnical testimony, we find the following rule relative to the admission of testimony based upon sound, where it is said: "Although it is perhaps proper to permit a witness whose opinion is based on sound to tell whether a train was going rapidly or slowly, the courts, with but one exception, have held it improper for witnesses to testify to estimates of the rate of speed of trains and street cars, based entirely upon the sounds arising from their operation." That is exactly the course pursued in the instant case. The witness was allowed to testify as to whether the street car was moving rapidly or slowly. Thus, in Van Horn v. Burlington, C. R. & N. R. Co., 59 Iowa, 33, 12 N. W. 752, the court said: "Small differences in the speed of moving trains cannot probably be determined by the sound, but we think that the difference between the speed of a slowly-moving and of a rapidly-moving train could be distinguished quite easily from the sound by a person in the immediate vicinity. The evidence, we think, was not inadmissible. Such evidence, we think, could not, under all circumstances [of the case], be deemed wholly unreliable. What weight the evidence in question was entitled to, under the circumstances shown, it was for the jury to determine."

In Lake Erie & W. R. Co. v. Moore, 51 Ind. App. 110, 97 N. E. 203, witnesses who lived near a railroad, who testified that they were familiar with the surroundings and with the running of trains, and that they had frequently heard the sound of a whistle and bell, were properly permitted to testify as to where a train was when it whistled, and give an opinion of its speed.

In Nesbit v. Crosby, 74 Conn. 554, 51 A. 550, the Supreme Court of Connecticut, considering the question of admitting testimony based upon sound, held that a witness may be allowed to express his opinion as to the speed at which a horse was traveling along a highway, judging from the sound. The clatter of hoofs would indicate whether the horse was moving slowly or rapidly. Likewise, the clatter of a street car or of the trucks thereof as it speeds over the joints of a railway, indicate to an intelligent observer whether the car is moving rapidly or slowly.

In Kuhn v. Stephenson, 87 Ind. App. 157, 161 N. E. 384, the Appellate Court of Indiana, sitting in banc, held admission of testimony as to the speed of an automobile, based upon sound, to be proper; citing in support of the ruling a number of cases.

In the case of Lake Erie v. Moore, supra, as reported in 97 N. E., may be found, on page 208, a number of cases cited to support the admission of testimony as to whether a train is running rapidly or slowly, based upon the sound made by the train.

In the case of Hamilton v. De Camp, 120 Kan. 645, 244 P. 1057, the Supreme Court of Kansas upholds the rule that estimates of speed of a street car, based upon the noise it makes, is admissible.

Without quoting therefrom it is sufficient to say that an examination of the following additional cases shows that testimony as to speed, couched in general language such as "very fast," "mighty fast," etc., is admissible: Missouri Pac. Ry. Co. v. Hildebrand, 52 Kan. 284, 34 P. 738; Davis v. Smitherman, 209 Ala. 244, 96 So. 208; Little Rock Ry. & Electric Co. v. Green, 78 Ark. 129, 93 S. W. 752; Colorado Midland Ry. Co. v. Robbins, 30 Colo. 449, 71 P. 371; Shea v. Hemming et al., 97 Conn. 149, 115 A. 686; Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275; McLaughlin v. Griffin, 155 Iowa, 302, 135 N. W. 1107; Illinois Central Ry. Co. v. France's Adm'x, 130 Ky. 26, 112 S. W. 929; Anderson v. Wells (Mo. App.) 261 S. W. 952; State v. United Rys., etc., 139 Md. 306, 115 A. 109; Jones v. St. Louis-San Francisco Ry. Co. (Mo. Sup.) 220 S. W. 484; Burke v. Shaw Transfer Co., 211 Mo. App. 353, 243 S. W. 449, also, State ex rel. Shaw Transfer Co. v. Trimble (Mo. Sup.) 250 S. W. 384; Ehrmann v. Nassau Electric Ry. Co., 23 App. Div. 21, 48 N. Y. S. 379; Macchi v. Portland, etc., Co., 76 Or. 215, 148 P. 72; Moore v. Northern Texas Traction Co., 41 Tex. Civ. App. 583, 95 S. W. 652; Sears v. Seattle Consolidated Street Ry. Co., 6 Wash. 227, 33 P. 389, 1081; Gerbing v. McDonald, 201 Wis. 214, 229 N. W. 860.

In view of the foregoing decisions and the fact that the testimony of the witness that the street car was moving very fast does not stand alone in the record, it must be held that the court did not err in permitting its admission, and when all the facts of this case are kept in mind, it is readily perceived that the holding of the court in the Diamond and Rosander Cases, supra, is inapplicable.

[3] That evidence of speed in excess of that limited by municipal ordinance may be introduced to support the charge of negligence, is the established law of this state. Simoneau v. Pacific Electric Ry. Co., 166 Cal. 264, 137 P. 544, 49 L. R. A. (N. S.) 737; Keena v. United R. R., 197 Cal. 148, 239 P. 1061; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 P. 734; Switzler v. Atchison, etc., Ry. Co., 104 Cal. App. 138, 285 P. 918.

[4-6] In addition to the testimony to which we have referred relative to the speed of the street car, the distance it traveled after the collision was a proper fact for the jury to consider. The testimony that he did not see the automobile until after he had stopped the street car and opened one of the windows, constituted an important item for the consideration of the jury in determining whether the motorman had or had not neglected his duty immediately preceding the collision, as well, also, as the fact of his having speeded up the car just before reaching the intersection. "It is well settled that as a general rule the driver of a street car approaching a street intersection must be vigilant in his watch for automobiles, etc., approaching the tracks, and have his car under control." This rule of law is set forth in 28 A. L. R. page 275, in an extended note dealing with automobile and street car collisions, and is supported by a long list of authorities, so long as to prohibit their listing here. See, also, the annotations found in 46 A. L. R. page 1040, citing cases in support of the rule just stated.

[7] The fact, if it be a fact, that the street car was not exceeding the speed limit, would not excuse any negligent operation. Indiana Union Traction Co. v. Love, 180 Ind. 442, 99 N. E. 1005; and note 28 A. L. R. 278; Carey v. Pacific G. & Elect., 75 Cal. App. 129, 242 P. 97; Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 P. 31; Johnson et al. v. Sou. Pacific Co. et al. (Cal. App.) 288 P. 81.

[8] The record contains sufficient testimony to support the conclusion that the motorman rang no bell and gave no alarm of the car approaching Fifteenth street; even the testimony of the motorman is deficient in this respect, and such as to warrant the jury in doubting its accuracy, as in answer to a question as to whether he rang the bell, he answered, "Yes, I always do," which immediately raises the inference that the answer was based upon a custom or practice, and not upon the fact that he rang the bell as a warning of the approach of the car before entering the intersection at Fifteenth street.

That the jury was authorized to conclude that no signal had been given of the approach of the car, based upon the testimony introduced, is supported by the cases of Jones v. Southern Pac. Ry. Co., 74 Cal. App. 10, 239 P. 429, and Johnson v. Southern Pac. Co., 105 Cal. App. 340, 288 P. 81.

It further appears from the record that Fifteenth street is a busy street, which necessarily demanded of all persons using the intersection in question to keep a careful lookout and use due precaution not to injure any one lawfully thereon, or lawfully entitled to use the same. This was a common duty incumbent upon both the motorman and the driver of the automobile.

[9] It is further urged that the testimony shows not only negligence on the part of the automobile driver, but that the accident was due solely to his inattention. The testimony to which we have referred, however, if accepted by the jury, is sufficient to show that the negligence of the motorman concurred in, and was at least a joint, proximate cause of the plaintiff's injury. The law is well settled that if the injury is the result of the concurrent tort of two or more persons, all are liable. In support of this statement we need only cite the cases of Johnson v. Southern Pac. Co., 105 Cal. App. 340, 288 P. 81, and Switzler v. Atchison, etc., Ry. Co., 104 Cal. App. 138, 285 P. 918, where authorities upon this question are cited. The record in this case does not disclose any facts upon which the plaintiff, riding as a guest in the automobile, could be charged with contributory negligence.

[10-12] It is finally urged that the verdict is excessive, and was the result of passion and prejudice. In this particular it may be stated that the action of the trial court in modifying the verdict cannot be accepted as proof or any indication that the trial court considered the verdict as the result of either passion or prejudice.

An examination of the transcript presents for our consideration a case where one might well consider that no pecuniary compensation would ever make amends for the injuries sustained and suffering endured by the plaintiff, and while the verdict was reduced in a large sum by the trial court, the facts are such as to show that the jury might very well have fixed the damages in the sum that it did, without any passion or prejudice but simply as a result of their deliberate judgment in attempting to make adequate reparation. With this statement we need only to consider the judgment for damages as allowed to stand by the trial court, and add a few excerpts from the testimony, showing that it is not excessive.

At the time of the accident the plaintiff was 18 years of age, with practically her whole life before her. The record shows that in addition to her body being bruised, and as stated by one of the doctors, her face so injured that he could scarcely recognize the plaintiff, it is shown that the lower jawbone was broken in three places; the chin bone was splintered; the upper jawbone in front had been splintered where her lower teeth had been driven into it; two teeth had been driven into the nasal cavity; twelve teeth were lost; four of the upper teeth were driven into the upper jawbone; the jawbone had to be wired together; there were several operations; the plaintiff was confined in the county hospital for a short period of time; was then moved to the Sutter hospital where she remained five and one-half weeks; for a long time the plaintiff was unable to masticate food; at the time of the trial the jaws were not entirely lined up; one of the eyes was so injured that an eye specialist testified "that the defect in her vision cannot be corrected by glasses, and she may recover one or two tenths vision but the balance of the vision will be gone, it will be distorted; she will only be able to see to get around; she might see an object from this side, but she will never be able to use it for reading or work of any kind." Dr. Binkley testified that the face of the plaintiff "was almost unrecognizable as a face after the collision." This witness further testified that "the gums just sluffed away." And further, "That the lower front teeth were tipped at an angle of probably 45 degrees; they were forced right back, like you take your finger and just move these four teeth as one group; in other words, these teeth were broken off below the roots so they all stuck together by the bone that held them in place." It further appears from the record that the mouth of the plaintiff is twisted and is not in its former shape. Other details of injuries might be set forth, but the foregoing is sufficient to support the judgment for damages.

We need not cite authorities to the effect that where there is a conflict of testimony, the verdict of the jury is binding upon this court. Nor does it matter that this court, if sitting as a jury considering the same testimony, would have concluded that it preponderated in favor of the defendant, and found in its favor.

Finding no sufficient cause to warrant a reversal herein, the judgment of the trial court must be affirmed, and it is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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115 Cal.App. 30

SCHILLING v. CENTRAL CALIFORNIA TRACTION CO.

Civ. 4153.

District Court of Appeal, Third District, California.

June 16, 1931.

Rehearing Denied July 16, 1931. Hearing Denied by Supreme Court Aug. 10, 1931.

1. Street railroads 🔑118(7).

Instruction that speed over limit prescribed by ordinance constituted negligence as matter of law *held* not erroneous, though ordinance further provided that greater speed was only prima facie unreasonable.

2. Master and servant 🔑328.

Statute authorizing maintenance of action against person causing injury, "also" against his employer authorizes action against employer alone, without joining employee (Code Civ. Proc. § 376).

> The word "also" is defined as "as well; besides; in addition; some other thing; including; further; furthermore; likewise; in like manner; in the same manner; moreover; and further," and as a copulative injunction the word is used as denoting nearly the same as the word "and" or "likewise."
>
> [Ed. Note.—For other definitions of "Also," see Words and Phrases.]

3. Appeal and error 🔑187(3).

Defendant could not on appeal object for first time on ground of defect of parties (Code Civ. Proc. § 434).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by G. A. Schilling against the Central California Traction Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Albert E. Sheets and J. Q. Brown, both of Sacramento, for respondent.

PLUMMER, J.

In this action the plaintiff had judgment in the sum of $5,000 in an action brought to recover damages for the death of a minor daughter named Iva May Schilling. From this judgment the defendant appeals.

In most particulars this is a companion case with that of Helen P. Bennett v. Central California Traction Co., a corporation, 1 P. (2d) 47, heretofore decided by this court in an opinion filed on the 13th day of June, 1931.

The cause of action in this, as in the Bennett Case, arises out of a collision between a street car owned by the defendant, and an automobile in which the plaintiff was riding. As stated in the Bennett Case, the collision occurred at the intersection of Fifteenth and X streets in the city of Sacramento, at about 9 o'clock on the evening of February 14, 1929. For a detailed description of the circumstances attending and surrounding the collision, we refer to the opinion in the Bennett Case. Here, as in the Bennett Case, the argument is made that the testimony does not support the verdict, and that the death of Iva May Schilling, which resulted from the collision, was caused by the sole negligence of the driver of the automobile.

It is further argued that the court erred in the admission of testimony, and particularly in the admission of the testimony of the witness Cecchettini. The same argument is presented here in relation to this testimony as was presented in the Bennett Case. As we there took occasion to consider, somewhat at length, the admission of the testimony of this witness, and also cited a long list of authorities supporting the ruling of the trial court, it is unnecessary to repeat here our reasons for upholding the ruling of the trial court, and we therefore refer to the opinion in the Bennett Case as showing the correctness of such ruling.

The testimony of this case relative to the speed of the street car at the time of the collision, the failure of the motorman to sound any gong or give any warning of the approach of the street car, and that he did not see the automobile with which the street car collided, until after his car had been stopped a trifle over 97 feet from the point of the collision, is the same as that set forth in the Bennett Case, and what we said there applies here, and without further elaboration we think presents sufficient to send the cause to the jury.

In addition to the legal questions involved in the Bennett Case, which need not be reconsidered here, it is urged that the court erred in giving an instruction to the jury relating to the speed of the street car, and also, as the motorman was not joined with the Traction Company as a party defendant, no cause of action is stated. The instruction complained of is as follows: "If you find that at the time and place of the collision in this case the defendant was propelling its street car at a speed in excess of twenty miles per hour, then I instruct you that this constitutes negligence as a matter of law, it being provided in the city ordinance of the city of Sacramento that street cars must not exceed twenty miles per hour in the residence district of the city."

Ordinance No. 304, Fourth Series, article VI, section 40, of the city of Sacramento, reads, so far as pertinent here: "The operator of a street car in a city shall operate the same at a careful and prudent speed, and subject to this limitation may lawfully proceed at a speed not exceeding the following: * * * 20 miles per hour in a residence district. Speeds in excess of those set forth above shall be taken as prima facie, but not conclusive evidence of a speed greater than is reasonable and proper."

[1] It is contended upon the part of the appellant that in instructing the jury that speed in excess of 20 miles per hour is negligence as a matter of law, the court committed reversible error for the reason that the concluding paragraph of the ordinance which we have quoted specifies that "speeds in excess of those set forth above shall be taken as prima facie, but not conclusive evidence of a greater speed than is reasonable and proper." In support of its contention the appellant cites the case of Brixey et al. v. Craig, 49 Idaho, 319, 288 P. 152, 154, where the court had under consideration a somewhat similar question, but which we think is distinguishable from the issue here involved. In that case the court did say that the violation of a positive statutory inhibition is negligence per se and not merely prima facie evidence of negligence. However, the statute there under consideration did not in terms make it unlawful to drive in excess of a certain speed. Subdivision (b) of section 4 of the act (Laws Idaho 1927, c. 260) relating to the operation of vehicles upon public highways under consideration in that case, reads as follows: "Subject to the provisions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding the following, but in any case when such speed would be unsafe it shall not be lawful." In the ordinance under consideration the statute expressly provides that it is lawful only to proceed at a speed not exceeding a certain specified rate, being 20 miles per hour at the intersection where the collision in this case occurred. It is true that the ordinance concludes in the following language: "Speeds in excess of those set forth above shall be taken as prima facie, but not conclusive evidence of a greater speed than is reasonable and proper." This portion of the ordinance is not controlling in this action. We have not been cited to any authorities which hold that a city council has any power to fix, change or limit rules of evidence in the trial of actions in superior courts. The speed fixed by the ordinance is 20 miles per hour; that is the lawful rate which cannot be exceeded under certain conditions, and could not be lawfully exceeded under the conditions presented, at the intersection of Fifteenth and X streets in the city of Sacramento. The instructions to the jury

as to what would be the result of exceeding that speed limit was and is a pure matter of law for the courts and not for the city council, in actions involving personal injuries. That the city council might affix penalties and provide for their imposition, and how proof of violation of its ordinances may be established in city courts, is beside the question.

That the construction given by the Supreme Court of Idaho in the case of Brixey v. Craig, supra, is not controlling here appears from the decisions in the recent cases of Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045, 1046; Cooper v. Smith, 209 Cal. 562, 289 P. 614; and Loggie v. Interstate Transit Co. (Cal. App.) 291 P. 618. These cases deal with the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30), the concluding paragraph (subdivision c) of which reads as follows: "In all charges for a violation of this section, speeds in excess of those set forth in subdivision (b) of this section shall be taken as prima facie but not as conclusive evidence of a violation of this section," etc. In the Noonan Case the instruction was in substance and effect the same as that here given, as appears from the following quotation: "We find no error in said instruction. As said in Scragg v. Sallee, 24 Cal. App. 133, 144, 140 P. 706, 710: 'While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence. [Citing cases.] Therefore, the statement that such an act is "of itself negligence," or "negligence as a matter of law" or "negligence per se" (equivalent expressions) is, in this state, strictly correct.'" Citing Baillargeon v. Meyers, 180 Cal. 507, 182 P. 37; Flynn v. Bledsoe, 92 Cal. App. 145, 262 P. 887; Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010; Greeneich v. Knoll, 73 Cal. App. 1, 238 P. 163.

In Cooper v. Smith, supra, it is said that a speed limit in excess of 35 miles per hour, being the speed limit fixed for the conditions where the accident took place, constituted negligence on the part of the automobile driver. To the same effect is the holding of this court in the case of Loggie v. Interstate Transit Co., supra, where the court instructed the jury that a speed in excess of the limit fixed by the California Vehicle Act was negligence as a matter of law.

In addition to the foregoing cases, we may cite the case of Simoneau v. Pacific Elec. Ry. Co., 166 Cal. 264, 136 P. 544, 49 L. R. A. (N. S.) 737, where, on page 269 of the California volume cited (136 P. 547), is listed a number of cases showing that the violation of a city ordinance relative to the rate of speed is negligence per se. Also, we may cite the recent case of Flynn v. Bledsoe, 92 Cal. App. 145, 267 P. 887, where a number of cases are cited to the same effect. See, also, 23 California Jurisprudence, p. 870, § 35.

[2] Finally, the appellants contend that no cause of action is stated by reason of the fact that the motorman was not joined as a party defendant. This contention is based upon a reading of section 376 of the Code of Civil Procedure, where, after providing for the maintenance of an action for the death or injury of a child, the section concludes as follows: "Such action may be maintained against the person causing the injury, or death, or if such person be employed by another person who is responsible for his conduct, also against such other person." The construction of this section advanced by appellant is that it was the intention of the Legislature, and the necessary meaning of the language employed, that the action could only be maintained jointly against the employer and the employee. This contention, however, does not appear to us to be tenable. The word "also" does not carry any such meaning.

In 2 C. J. 1164 we find the word "also" thus defined: "As well; besides; in addition; some other thing; including; further; furthermore; likewise; in like manner; in the same manner; moreover." And further: "As a copulative conjunction 'also' is used as denoting nearly the same as the word 'and' or 'likewise.' The words 'also,' or 'and also,' are usually read in wills as copulative, carrying on the same sense of the preceding words, and are equivalent to 'in like manner' or 'in the same manner,'" etc. None of these definitions contain the idea that the action must be joint. The plain interpretation is that the action may be maintained against the person causing the injury; likewise, an action may be maintained against the employer. Take the first definition and it reads, "An action may be maintained against the employee," and "as well," an action may be maintained against the employer. Take some of the other definitions and the statute reads that an action may be maintained against the person causing injury; and an action may be maintained "in like manner" against the employer.

[3] Our attention is called to the provisions of section 377 of the Code of Civil Procedure authorizing heirs or personal representatives to maintain an action for damages, and the case of Salmon v. Rathjens, 152 Cal. 290, 92 P. 733, is cited as supporting appellant's contention. Section 376 of the Code of Civil Procedure differs in its reading from section 377. Furthermore, the case cited by the appellant holds that the objection of misjoin-

der of parties must be taken before trial, and cannot be raised upon appeal. Under section 434 of the Code of Civil Procedure, which specifies that objections, save as to the failure of the complaint to state facts sufficient to constitute a cause of action, or to the jurisdiction of the court not taken before trial, are deemed waived, the appellant in this case is foreclosed from making the contention that the motorman should have been joined as a defendant in this action. All the argument advanced by the appellant in this particular only goes to show that the appellant should have applied to the trial court for an order directing that the motorman be brought in and made a party to the action, and not having done so, it is too late now to raise any objection based upon lack of parties to the action.

The judgment is affirmed.

I concur: PRESTON, P. J.

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115 Cal.App. 113

AUNGST v. CENTRAL CALIFORNIA TRACTION CO.

Civ. 4152.

District Court of Appeal, Third District, California.

June 19, 1931.

Rehearing Denied July 18, 1931. Hearing Denied by Supreme Court Aug. 10, 1931.

1. Master and servant 🔑328.

Statute authorizing maintenance of action against person causing injury, "also" against his employer, authorizes maintenance of action against employer alone without joining employee (Code Civ. Proc. § 376).

2. Appeal and error 🔑930(1).

In must be presumed sufficient evidence was introduced to justify verdict, where order granting new trial makes no reference to insufficiency of evidence.

3. Street railroads 🔑90(2, 3).

Driver of street car approaching street intersection must be vigilant in watch for automobiles and must have car under control.

4. Street railroads 🔑117(8).

Negligence of street car motorman *held* question for jury in action for injuries to occupant of automobile.

In addition to the testimony that no bell was rung or warning given of the approach of street car, and that it was traveling in excess of speed limit, the motorman testified that just before reaching intersection he added additional power to the car and that he did not see automobile approaching until after his street car had stopped 97 feet beyond the point of collision.

5. Street railroads 🔑81(3), 98(1).

Street car companies and automobiles must use public streets with due regard to rights of each other.

6. Street railroads 🔑102(1).

Guest in automobile can recover damages from street railway company for injuries caused by concurring and contemporaneous negligence of automobile driver and operator of street car.

7. Street railroads 🔑99(10).

Rule requiring traveler to stop, look, and listen before crossing railroad tracks *held* inapplicable to street cars.

8. Street railroads 🔑118(13).

In action for injuries resulting from collision, instruction that guest was negligent if he failed to warn driver of automobile as early as reasonably prudent person would have warned him *held* erroneous.

9. Courts 🔑90(1).

Opinion of District Court of Appeal cannot be relied on as authority, where case has been transferred to Supreme Court for further hearing.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by J. T. Aungst against the Central California Traction Company. There was a verdict for defendant, and from an order granting plaintiff a new trial, defendant appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Albert E. Sheets and J. Q. Brown, both of Sacramento, for respondent.

PLUMMER, J.

In this action, tried before a jury, a verdict was returned in favor of the defendant. Upon motion of counsel for the plaintiff a new trial was granted. The defendant appeals from this order.

The facts involved in this action are identical with those presented in the companion cases of Helen P. Bennett v. Central California Traction Company (Cal. App.) 1 P. (2d) 47, and G. A. Schilling v. Central California

Traction Company (Cal. App.) 1 P. (2d) 53. A detailed statement of the facts involved is set forth in the opinion of this court filed in the Bennett Case on June 13, 1931. In the instant case all the legal questions involved in the Bennett Case are again presented, but as we are satisfied with our conclusions in the Bennett Case we will content ourselves with referring thereto concerning all questions involving the admission of testimony and the rulings of the court, other than as hereinafter set forth. The testimony introduced in this case being in all respects similar to that introduced in the Bennett Case, it is sufficient, without setting it forth, to justify the ruling that it was sufficient to send the cause to the jury.

[1] The plaintiff began this action under the provisions of section 376 of the Code of Civil Procedure, to recover damages on account of the death of his son, which resulted from the collision mentioned in the Bennett and Schilling Cases. The objection is made here that under the terms of that section the motorman should have been joined as a party-defendant. The same objection was raised and considered in the Schilling Case. Upon the authority of what is there said, we hold that the objection of the appellant is untenable.

[2, 3] As the order granting a new trial in this action makes no reference to the insufficiency of the evidence, it necessarily follows that it must be presumed sufficient evidence was introduced to justify the verdict. The question then arises: Are there any rulings of the court which necessitated the granting of the plaintiff's motion? An examination of the record satisfies us that such is the case. As a preliminary to what we will hereafter set forth, we may state that the evidence introduced by the plaintiff was sufficient to make out a prima facie case of negligence on the part of the defendant. As said in the case of Bennett v. Central California Traction Company: "It is well settled that * * * the driver of a street car approaching a street intersection must be vigilant in his watch for automobiles, etc., approaching the tracks, and have his car under control." Notes in 28 A. L. R. page 275; also annotations found in 46 A. L. R. page 1040; Whitmeyer v. Southern Pacific Co., 102 Cal. App. 199, 282 P. 1005; Carey v. Pacific Gas & Elect. Co., 75 Cal. App. 129, 242 P. 97; Taylor v. Pacific Elect. Ry. Co., 172 Cal. 638, 158 P. 119.

[4, 5] In addition to the testimony introduced on the part of the plaintiff that no bell was rung or warning given of the approach of the street car, and that it was traveling in excess of 20 miles per hour, the motorman in this case, just as in the Bennett and Schilling Cases, testified that just before reaching the intersection of Fifteenth and X streets, he added additional power to the car and increased its momentum. He likewise testified that he did not see the automobile approaching the intersection, and did not see it until after his car had stopped 97 feet beyond the point of collision. From this testimony it is clear that the jury might have inferred that the motorman was negligent in not having his car under control, and in not keeping a proper watch for those who might also be using the intersection.

As stated in 46 A. L. R. page 1001, "that where both street car companies and automobiles have the right to use the public streets, the right of each must be exercised with due regard to the rights of the other, and in such a manner as not unreasonably to infringe upon the rights of the other." While street cars must run upon the tracks provided for them, they have no absolute or pre-eminent right of way over intersections, but must use the same with due regard to the safety and rights of the general public. O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809.

[6] A considerable portion of appellant's brief is devoted to the alleged negligence of the driver of the automobile, and for the purposes of this decision it may be admitted that there is sufficient testimony set forth in the transcript to justify the conclusion that the automobile driver was negligent, and that as to him, no cause of action could be maintained. This case, however, does not depend upon the sole negligence of the automobile driver. It is evident from a reference to the facts set forth in the Bennett Case and the additional testimony to which we have just referred, that the jury could conclude that the collision was caused by the concurrent negligence of both the driver of the automobile and the motorman in charge of the defendant's car. Under such circumstances a guest riding in the automobile, or, in this case, his father, is entitled to maintain an action unless the guest was also guilty of contributory negligence. The law is well settled in this state that one riding as a guest in an automobile is entitled to recover damages from a street railway company for injuries sustained in a collision caused by the concurring and contemporaneous negligence of the automobile driver and the operator of a street car. Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319; Thompson v. L. A., etc., Ry. Co., 165 Cal. 748, 134 P. 709; Unger v. San Francisco-Oakland Terminal Rys., 61 Cal. App. 125, 214 P. 510; Simmons v. Pacific Elect. Ry. Co., 60 Cal. App. 129, 112 P. 637; Bibby v. Pacific Elect. Ry. Co., 58 Cal. App. 658, 209 P. 387; Switzler v. Atchison, etc., Ry. Co., 104 Cal. App. 138, 285 P. 918, 921.

The duty of a guest riding in an automobile, when approaching an intersection crossed by railroad tracks, will be considered after reference is made to certain instructions given to the jury which we think erroneous.

[7] At the request of the defendant the court gave to the jury instruction No. 22 in the following words: "It was the duty of the driver of the automobile in which Robert Aungst was riding, upon approaching the street car track, to look for the approaching car, and if his view was obstructed, this duty to look before going upon the track continued, and he should at some point before reaching the car track, look for the cars, even though it was necessary for him to stop in order to get an effective view of the track. During this period of time it was his duty to have had his automobile under such control, and to have operated it at such a speed, as to enable him to stop before reaching the track, if on looking, he should observe the approaching street car." Some contention is made by the appellant that as interurban cars were operated over the same line, the "stop, look and listen" rule applies to the instant case the same as where one is approaching a crossing over which steam engines or ordinary railroad trains are operated. The same question was raised in the case of Callett v. Central California Traction Co., 36 Cal. App. 240, 171 P. 984, 986. What is said there is applicable here, to wit: "The fact that the appellant operates interurban cars over the track in question does not, in our opinion, affect the merits of the case."

We may further add that the collision involved in this action was not between an interurban train, but was between an ordinary street car operated by the defendant, and the automobile driven by Thorr. That the "stop, look and listen" rule does not apply to street cars definitely appears from the case of Carey v. Pacific Gas & Electric Co., 75 Cal. App. 129, 242 P. 97, where this court (quoting from the syllabus) said: "The duty of stopping, looking, and listening made incumbent upon one about to cross the right of way of a steam railroad is not the rule governing the rights of foot-passengers and vehicle drivers in venturing upon, crossing, or using the tracks of a street railroad, but the duty of such is no higher than or different in law from the duty of the company operating the electric car saving in the one particular that, because the car is confined to its tracks, vehicles and foot-passengers must give way to clear its passage." Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 P. 1109. That the "stop, look and listen" rule does not apply to intersections in cities crossed by street railways, appears from a long list of notes found in 28 A. L. R. beginning on page 229.

[8, 9] At the request of the appellant the court gave to the jury instruction No. 25, which reads as follows: "If you find from the evidence in this case that the driver of the automobile in which Robert Aungst was riding had, prior to this accident, been driving and operating said automobile while Robert Aungst was riding therein, in a careless, reckless and negligent manner, it was the duty of Robert Aungst to remonstrate with said driver relative to the negligent operation of said automobile. Therefore, if you find that prior to said accident, and while Robert Aungst was riding in said automobile, said automobile was being driven in a careless, reckless and negligent manner, and that Robert Aungst acquiesced, in the manner of operation thereof, or failed to remonstrate with the driver of said automobile, Robert Aungst was guilty of negligence, and if you further find that said negligence of Robert Aungst, if any, contributed to the accident in question, then your verdict must be for the defendant."

At the request of the defendant the court gave to the jury instruction No. 26, which reads: "There was a legal duty upon Robert Aungst to exercise ordinary care and prudence for his own safety. If, from the evidence, you find that Robert Aungst observed the street car of the Central California Traction Company approaching the intersection prior to the accident, at such a time as to enable him to warn the driver of the approach of said street car, and if you further find that the said Robert Aungst, having such knowledge of the approach of said street car, neglected and failed to warn the driver of the automobile, *as early as a reasonably prudent person, under similar circumstances, would have warned him*, Robert Aungst was negligent, and if you further find that such negligence contributed to the injuries which caused his death, then your verdict must be for the defendant and against the plaintiff."

Our attention has not been called to any testimony upon which to base instruction No. 26, and we have not found any which would justify the giving of such an instruction, if it were otherwise a correct statement of the law. In support of this instruction the appellant calls our attention to the recent case of Cate v. Fresno Traction Co. (Cal. App.) 295 P. 98. However, this case has been transferred to the Supreme Court for further hearing, and cannot, therefore, be relied upon as an authority.

In the case of Brown v. Davis, 84 Cal. App. 180, 257 P. 877, 878, this court had before it a similar instruction, and speaking through the late Presiding Justice Finch, we there said: "The court instructed the jury, in effect, that if the defendant was driving at an excessive or dangerous rate of speed and that fact was known to the deceased 'or was plainly obvious to a reasonable person in her situation,' and that she failed to remonstrate with the defendant, she was guilty of contributory negligence. The instruction is so clearly erroneous that it is deemed sufficient to cite Dowd v. Atlas T. & A. Service, 187 Cal. 523, 202 P. 870, and Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236, wherein the duty of a passenger in case of a driver's negligence is considered."

Again, in Switzler v. Atchison, etc., Ry. Co., supra, this court had occasion to examine the question as to the contributory negligence of a guest. We there said: "This question has been before the appeal courts of this state a number of times, and it seems to be pretty well settled that a guest riding in an automobile must use ordinary care and prudence to insure his own personal safety, that is, he must use such reasonable care and prudence as an ordinarily prudent person would exercise under like circumstances. However, a guest when not having any control, supervision or management over the automobile, is not placed in the same legal situation as the driver. As stated in Carpenter v. Atchison, etc., Ry. Co., 51 Cal. App. 60, 195 P. 1073, 1075: 'Interference by the passenger or guest where the vehicle is about to be placed in a position of danger might prove to be gross imprudence and so disconcert the driver as to cause the disastrous result which such interference was designed to avoid.' And further * * *: 'For aught that appears to the contrary, he might have reasonably believed that Gibson intended to and would have either stopped or increased the speed of the car and thus have easily escaped the threatened peril.' The opinion in that case quotes from a number of other cases, and then the rule approved is as follows: 'Assuming that deceased, when the automobile which he occupied as a passenger or guest, reached the point 30 feet distant from the crossing, and traveling at a speed of only 4 miles per hour, saw the train 300 feet away therefrom and approaching at a high rate of speed, we cannot say as a matter of law that his failure to interfere with the driver's operation of the car rather than to rely upon the latter's judgment in escaping the threatened danger, nor that his failure to leave the car, constituted contributory negligence. * * *' 'While one who knows, or should know, that the driver is carelessly operating the car must use ordinary care for his own safety, and it is incumbent upon him to take proper steps for his own protection, still whether by failing to protest against the course being pursued by the driver, or to leave the vehicle, constituted a want of ordinary care which proximately contributed to his injuries was a question of fact to be submitted to the jury, unless from the evidence but one conclusion might reasonably be drawn.' The following cases all show that whether the guest is chargeable with contributory negligence in not protesting with the driver, or doing anything to interfere with his management and control of the car, is a question to be submitted to the jury." Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 143 P. 714; Ilardi v. Central California Traction Co., 36 Cal. App. 488, 172 P. 763; Dover v. Archambeault, 57 Cal. App. 659, 208 P. 178; Carpenter v. Atchison, etc., Ry. Co., supra; Curran v. Earle C. Anthony, Inc., supra. See, also, notes 47 A. L. R. 289. That the negligence of an automobile driver, even in approaching railway crossings, is not imputable as a matter of law to a passenger having no control or direction, likewise appears from the text found in 3 California Jurisprudence, pages 853, 854, and 855.

The recent case of Marchetti v. Southern Pacific Ry. Co., 204 Cal. 679, 269 P. 529, is a complete answer to the appellant's contentions. It is there said (quoting from the syllabus): "The negligence of the driver of an automobile cannot be imputed to a passenger therein in the absence of any evidence showing that the latter exercised some control over the driver, or that he possessed the power to supervise or direct the manner in which the automobile should be operated. A passenger in a motor vehicle approaching a railway crossing is under no legal obligation to warn the driver, either of the presence of the tracks or of an approaching train; and while it is the passenger's duty to look and listen, it is not his duty to stop for a successful observation, since he has no authority over the driver, but is fully subject to the latter's action, and he has the right to assume that the driver, on approaching a railway crossing, will exercise due care for the protection and safety of his passengers and that even when so near the crossing as to be in apparent danger of a collision with an oncoming train he will take some action to avert an accident."

In addition to the authorities cited we may list the following cases which uphold the same rule: Bryant v. Pacific Elect. Ry. Co., 174 Cal. 737, 164 P. 385; Irwin v. Golden State Auto. Touring Co., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319.

We do not need to discuss instructions Nos. 29 and 30 given at the request of the defendant, further than to state that they should be remodeled to conform to what is said in the case of Armock v. United R. R. of San Francisco, 56 Cal. App. 160, 204 P. 856, and other cases cited herein, as to the respective rights of street car companies and the public at intersections.

We think it evident that the instructions which we have been considering, given to the jury, were prejudicially erroneous, and justify the court in granting a new trial; and therefore the order is affirmed.

I concur: PRESTON, P. J.

117 Cal.App.(Supp.) 775

PEOPLE v. CHASE et al.

Cr. A. 598.

Appellate Department, Superior Court, Los Angeles County, California.

June 25, 1931.

Rehearing Denied July 10, 1931.

1. Criminal law 🔑45.

Words "room" and "building" in statute respecting gambling include ships (Pen. Code, § 318).

> Word "building" in its primary sense means merely that which is built, but usually indicates some sort of edifice or structure located on or affixed to land. Word "room" is defined to mean space inclosed or set apart by a partition, an apartment, or chamber, and a room may as well be on a ship as on shore.
>
> [Ed. Note.—For other definitions of "Building" and "Room," see Words and Phrases.]

2. Criminal law 🔑45.

Expression "prevail upon" in statute respecting gambling means to bring persuasion, inducement, or urgency to bear successfully (Pen. Code, § 318).

3. Criminal law 🔑45.

Crime of inviting others to visit place kept for purpose of gambling is committed at place where defendant delivers invitation or makes use of device (Pen. Code, § 318).

4. Criminal law 🔑97(3).

Even if ship kept for purpose of gambling was on high seas, if invitation to visit ship was given in state, offense could be prosecuted in state (Pen. Code, § 27, subd. 1, and § 318).

> Pen. Code, § 27, subd. 1, provides that persons who commit, in whole or in part, any crime within state, are liable for punishment under laws of state.

5. Criminal law 🔑112(1).

Prosecution for prevailing upon persons to visit ship kept for gambling purposes could be had in county wherein acts of inducement occurred, notwithstanding ship was kept in another county (Pen. Code, §§ 781, 318).

6. Criminal law 🔑369(2).

In prosecution for prevailing upon persons to visit place kept for gambling, evidence regarding acts done on other days than date charged *held* admissible to prove conspiracy (Pen. Code, § 318).

7. Criminal law 🔑45.

That ship also contained facilities for eating and dancing did not affect its character as place for gambling (Pen. Code, § 318).

8. Criminal law 🔑562.

Evidence *held* sufficient to sustain conviction for prevailing upon persons to visit place kept for purpose of gambling (Pen. Code, § 318).

9. Criminal law 🔑45.

Invitation to visit place kept for purpose of gambling in violation of statute may be given by any conduct which conveys the idea (Pen. Code, § 318).

10. Criminal law 🔑45.

Sign at dock, pamphlets, and free tickets for rides to ship, constituted "invitation" to visit ship kept for gambling purposes (Pen. Code, § 318).

> [Ed. Note.—For other definitions of "Invitation," see Words and Phrases.]

11. Criminal law 🔑45.

Speedboats, dock, sign, free parking place, and free tickets on speedboats constituted "device" to prevail upon persons to visit ship kept for gambling purposes (Pen. Code, § 318).

> "Device" is defined as a contrivance, invention, project, scheme, often a scheme to deceive, stratagem, artifice.
>
> [Ed. Note.—For other definitions of "Device," see Words and Phrases.]

12. Criminal law 🔑552(1).

Facts regarding what induced person to visit place kept for gambling could be proved by circumstantial evidence (Pen. Code, § 318).

13. Criminal law 🔑45.

Invitation or device need not be sole cause moving person to visit place kept for purpose of gambling in order to establish offense (Pen. Code, § 318).

14. Criminal law 🔑559.

Ordinarily, jury may infer from fact that person, after being invited to visit place kept for gambling, does so, that he was by means of invitation prevailed upon (Pen. Code, § 318).

15. Criminal law 🔑745.

Whether invitation and device of defendant were in whole or in part causes moving any of persons visiting ship for purpose of gambling to do so *held* for jury (Pen. Code, § 318).

Appeal from Municipal Court of Long Beach; Charles D. Wallace, Judge.

Clarence R. Chase and others were convicted of prevailing upon persons to visit a place kept for the purpose of gambling, and they appeal.

Affirmed.

John S. Cooper and Newton J. Kendall, both of Los Angeles, for appellants.

John K. Hull, City Pros., and Charles C. Stratton, Deputy City Pros., both of Long Beach, for respondent.

SHAW, J.

The charge on which appellants were convicted is that in the city of Long Beach they "wilfully and unlawfully, by invitation and/or device, did prevail upon persons to visit a place kept for the purpose of gambling, to-wit, the 'Johanna Smith,' a ship anchored off the coast of the City of Long Beach." This is alleged to be a violation of section 318 of the Penal Code, which reads in part as follows: "Whoever, through invitation or device, prevails upon any person to visit any room, building or other places kept for the purpose of gambling or prostitution, is guilty of a misdemeanor."

[1] Appellants contend that a ship does not come within the provisions of this section of the Code, relying on the rule of ejusdem generis to cut down the meaning of the word "places" so as to exclude ships from its purview. Many cases are cited in which general terms have been limited by reference to preceding particular terms, but we do not deem it necessary to review them, because we can discern no genus of places broad enough to include all rooms and buildings that might not also include ships. The word "building" in its primary sense means merely "that which is built" (Webster's Dictionary), but usually indicates some sort of edifice or structure located on or affixed to land. It has been held to include a railroad car, which, while located on land, is certainly not affixed to it. Hardin v. State, 92 Neb. 298, 138 N. W. 146; State v. Lintner, 19 S. D. 447, 104 N. W. 205. The word "room" is defined to mean "space inclosed or set apart by a partition; an apartment or chamber." Webster's Dictionary. A room may as well be on a ship as on shore; in fact, the spaces assigned to passengers on a ship are known as staterooms. In view of the manifest purpose of section 318 to further the suppression of gambling and prostitution, we cannot think the Legislature intended to draw any fine distinctions as to the nature of the places put under its ban, and we hold that the words enumerating those places are used in their most general sense, and as so used include ships. See Coleman v. State, 13 Ala. 602, and Dickey v. State, 68 Ala. 508, holding that a steamboat or ferryboat is a place, within the meaning of a statute prohibiting gambling in public places.

[2] Appellants also attack the judgments on the ground that the evidence shows the Johanna Smith, at the time of the offense charged, to have been on the high seas and therefore entirely beyond the jurisdiction of the state of California, or at least in Orange county, and therefore beyond the criminal jurisdiction of the Long Beach municipal court, claiming that, for one or the other of these reasons, the offense is without the jurisdiction of the municipal court. In the view we take of the matter the position of the ship is immaterial. To state our reasons for this conclusion requires some further interpretation of section 318.

The conduct constituting the offense at which this section is aimed is defined in the words "through invitation or device, prevails upon any person to visit any room, building or other places"; the remainder being merely descriptive of the places. It is plain that the offense is not committed by the mere passing of an invitation or use of a device. If it were, no further words describing the offense would be necessary, and the sentence might have been completed by the use of the word "requests," or other equivalent term; but instead thereof we find the expression "prevails upon," whose meaning goes far beyond the mere giving of an invitation. The primary sense of the word "prevail" is "to gain the victory; have the mastery; triumph." Webster's Collegiate Dictionary. In a secondary or figurative sense it means, according to the same authority, "to bring persuasion, inducement or urgency to bear (on, upon or with) *successfully*." (Italics ours.) Similar definitions are given by other lexicographers. In section 318 the word is unquestionably used in the sense last stated, and by its use the Legislature declared that the offense is not completed unless the person subjected to an invitation or device actually goes to a place described in the section. Without this there might be an attempt to violate section 318, but nothing more, and, since the appellants were found guilty of a completed offense, we are not here concerned with an attempt. This statute is very similar to a Minnesota statute which was under consideration in State v. Stickney, 118 Minn. 64, 136 N. W. 419. That statute declared it unlawful "to induce, entice or procure * * * any female person * * * to enter any house of ill fame," and the court there declared that this crime is not complete and no conviction can be had therefor unless the female actually enters the house of ill fame. Our statute of 1929 regarding gambling ships (St. 1929, p. 703) is an example of a statute more broadly worded and shows by contrast the effect of section

318. Section 2 of the act of 1929 makes it "unlawful for any person, within this state, to solicit, entice, induce, persuade or procure * * * any person to visit any gambling ship." By the use of the word "solicit," this statute makes it clear that the conduct of the person solicited is not material to the offense; and this difference between the statutes shows that the act of 1929 has not by implication repealed section 318 as to gambling ships.

[3] But, notwithstanding the conclusion just reached, we think the gist of the offense under section 318 is the giving of the invitation or the use of the device by which some person is prevailed upon to visit a place described in the section. The actual visiting is not an act done by the defendant, but a result of his acts, the happening of which is by the section made a condition to his criminal responsibility. Hence we think it may fairly be said that the crime is committed at the place where the defendant delivers the invitation or makes use of the device, and, if that place is within the jurisdiction of the court, it is enough; that jurisdiction is not affected by the location of the place visited by the other person. The purpose of the statute is to protect the inhabitants of this state against being led into evil courses, and it matters not to that purpose whether the places of evil doing are in this state or outside of it. Such was the conclusion reached in State v. Stickney, supra, where the acts of enticement occurred and the prosecution was had in Minnesota, but the house of ill fame entered was in Wisconsin, and it was held that the crime was committed in Minnesota and was within the jurisdiction of the Minnesota courts.

[4, 5] But, if it be conceded that we are wrong in this conclusion, and that the commission of an offense under section 318 is consummated at the place visited, nevertheless the acts of invitation, etc., would constitute a part of the offense, the crime would be partly committed where those acts were done, and, if any of them were done in Long Beach, as charged, the Long Beach court would have jurisdiction of the offense, under either section 27 or section 781 of the Penal Code, as the case may be. Section 27 provides, in part: "The following persons are liable to punishment under the laws of this state: 1. All persons who commit, in whole or in part, any crime within this state." Even if the Johanna Smith was on the high seas, yet, if the invitation was given in this state, the offense may be prosecuted here, under this section (People v. Botkin, 132 Cal. 231, 64 P. 286, 84 Am. St. Rep. 39; People v. Chapman, 55 Cal. App. 192, 197, 203 P. 126); and it matters not, to this conclusion, that there may be no law on the high seas by which the transaction in question is made a crime (People v. Chapman, supra). See, also, People v. Staples, 91 Cal. 23, 29, 27 P. 523. On the other hand, if the ship was in Orange county, the prosecution may be had in Los Angeles county, under section 781, which reads as follows: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

[6, 7] Since the guilt of the appellants, as well as the jurisdiction of the court, depends on the commission of acts of inducement and there appears to be no question that such acts as were done in that respect were done in Long Beach, we proceed to consideration of the question whether acts sufficient to show the guilt of the appellants were proved. It may be stated at once that as to several of them there is no showing that they personally did anything amounting to a direct invitation to any one to visit the Johanna Smith. The respondent contends as to them that there was a conspiracy of which they were members, the object of which was to prevail upon other persons to visit the Johanna Smith, and that hence these persons were criminally liable for acts which were done by other persons in furtherance, as it is claimed, of this conspiracy. Here it should be noted that the complaint charges an offense committed November 29, 1930, and that, after evidence had been introduced as to occurrences on several different days, the prosecutor was required to elect on which he would rely for conviction, and elected the date charged in the complaint. Hence, unless there be found evidence of an offense committed on that date, the conviction cannot be upheld. People v. Williams, 133 Cal. 165, 168, 65 P. 323; People v. Hatch, 13 Cal. App. 521, 534, 535, 109 P. 1097; People v. Bartnett, 15 Cal. App. 89, 94, 113 P. 879; People v. Harlan, 29 Cal. App. 600, 603, 156 P. 980. The evidence as to acts done on other days was probably introduced for the purpose of proving the conspiracy, and was proper for that purpose.

The evidence shows that the ship Johanna Smith was on the date charged and for several months prior thereto had been anchored in the ocean off Long Beach. The character of this ship is not seriously questioned by appellants, and the evidence is ample to show that during all of this time and particularly on November 29th it was "kept for the purpose of gambling." Its character in that respect is not affected by the fact that in addition to its gambling equipment it also contained facilities for eating and dancing. 27 Corpus Juris, 1010; State v. Eaton, 85 Me. 237, 27 A. 126.

It also appears that during this time persons visiting this ship were transported to and from it by a number of speedboats called "water taxis." These boats ran from a dock at No. 1415 West Seventh street in Long Beach, at which place, in addition to the docking facilities, there was a free parking place for automobiles and a shed which contained a lunch counter, an office, and the gang plank for entering and leaving the boats. This line of boats and the dock and other appurtenances were owned and operated by appellants Chase and Casey, and all of the other appellants were their employees. On the street in front of the dock there was a Neon sign about 8x12 feet in size, which read: "Visit the Johanna Smith cabaret ship, dining and dancing. Get water taxi here." A free bus was operated from the business district of Long Beach to this dock. On it was a sign reading, "Free bus to 1415 W. 7th St. Water Taxi." There is no direct evidence to show who operated this bus or that it was running on November 29th, although it did run a few days before.

The operators of the Johanna Smith maintained a box for receipt of mail on the street in front of the dock, and on receiving inquiries regarding the ship would mail out cards, each of which stated that it "entitles you and your party to one free round trip speedboat ride" to the ship, that free busses run from Long Beach to the dock at 1415 West Seventh street, and that boats leave this dock every 20 minutes. They also gave away these cards on the ship, distributing altogether 10,000 of them every week, and gave away other tickets purporting to be complimentary passes for one "round trip West Seventh Street Water Taxis, 1415 W. 7th St., Long Beach." Like tickets were given away at the docks. These tickets and cards were accepted for passage by the operators of the speedboats. Persons who did not have them were charged from 10 to 50 cents for passage to the ship, or, if they declined to pay, were carried free. Tickets collected were handed to some one on the ship by the operators of the boats and cash was handed to appellant Casey. No fares or tickets were collected on return trips. Persons who sent in by mail inquiries about the ship also received in reply a pamphlet describing the attractions to be found on the Johanna Smith, including the gambling games. These pamphlets stated that the trip to the ship is made on speedboats which leave the dock at 1415 West Seventh street, and that free busses from Long Beach connect with these "water taxis." There was also a picture of the bus showing that, in addition to the sign above mentioned, the words "Johanna Smith, Amusement Ship," were conspicuously painted on the cover of its spare tire. On the back of this pamphlet was printed a coupon reading "Pass 2 Free complimentary to West Seventh Street Water Taxis." About 60,000 of these pamphlets were printed and delivered to the dock at 1415 West Seventh street. Some were received there by appellant Ellis and others by appellant Casey. Casey opened one bundle of them and looked at it, and at another time gave one of the pamphlets to a police officer. On various occasions in November several hundred persons visited the Johanna Smith, and on the evening of November 29th the visitors numbered about 1,500 persons.

On November 29th the appellants Chase and Casey were actively engaged in operating the West Seventh street water taxis, and the other appellants were assisting them. Connor and Montoya were operating one of the speedboats, Ellis was maintaining order at the head of the gang plank and keeping an account of the passengers, and Bateman and Pullman were helping dock the boats and helping the passengers off and on. The five appellants last named had worked at the dock for at least a month. Some of them admitted seeing the sign and the bus above mentioned, and the jury might well have believed that the others saw them. Some of them disclaimed knowledge of the destination of the water taxis and of the character of the Johanna Smith, but, as one of them said, "Everybody knows it was a gambling ship," and the jury was justified in rejecting these disclaimers also. There is some suggestion in the evidence of the defendants that these speedboats could be hired for trips to other places than the Johanna Smith, but no showing that any of them ever did go elsewhere, during a period of five months including November 29th, except on one occasion.

[8] Taking all the evidence together, we think it is sufficient to warrant the jury in finding that the Johanna Smith was a place kept for the purpose of gambling; that there was a conspiracy by the appellants Chase and Casey and the operators of that ship to prevail upon persons to visit it; that the other appellants, with knowledge of the nature and purposes of this conspiracy, aided and abetted their codefendants in carrying it out; and hence that all the appellants are equally responsible criminally for what was done in pursuance of it.

A police officer who went out to the Johanna Smith early in the evening of November 29th and remained there an hour and a half testified that 43 other passengers went out with him on the same speedboat, and that he saw 1,500 persons on the ship. Other officers were stationed in and around appellants' dock during the same period of time, and their testimony presents a picture of continual activity on the part of the various appellants in running boats, directing passengers, and supervising the loading and unloading of the boats. These officers also saw many people park cars in the parking place and enter the dock, about 100 cars being parked there at one time, and observed the entry of many persons to the dock and upon the boats. The jury could properly infer that a large number, if not all, of the 1,500 persons who were on the ship that evening, reached it on appellants' speedboats.

[9-11] It was necessary, of course, for the prosecution to show also that the appellants made use of some invitation or device and thereby prevailed upon some of these persons to visit the ship. An invitation, while it may be oral or written, need not be either; it may be given by any conduct which conveys the idea. The Neon sign maintained at the dock and above described constituted an invitation to all who read it to visit the Johanna Smith. The same is true of the pamphlets and the tickets. The sign faced the street, where it could be read by all who passed by or approached the dock. We think the combination of the speedboats, the dock, the sign, the free parking place, and the free tickets on the speedboats, which were given away in quantities of 10,000 every week, also constituted a device, the purpose of which was to prevail upon persons to visit the Johanna Smith. A device is defined as "a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice." Webster's Dictionary; 18 Corpus Juris, 1032. The combination to which we have just referred answers that description.

[12-15] There is no direct evidence showing what induced any person other than a police officer to visit the Johanna Smith on November 29th, but the fact regarding this matter, like any other, may be proved by circumstantial evidence. In order to establish an offense under section 318, it is not necessary to show that the invitation or device was the sole cause moving a person to visit one of the places therein described. If it was a moving cause of his visit, that is sufficient. In the ordinary case the jury is justified in inferring, from the fact that a person, after being invited to visit a place, does so, that he was by means of the invitation prevailed upon—that is, successfully urged—to make the visit, without having before them the information necessary for making an analytical investigation of his state of mind to ascertain whether some other cause also influenced him. Here there is proof, not only of invitation and device put forth by appellants, but also that so many persons came within their range and visited the ship as to support an inference that some of these persons, at least, were influenced by the invitation and device. Under the circumstances of the case, it was a question of fact for the jury whether the invitation and device of appellants were in whole or in part the causes moving any of the persons who visited the Johanna Smith on November 29th to do so, and with their decision upon it we cannot interfere.

The judgment and order appealed from are affirmed.

We concur: McLUCAS, P. J.; BISHOP, J.

Order Denying Rehearing.

PER CURIAM.

Appellants' petition for a rehearing after judgment in the above entitled case having been filed, and said petition having been duly considered, it is now ordered that said petition be denied.

We concur: SHAW, Acting P. J.; BISHOP, J.

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117 Cal.App.(Supp.) 763

PEOPLE v. ANDERSON et al.

Cr. A 601.

Appellate Department, Superior Court, Los Angeles County, California.

July 10, 1931.

1. Breach of the peace ⚷1.

"Breach of the peace" is substantially synonymous with "disturbance of the peace," and means violation of public tranquillity and order—offense of breaking or disturbing public peace by any riotous, forcible, or unlawful proceeding (Pen. Code, §§ 415, 416).

> The term "breach of the peace" is generic and includes all violations of public peace or order, or decorum; in other words, signifies offense of disturbing public peace or tranquillity enjoyed by citizens of a community; a disturbance of public tranquillity by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by any act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs peace and quiet of community.
>
> [Ed. Note.—For other definitions of "Breach of the Peace," see Words and Phrases.]

2. Unlawful assembly ⚷1.

Statute requiring certain officers to go among persons unlawfully assembled and command them to disperse *held* inapplicable to statute respecting disturbing public peace (Pen. Code, §§ 415, 416, 726).

3. Unlawful assembly ⚷1.

Police officers' going among persons assembled for purpose of disturbing peace and directing them severally to move on, or using similar words, is sufficient compliance with statute (Pen. Code, § 415).

4. Criminal law 🔑1159(4).

Appellate court cannot review jury's determination as to credibility of witnesses.

5. Unlawful assembly 🔑3.

Evidence warranted finding that one purpose of assembly in street was to resist by force attempt to arrest or disperse defendants and to disturb the peace (Pen. Code, § 415).

6. Unlawful assembly 🔑1.

Guilt of offense of assembling for purpose of disturbing peace and refusing to disperse did not depend on consummation of purpose of assembly (Pen. Code, § 415).

7. Unlawful assembly 🔑1.

Where crowd listening to speech overflowed into street more than halfway to street car tracks, it was duty of police to keep crowd moving (Pen. Code, § 415).

8. Criminal law 🔑304(5).

Courts could take judicial notice of fact that street where assembly of people occurred was business street along which there was much traffic.

9. Unlawful assembly 🔑1.

Where one speaking to people in street refuses to move on request though hearers are blocking traffic, he becomes at least an aider and abettor, and a principal in offense (Pen. Code, §§ 31, 415).

10. Arrest 🔑63(3).

Where speakers committed misdemeanor in presence of officers by refusing to move on, though hearers were blocking traffic, police officers could arrest defendants without warrant or previous declaration of intention to do so (Pen. Code, §§ 836, 841).

11. Unlawful assembly 🔑3.

In prosecution for unlawfully assembling to disturb public peace, evidence that police officers had received instructions from superiors not to permit meeting *held* properly excluded (Pen. Code, §§ 410, 416).

12. Unlawful assembly 🔑1.

That police officers prevented some people from going to place of assembly afforded no justification for breach of peace by defendants or for assembly for purpose of committing breach (Pen. Code, § 416).

On Rehearing.

13. Criminal law 🔑369(2).

Conspiracy may be proved on trial of any one of conspirators for crime committed in pursuance of it, although defendants are not charged with conspiracy (Pen. Code, § 182).

14. Unlawful assembly 🔑1.

In prosecution for assembling for purpose of disturbing peace, defendants' acts in resisting officer or violating ordinance regulating public speaking could be scrutinized to ascertain their purpose in assembling (Pen. Code, § 416).

15. Unlawful assembly 🔑1.

If part of purpose of assembling was to commit disturbance of peace, offense was complete though no such disturbance actually happened (Pen. Code, § 416).

16. Criminal law 🔑1172(6).

Court's reading to jury parts of statute inapplicable to case *held* not prejudicial, where there was no evidence to which such parts were applicable.

17. Criminal law 🔑1159(4).

Points depending on argument regarding credibility of certain evidence *held* not reviewable.

Appeal from Municipal Court of Los Angeles; H. Parker Wood, Judge.

Thorsten Anderson and others were convicted of unlawfully assembling for purpose of disturbing public peace and committing an unlawful act, and refusing to disperse on being commanded to do so by a public officer, and they appeal.

Affirmed.

Leo Gallagher and F. H. Moore, both of Los Angeles, for appellants.

Charles P. Johnson, City Pros., and Joe W. Matherly and John L. Bland, Deputy City Prosecutors, all of Los Angeles, for the People.

SHAW, J.

Three separate complaints were filed in the municipal court and tried together. Appeals by all the defendants from judgments of conviction entered against them are now presented to us on a single record. In each case the charge was that the defendants named in the complaint "did willfully and unlawfully assemble for the purpose of disturbing the public peace and committing an unlawful act, to-wit: a violation of 415 of the Penal Code, and did fail and refuse to disperse on being desired and commanded so to do by a public officer, to-wit: (naming a different officer in each case) a police officer of the City of Los Angeles," in violation of section 416 of the Penal Code.

Section 416, just mentioned, provides that, "if two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor." In order to show an offense under this section four facts must appear, viz.: (1) an assembly by two or more persons, (2) for the purpose of disturbing the public peace or committing an unlawful act, (3) that such persons be desired or commanded by a public officer to disperse, and (4) that they then fail to do so. The language of the section as to the first and fourth of these facts is so clear as to need no elucidation, but as to the second and third some discussion seems proper.

[1] The unlawful purpose charged in this case is to disturb the public peace and to violate section 415 of the Penal Code. The only part of section 415 that could possibly be material here is that providing for the punishment of "every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarrelling, challenging to fight or fighting," and this adds little to the phrase "disturbing the public peace" appearing in section 416. The expressions, "disturbance of the peace" and "breach of the peace," are substantially synonymous, and have a well-understood legal meaning. "Breach of the peace has been defined as a violation of the public tranquillity and order—the offense of breaking or disturbing the public peace by any riotous, forcible or unlawful proceeding." 4 Cal. Jur. 471, citing Black's Law Dict. "The term 'breach of the peace' is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquillity enjoyed by the citizens of a community; a disturbance of the public tranquillity by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by any act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community." 9 Corpus Juris. 386, citing cases. "A breach of the peace is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to breach the peace." 8 R. C. L. 284. "It is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community." People v. Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509; People v. Wallace, 85 App. Div. 170, 83 N. Y. S. 130, 133. The term "breach of the peace" includes all violations of the public peace and order, and may include disturbances in the nighttime by shouting alone, though the expressions used are innocent and harmless. State v. Christie, 97 Vt. 461, 123 A. 849, 34 A. L. R. 577.

The assembly described in section 416 appears to be included within the definition of an "unlawful assembly" stated in section 407 of the Penal Code. Consequently the offense defined by section 416 is similar to that punishable under section 409, which declares that "every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse" (with certain exceptions) is guilty of a misdemeanor. In People v. Sklar (1930) 292 P. 1068, we held that the words just quoted from section 409 refer to section 726 for a definition of a lawful warning. In this case the commands were similar to those considered in People v. Sklar, and would be insufficient to comply with section 726, under the rule declared in that case. It is therefore necessary to determine whether section 726 applies to the proceedings of officers acting under section 416.

[2, 3] There are several differences between section 416 on the one hand, and sections 409 and 726 on the other. Section 409 is manifestly incomplete in not stating what constitutes a lawful warning, and a reference to section 726 is necessary to supply the omission, that being the only section which could serve such purpose, while section 416 appears to be complete in itself, on this point, and needs no cross-reference. Section 416 confers power to order a dispersal of the assembly on "*any* public officer," but section 726 gives such power only to certain enumerated officers, who are far from constituting the entire class of "public officers," and therefore section 726 does not fully cover the situation provided for by section 416. For these reasons we conclude that section 726 is not applicable to the cases provided for in section 416. If police officers go among the persons assembled and direct them severally to "move on" or to leave the place where they are assembled, or use other similar words, this is in effect a command to disperse and is a sufficient compliance with this requirement of section 416, at least as to the persons to whom such commands are addressed.

While every assembly subject to the provisions of section 416 may also be dispersed under sections 409 and 726, and the construction we give to section 416 results in two modes of procedure for the dispersal thereof, yet there is discernible some ground for such a course of legislation. Under section 409, an assembly for the doing of a lawful act in a violent, boisterous, or tumultuous manner may be dispersed, and an offense is committed by every person not in the excepted classes, who remains at the place of assembly, after the proper warning, although he may not have participated in the assembly; whereas the assembly denounced in section 416 must be for an unlawful purpose and only the participators therein may be punished for failure to disperse on command. The Legislature may have thought that these differences justified a more summary mode of proceeding under section 416.

While we have before us three separate complaints, the events from which they arose were so connected that the jury might have considered them all part of a single transaction or at least the result of a single plan in which all the defendants participated. All these events happened about 2 p. m. on September 1, 1930, on public streets, and within a distance of about one block from the public square or park known as the Plaza. An organization holding Communist doctrines and known as the Trades Union Unity League had called what its members referred to as a "demonstration against unemployment," to be held at this time at the Plaza, and large crowds were gathered on all the streets in this vicinity, in places blocking the sidewalks and even the roadways. All of the defendants were members of the Trades Union Unity League and had come to the neighborhood of the Plaza either to speak or otherwise to assist in the "demonstration." The defendants all took the stand, and from their evidence, taken with the circumstances appearing from other testimony, the jury could properly infer that they were all acting in concert and with a common purpose in so assembling, that whatever was done by any one of them was in furtherance of their common design, and hence that all were equally responsible criminally for the acts of any of them. Looking at the case from this standpoint it appears that all the defendants were a part of one assembly, although the overt acts committed by them may be divided into three occurrences separated by a space of a city block and a time interval of a few minutes.

The defendant Olson was raised on the shoulders of defendants Snyder and Anderson, on Main street about 50 or 60 feet south of Arcadia street, and began to make a speech. Speaking in the streets is not prohibited there. Police officers who were near heard a crowd shouting, and as they approached saw Olson above the crowd, holding a placard, and heard him shouting. One of the police officers started toward him, and had to force his way through by pushing aside a ring of eight or ten people, who surrounded these three defendants, to get there. As he approached he heard Olson shout: "Don't let the police disperse us, don't let them arrest our speakers, fight for unemployment insurance, fight against unemployment." The police officers testified that the noise was so great they could not hear all that was said. As soon as the first police officer reached defendants, he told them to disperse; that they were disturbing the peace and blocking traffic. Olson refused to get down, but went on speaking and said the streets were public and he would speak there if he wanted to. Two other police officers came up, and the three pulled Olson down, in spite of much forcible resistance on the part of all three defendants, and the defendants were arrested. Defendant Anderson then threw in the air a handful of cards bearing the words, "Fight police brutality." While the arrest was being made the crowd was shouting, "Don't arrest our speakers."

The arrest of defendants Olson, Anderson, and Synder was witnessed by defendants Chambers and Yamaguchi. Shortly thereafter, around the corner but within a distance of 100 feet from the scene of that arrest, Chambers was held up on the shoulders of Yamaguchi and began to make a speech to the crowd on Arcadia street just east of Main street, at a place where speech making was prohibited by ordinance. He was "hollering in a loud manner" and saying, "Fellow workers and comrades, don't starve, fight," and also something about the release of Imperial Valley prisoners. Before he spoke further, both defendants were arrested. Chambers had a placard on which was printed, "Demand release of Imperial Valley prisoners" and Yamaguchi had a placard reading, "Vote Communist." A police officer told the defendants to go on, and they refused, whereupon they were arrested.

The defendant Reynor was raised on the shoulders of two other persons, near the corner of Arcadia and Los Angeles streets, at a place where speech making in the streets was prohibited, and began to speak to a crowd of about 65 people. She said rather loudly, "Fellow workers, don't run, fight," and, "Down with the police." The crowd had been moving on at the direction of the police, and she was trying to stop them. Officer Chambers three times told her and those with her to move on and not obstruct the sidewalk, and another officer told them to move on, but they refused; defendant Reynor saying, "This is our sidewalk and we can make speeches anywhere we want to."

[4-6] The evidence was conflicting, but the foregoing statement finds support in that part of it which, as shown by their verdict, the jury believed. We cannot review their determination as to its credibility. These facts are sufficient to warrant a finding that one of the purposes of the assembly in which the defendants participated was to resist by force any attempt to arrest or disperse them and to commit a disturbance of the peace, within the meaning we have already given that term. Some of the defendants went farther than others in executing this unlawful purpose, but

their guilt does not depend on the consummation of the purpose by all, or even by any, of them. The four facts necessary under section 416 were shown as to each defendant. People v. Wallace, supra, was a similar case, though the evidence against defendants was perhaps somewhat stronger than here, and a conviction was sustained under a statute providing for the punishment of one who "seriously disturbs or endangers the public peace."

[7-10] The conduct of defendants cannot be justified on the theory that they were merely resisting unlawful arrests. Two of the speech-making episodes occurred at places where such speaking was prohibited and the participators were for that reason subject to arrest. While speech making, per se, was not prohibited at the other place in question, yet, according to the testimony of the officers, when they approached the defendants there assembled, the crowd overflowed into the street more than halfway to the street car tracks and it would be hard for any one to move back and forth, and these defendants were told that they were blocking traffic, but refused to move or quit speaking. Under the circumstances here appearing, it was not only the right but the duty of the police to keep the crowd moving and the streets open for passage. People v. Wallace, supra. We may take judicial notice of the fact, which is not shown by the evidence, that Main street, where this occurred, is a business street along which there is much automobile and street car traffic. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 341, 208 P. 125; Katz v. Helbing, 205 Cal. 629, 635, 271 P. 1062, 62 A. L. R. 825. The primary purpose of a street is for passage, not for public meetings; and even where public speaking is not prohibited, standing, or congregating in the streets in such a manner as to block traffic is prohibited by city ordinances. While a speaker who is not himself obstructing traffic may not always be criminally responsible for such obstruction created by his hearers, yet when he refuses to move on request and insists on holding his meeting at a place where his hearers are blocking traffic, as in this case, he becomes at least an aider and abettor, and a principal in the offense. Penal Code, § 31. For such a misdemeanor committed in their presence the police officers could properly arrest defendants, without a warrant or a previous declaration of their intention to do so. Penal Code, §§ 836, 841; People v. Wolfgang, 192 Cal. 763, 221 P. 907.

Complaint is made by defendants of the action of the court in the matter of instructions, but little argument is made in support of it. We have examined the instructions given and refused and find no substantial error in regard thereto.

[11, 12] Defendants sought to prove that the police officers present at and near the Plaza had received instructions from their superiors not to permit the holding of the meeting above mentioned, which had been called to be held at the Plaza, but the offered evidence was excluded as immaterial. There was no error in these rulings. It was the duty of the police, regardless of such orders, to suppress unlawful assemblies. Penal Code, § 410. Perhaps the offered evidence might be regarded as corroborative of evidence given by defendants and some of their witnesses that police officers prevented them from going to the Plaza. But if this be accepted as a fact it affords no justification for a breach of the peace by defendants or for an assembly for the purpose of committing such a breach. And if we assume both that the defendants' original intention was to assemble at the Plaza and that they were prevented from doing so, yet we find sufficient evidence in the record to show that their intention as to the place of the assembly was quite flexible, that they were determined to make speeches at any available place, and that the above mentioned unlawful purpose entertained by them extended not alone to the Plaza, but to any place where speeches might be made.

The judgments are affirmed.

I concur: McLUCAS, P. J.

I concur, without giving assent, however, to that portion of the opinion holding that those making speeches to a crowd halfway to the car tracks were subject to arrest for blocking traffic: BISHOP, J.

On Rehearing.

SHAW, J.

[13] Appellants' petition for rehearing is for the most part based on the contention that they were not charged with the crime of conspiracy and hence the evidence tending to show that they entered into a conspiracy could not be considered by the jury or by this court. Under section 182 of the Penal Code, a conspiracy to commit any crime is an offense entirely separate from the crime which is the object of the conspiracy; and it is undoubtedly true that appellants, not having been charged with the crime of conspiracy, could not be convicted of it. But where several persons conspire or combine together to commit any crime, each is criminally responsible for the acts of his associates or confederates committed in furtherance of the common design, and such conspiracy may be proved on the trial of any of the conspirators for a crime committed in furtherance of it, although the defendants are not charged with conspiracy. People v. Brown, 59 Cal. 345, 352; People v. Holmes, 118 Cal. 444, 456, 50 P. 675; People v. Kauffman, 152 Cal. 331, 334, 92 P. 861; People v. Creeks, 170 Cal. 368, 374, 149 P. 821; People v. Ford, 25 Cal. App. 388, 397, 143 P. 1075; People v. Wilson, 76 Cal. App. 688, 694, 245 P. 781.

[14, 15] It is also true that appellants cannot be convicted of the offense here charged merely because the evidence may show them to be guilty of some other offense, such as resisting an officer, or violation of the ordinance regulating public speaking. But their acts in that respect may be scrutinized for the purpose of ascertaining their purpose in assembling; and if a part of that purpose was to commit a disturbance of the peace, the offense charged was complete even though no such disturbance actually occurred.

[16] The action of the trial court in reading to the jury parts of section 415 of the Penal Code other than those we held applicable to the case could not have prejudiced appellants, as there was no evidence to which such parts of the sections were applicable. People v. Rivera, 75 Cal. App. 222, 242 P. 506.

[17] Other points made in the petition depend on an argument as to the credibility of certain evidence, which is beyond our review.

The petition for a rehearing is denied.

I concur: BISHOP, J.

McLUCAS, J., being absent, does not participate in this order.

213 Cal. 30

MASON v. DEL VALLE et al.

L. A. 10993.

Supreme Court of California.
June 26, 1931.

1. Judgment 🔑**565.**

Judgment denying injunction without prejudice to plaintiff's maintenance of action for damages *held* not res judicata as against defendant's contention of prescription.

2. Judgment 🔑**540.**

Judgment is only real conclusion of law, and displaces all former statements in findings on subject.

3. Judgment 🔑**720.**

Only such issues become res judicata as are properly adjudicated in judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Suit by O. R. Mason against R. F. Del Valle and others. From the judgment, defendants appeal.

Affirmed.

Erwin P. Werner, City Atty., W. Turney Fox, Asst. City Atty., Jess E. Stephens, City Atty,. W. B. Mathews, Clarence S. Hill, Francis H. Lindley, and Kenneth K. Scott, Deputies City Atty., all of Los Angeles, for appellants.

R. M. Wiley, of Silver City, N. M., and Otto A. Gerth, of Los Angeles, for respondent.

PRESTON, J.

Proceeding instituted in 1928 to enjoin the use and maintenance of a 66-inch pipe line across property acquired in 1924 by plaintiff, and described as lot 45, tract 1336, city of Los Angeles. Defendants are the city itself and certain agents or agencies thereof. At least two special defenses were interposed: First, that a public use had theretofore intervened; and, second, that defendant city had acquired by prescription a right of way 25 feet in width across said property for the construction, maintenance, and use of said pipe line which had become part of the trunk line carrying a supply of water from Inyo county to said city for the use of its inhabitants. Defendants claimed that upon either or both grounds plaintiff must be denied injunctive relief.

The complaint prayed for no alternative relief in damages or otherwise. It stood exclusively upon the claim for an injunction. The answer prayed for no affirmative relief. The issue of injunction was therefore the sole issue before the court. Upon the trial the court denied the injunction and gave judgment for defendants, which judgment contained the following language: "Now, therefore, it is hereby ordered, adjudged and decreed that the injunction as prayed by plaintiff above named be and the same is hereby denied, for the reason that the detriment to be suffered by defendants would not be adequately balanced by the benefit to be enjoyed by plaintiff in the event that said injunction should be granted as prayed. And it is further ordered, adjudged and decreed that the denial of the said injunction as prayed be without prejudice to the maintenance by plaintiff of an action for damages, if any, occasioned by the trespass of the defendants and each of them through the maintenance and use by them and each of them of a sixty-six (66) inch pipe line in and across that portion of plaintiff's property described as follows: * * *"

[1-3] Defendants appealed from all of the judgment except, of course, that part thereof denying the injunction. Coupling the above-quoted provision of the judgment with certain rather ambiguous findings of fact and conclusions of law, appellants fear that the issue of prescription has reached the state of res adjudicata as against their contention, and accordingly they assert that the evidence shows without substantial conflict that a right of way for said pipe line was in fact acquired by precription in that the pipe line was completed in 1914, and has been continuously since then in use openly and notoriously under a claim of right for said purpose. We do not see any real ground for this fear on the part of appellants. Indeed, counsel for respondent himself concedes that no such adjudication has yet been made. The judgment is the only real conclusion of law, and displaces all former statements in the findings on the subject. Roberts v. Hall, 147 Cal. 434, 437, 82 P. 66.

Even if it be conceded that the judgment might have been broader under the findings of fact, it does not follow that such issues as were not determined by the judgment have become res adjudicata because of the language of the findings. The safe rule seems to be that only such issues have become res adjudicata as were properly adjudicated in the judgment. While appellants have not urged this contention, it seems to be sound and to be conceded by respondent and to dispose of the appeal, for the judgment does not purport to settle any issue save alone the issue of injunction based upon the ground of the intervention of a public use. The language of the judgment above quoted seems to be merely precautionary, to make certain that no adjudication has been made of the question of damages for an act founded originally at least in trespass. The action of the court as thus interpreted is not subject to the attack made upon it by appellants.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

EBERHARD et ux. v. PACIFIC SOUTHWEST LOAN & MORTGAGE CORPORATION. *

L. A. 12861.

Supreme Court of California.

June 23, 1931.

Rehearing Granted July 20, 1931.

Licenses ⚿18½.

Promissory note issued by private corporation evidencing loan made by individual creditor secured by mortgage on specific real estate *held* not "security" requiring permit for issuance and sale (St. 1917, pp. 674, 675, 679, § 2, subd. 6, and §§ 3, 12).

> St. 1917, p. 674, § 2, subd. 6, provides that word "security" includes all bonds, debentures, and evidences of indebtedness issued by any company, excepting therefrom bills of exchange and promissory notes not offered to public by drawer, maker, or underwriter thereof, and all mortgages and deeds of trust of property situated in state, executed to secure payment thereof.
>
> [Ed. Note.—For other definitions of "Security," see Words and Phrases.]

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Jules Eberhard and wife against Pacific Southwest Loan & Mortgage Corporation. From the judgment, defendant appeals. Affirmed.

Dudley Robinson, of Los Angeles (Harry C. Miller, of El Paso, Tex., of counsel), for appellant.

Bayard R. Rountree, of Los Angeles, for respondents.

RICHARDS, J.

This action was instituted for the foreclosure of a mortgage executed by the defendant to the National Loan Company of Los Angeles and duly assigned to plaintiffs, which mortgage had been given upon a particular parcel of land situate in the city of San Diego for the purpose of securing a promissory note in the sum of $1,000, payable to the National Loan Company of Los Angeles, and also duly assigned to plaintiffs. The complaint alleged the nonpayment of the principal and interest due upon said note. The defendant mortgagor appeared and answered, admitting practically all of the averments of the complaint, but pleading by way of a separate defense to said note and to the foreclosure of said mortgage that the note and mortgage constituted a security as defined by the Corporate Securities Act of California, and that no permit had ever been issued or granted by the corporation commissioner of the state of California for the issuance or sale of said promissory note and of the mortgage securing the same, and that by virtue of the provisions of section 12 of the Corporate Securities Act (St. 1917, p. 679) the note and mortgage were void. In amplification of this latter plea the defendant averred that the note and mortgage sued upon constituted one of a number of mortgage notes made and executed by appellant in favor of the National Loan Company of Los Angeles; that each of said mortgage notes was secured by an individual mortgage covering a separate and specific parcel of land; that each mortgage note and mortgage was in itself an individual and separate transaction, although the mortgagor and mortgagee were in each instance the same; that the National Loan Company of Los Angeles took these notes and mortgages from appellant for loans made in each individual case, and after acquiring the same sold and assigned them, without recourse, to various and divers persons who had the money to loan upon mortgage notes of the above character. The prayer of the defendant's answer was that said promissory note and mortgage be declared void, and that plaintiffs take nothing by said action. The provisions of the Corporate Securities Act (Stats. 1917, p. 673), as amended from time to time since the date of its passage, proceeds to define the various corporate acts and obligations to which its provisions have relation. By its title one of its declared purposes was "to prevent fraud in sale of securities." By subdivision 6 of section 2 (St. 1917, p. 674) thereof the word "security" includes "(b) All bonds, debentures, and evidences of indebtedness issued by any company; (c) * * * excepting therefrom the following: 1. Bills of exchange and promissory notes not offered to the public by the drawer, maker, or underwriter thereof, and all mortgages and deeds of trust of property situated in this state, executed to secure the payment thereof." By section 3 of said act (St. 1917, p. 675) it is provided that "no company shall sell, except upon a sale for a delinquent assessment * * * or offer for sale, negotiate for sale of, or take subscriptions for

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 9 P.2d 302.

any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Section 12 of the act (St. 1917, p. 679) provides that "every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by any company, with the authorization of the commissioner but not conforming in its provisions to the provisions, if any, which it is required by the permit of the commissioner to contain, shall be void."

It was in reliance upon the foregoing provisions of the Corporate Securities Act that the defendant made the averment in its answer above set forth. Upon the filing of the answer the plaintiffs interposed a demurrer thereto, alleging that the answer did not contain facts sufficient to constitute a defense for the reason that the mortgage note and mortgage described in the complaint were not securities within the meaning of the Corporate Securities Act as the term "security" is therein defined, and that, if included within the operation of the act, that portion of the act so defining the same was unconstitutional and void. Upon a full hearing and argument upon the demurrer by respective counsel the trial court sustained the demurrer to the appellant's answer, holding that the mortgage note and mortgage sought to be foreclosed in this action were not securities for which a permit of the corporation commissioner was required under the provisions of said act. The defendant declined to amend its answer, and the trial court proceeded to a hearing upon the complaint, and having had such hearing, and upon motion of the plaintiffs, proceeded to enter its judgment in favor of the plaintiff, sustaining the validity of said promissory note and mortgage and directing foreclosure. From the judgment thus entered the defendant has prosecuted this appeal.

The sole point presented by the appellant is that urged before the trial court to the effect that said note and mortgage were and are void as within the inhibitions of the Corporate Securities Act. We are of the opinion that there is no merit in this contention. The language of the Corporate Securities Act, as above set forth, would seem to be plain and unambiguous in its definition of what securities were intended to be brought within the purview of the act, and in its express provision excepting from such operation "bills of exchange and promissory notes not offered to the public by the drawer, maker or underwriter thereof, and all mortgages and deeds of trust of property situated in this state, executed to secure the payment thereof." The transaction set forth in the complaint is nothing more or other than that of a promissory note issued by a private corporation evidencing a loan, made by an individual creditor, secured by a mortgage upon specific real estate. The other transactions to which the defendant in its answer makes reference were of the same identical character, each pertaining to a specific loan of money from a private person, and each secured by a separate mortgage upon separate and specific property, and each in no wise connected with each other except in the fact that the parties to each transaction were the same. There is nothing contained in defendant's answer tending in the remotest degree to show that these separate and individual transactions were ever "offered to the public" in the sense in which that term is employed in the Corporate Securities Act. Nor is there anything contained in the record herein to indicate that the Legislature had such private and individual transactions in mind in the adoption of the Corporate Securities Act, or that such transactions were sought to be embraced within the provisions of the act designed "to prevent fraud in the sale of securities." The express exceptions embraced in the terms of the act as above set forth negative such an assumption, and we are fully satisfied that had the act not contained said exceptions it would have been unconstitutional and void as an unwarrantable interference with the rights of individuals in dealing with each other respecting their private transactions and private properties.

The appellant relies in support of his appeal upon the case of People v. Leach (Cal. App.) 290 P. 131. That was a criminal proceeding involving an alleged conspiracy between certain persons interested in the National Loan Company of Los Angeles and also in the Pacific Southwest Loan & Mortgage Corporation, and involving some of the transactions to which the defendant in its answer referred. The facts set forth in said proceeding are not before the court in the instant case, but, in so far as it was purported to hold that transactions of the character of that set forth in the complaint and admitted in the answer herein come within the purview of the Corporate Securities Act, the language and conclusion of that case touching that subject are hereby expressly disapproved.

We discover no error in the action of the trial court in upholding the validity of the promissory note which forms the subject of this action and in directing the foreclosure of the mortgage upon the defendant's specific property securing the same.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

213 Cal. 33

In re FARMERS' & MERCHANTS' BANK OF IMPERIAL.

L. A. 11630.

Supreme Court of California.

June 26, 1931.

Banks and banking ⚷80(10).

Order directing that no dividend be paid on irrigation district's deposits until further order *held* proper, in view of pendency of action to determine rights of parties in security given district.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Petition by the Imperial Irrigation District against Will C. Wood, as Superintendent of Banks for the State of California, for payment of dividend on petitioner's claim against the Farmers' & Merchants' Bank of Imperial, in liquidation. From an order dismissing an order to show cause, petitioner appeals.

Affirmed.

Superseding opinions of the District Court of Appeal in 292 P. 665, and 293 P. 176.

Chas. L. Childers and D. B. Roberts, both of El Centro, for appellant.

Albert A. Rosenshine, Elbert W. Davis and J. H. Hoffman, all of San Francisco, for respondent superintendent of banks.

PRESTON, J.

Treating the petition herein as one in mandate, the action of the court below in denying it seems clearly correct and its order is hereby affirmed.

We may do this without a discussion of the contention that the petition is but an effort to modify a previous appealable order that had become final; hence the present order denying the petition was not appealable. We may also dispose of the cause without a discussion as to whether the so-called bankruptcy rule or the so-called chancery rule obtains in this state in bank liquidation proceedings where dividends upon the claims of general and partially secured creditors of the bank are involved.

The underlying facts of the present controversy are as follows: On October 10, 1927, respondent Will C. Wood, then superintendent of banks for the state of California, closed the doors of Farmers' & Merchants' Bank of Imperial and took possession of its property and business under the provisions of section 136 of the Bank Act of the state of California (Deering's Gen. Laws 1923, Act 652). Said respondent at all times herein has been and now is proceeding to liquidate the affairs of said bank and is administering them for the benefit of depositors and creditors thereof

Petitioner and appellant, Imperial irrigation district, on the above-mentioned date, had on commercial deposit in said bank approximately $54,547.62 and its claim for that sum was regularly approved as a legitimate claim against said bank. Appellant, however, before making said deposit, had exacted from said bank, as security therefor, United States Liberty bonds of the par value of $50,000. After this controversy arose it appears that appellant collected said bonds and received on account thereof the sum of $51,062.50, which it still retains. When appellant's claim for the above amount of said deposit was approved, it was with notice that respondent denied the validity of said pledge of securities, with a demand for the surrender of the bonds or proceeds thereof to him. Appellant refused this demand, whereupon respondent instituted in the superior court of Imperial county an action to recover said assets from appellant, which action is still pending and undetermined. On April 28, 1928, respondent petitioned the superior court of said county for authority to pay a 15 per cent. dividend to depositors of said bank and with respect to the claims of this appellant he alleged the following: "That a claim was filed against the commercial department of said bank by Imperial Irrigation District, a corporation, for $54,547.62; that said claim has been allowed, but claimant is claiming certain security therefor, and an action to determine the rights of the parties is now pending; that your petitioner does not desire to pay any dividend upon said claim until after said action is determined."

The court, on said April 28, 1928, gave the order prayed for and, after declaring authority to pay the dividend, concluded as to appellant's claim, which was No. 433, with the following language: "Excepting only that no dividends be declared or paid upon the claim of Imperial Irrigation District claim No. 433 until further order of this court." This order was not appealed from and became final. On October 9, 1928, the present proceeding was instituted by appellant to compel the payment to it of the full 15 per cent. dividend on the whole of its claim. An order to show cause was granted, but on the hearing the order was discharged and the petition denied. This action is under review upon this appeal.

The action of the court in withholding payment to appellant of said dividend, upon the showing made, seems clearly to have been a wise use of its discretion. To apply the bankruptcy rule contended for by respondent would be to pay appellant a 15 per cent. dividend upon the balance due upon its claim after the proceeds of the security taken had been applied thereon but to apply the equity rule contended for by appellant would be to allow it a fifteen per cent. dividend upon the full original amount of its claim, regardless of collateral, except that it could in no case receive more than the full amount of its demand. Merrill v. National Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. Ed. 640.

If respondent should prevail in his contention, the question put forth in appellant's petition would become immaterial and moot, for appellant would in such case be but a general creditor; again, if respondent's position be sound, appellant would then have in its possession the sum of 51,000 odd dollars belonging to respondent and it would be manifestly improper to make a payment of a dividend to a party withholding funds belonging to the trust estate. On the other hand, if appellant should prevail in its contention as to the right to retain said securities or the proceeds thereof, the 15 per cent. dividend upon the entire claim of 54,000 odd dollars would yield a larger sum than the total amount of appellant's claim.

It is therefore clear that from every standpoint the issue in the action pending between the parties to settle the rights to said securities or the proceeds thereof is a material factor to be considered by the court in ruling upon the matter of payment of dividends. Houghton v. Superior Court, 187 Cal. 661, 203 P. 765. If, after a final determination of the pending cause, the question of application of the chancery as distinguished from the bankruptcy rule, should become important, it can be disposed of at that time; hence the above ruling.

We concur: SHENK, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

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213 Cal. 70

PEOPLE v. RANNEY.

Cr. 3422.

Supreme Court of California.

June 30, 1931.

1. Criminal law ⇨1166½(6).

Refusal to permit defendant's counsel to examine prospective jurors to determine whether defendant's previous conviction would prejudice them *held* reversible error when taken with errors in instruction.

2. Criminal law ⇨695½.

To secure evidence ruling, better practice is to ask questions and secure direct ruling, not to secure advance ruling whether question, if asked, would be proper.

3. Criminal law ⇨369(1).

Evidence of offenses other than charged, except in exceptional cases, is incompetent as proof of crime charged.

4. Jury ⇨33(2).

Accused is entitled to be tried by fair impartial jury free from bias or prejudice.

5. Criminal law ⇨806(1).
Larceny ⇨70(2).

Instruction twenty-one times telling jury to convict of grand theft if they found defendant "unlawfully" took money *held* erroneous (Pen. Code, § 511).

Instruction was erroneous because it did not define "unlawful" as requiring finding that the taking was felonious or otherwise criminal and because accused claimed money admittedly taken had been taken as commissions with authority of four or five directors of corporation, while theory of prosecution was that directors never made such promise, and that it would have been unlawful transaction had they done so, so that in effect jury were permitted to convict if accused merely had no legal right to take money, though acting in good faith and without criminal or felonious intent required by Pen. Code, § 511.

[Ed. Note.—For other definitions of "Unlawfully," see Words and Phrases.]

6. Larceny ⇨70(2).

"Unlawful," as used in instruction on grand theft, is not synonymous with "criminal."

[Ed. Note.—For other definitions of "Criminal" and "Unlawful," see Words and Phrases.]

7. Criminal law ⇨823(4).

Error in instruction authorizing conviction for grand theft if accused "unlawfully" took property involved *held* not cured by qualifying instruction (Pen. Code, § 511).

The qualifying instruction was practically in language of Pen. Code, § 511, and told jury that conversion of property does not constitute grand theft if done under bona fide claim of title, and to that extent was correct and directly applicable to facts, but such statement was nullified by further instructing that such provision would not excuse the unlawful retention of property to pay accused's demands against corporate owner, since latter statement was not appropriate to any theory of case and must have been misleading.

8. Criminal law ⇨1137(3).

Accused, whose requests to charge acquittal of grand theft if money was not unlawfully taken were refused, *held* not precluded from objecting to instructions to convict if he unlawfully took money on theory he requested such instructions.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

W. S. J. Ranney was convicted of grand theft, and he appeals.

Reversed.

Superseding opinion of District Court of Appeal in 293 P. 887.

Gumpert & Mazzera and Claude H. Hogan, all of Stockton, for appellant.

U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., and Guard C. Darrah, Dist. Atty., and Ward A. Hill, Asst. Dist. Atty., both of Stockton, for the People.

PER CURIAM.

A hearing was granted by this court in this case after decision by the District Court of Appeal, 293 P. 887, in order to give further consideration to some of the matters discussed therein. The facts of the case, so far as it is necessary to recount them on this appeal, are as follows:

The defendant was charged with 21 counts of grand theft, and with having been twice previously convicted of a felony. Upon defendant pleading not guilty to the various charges of grand theft, a trial by jury was had, resulting in a conviction on seven of the counts charged in the indictment, the jury being unable to agree on the remaining counts. From the judgment so entered and from the order denying his motion for a new trial, defendant prosecutes this appeal.

Defendant contends that the trial court committed two major errors sufficiently prejudicial to require a reversal of the judgment. In the first place, it is contended that defendant was improperly restricted by the trial court in his examination of prospective jurors in that the trial court prohibited defendant from asking prospective jurors certain questions as to whether the fact that defendant had been twice convicted of a felony would bias or prejudice them to the extent that they would be unable fairly to weigh the evidence given by the defendant, as provided by law in such cases, in their deliberation upon the case.

In the second place, it is contended that the trial court committed reversible error in that it instructed the jury that it should bring in a verdict of guilty, if it should find that defendant unlawfully took the property involved. Defendant contends that an unlawful taking is not necessarily a felonious taking sufficient to constitute the crime of grand theft. These contentions will be discussed in order.

[1, 2] In reference to the first contention, the record shows the following facts:

During the voir dire examination of the jury, counsel for the defendant asked a prospective juror whether he knew that the defendant had previously served two prison terms. The trial court sustained the district attorney's objection to the question. The question, standing alone, was undoubtedly objectionable, for the reason that, the defendant having admitted the prior convictions, the jury had no concern with them, except in so far as they might tend to impeach the defendant, if he should take the stand. There is nothing in the question to indicate what relevancy it had as to the juror's qualifications. Immediately thereafter, however, the following took place: Counsel for defendant explained to the court that the question was merely preliminary; that the defendant would take the stand in his own behalf; that he presumed the district attorney would bring out the fact of the prior convictions on cross-examination, for purposes of impeachment; that he desired to question the prospective jurors "as to whether or not they would regard an admission of those felonies as evidence in the case, and indulge in the presumption of guilt * * * that this is one of the most vital questions that has been propounded to the jury. * * * It is only to show the extent of his bias and prejudice"; that what he wanted to determine was whether any juror will be biased or prejudiced by reason of the fact that "the defendant had been twice previously convicted of felony." After a question by the court, counsel for the defendant again stated: "We are asking to ascertain whether or not the jury, by reason of an admission on the part of the defendant of serving these two prior terms, would indulge in the presumption of guilt by reason of that fact alone. We can readily understand that the outside layman might be influenced, might be induced even to the extent of arriving at a verdict in this case on the basis of a past, or past convictions, and we are entitled to go into that fact in order to determine whether or not they would." The court thereupon announced that the objection would be sustained. Counsel then asked if the court's ruling went "to the extent of prohibiting the defendant from questioning any or all of the jurors as to whether or not they would be influenced in their deliberations at all by a statement of admission of prior conviction of a felony." To this the court answered: "That is correct."

It is our opinion that the refusal of the trial court to permit counsel for defendant to thus examine the prospective jurors on this important question, involving their possible bias or prejudice, while, if standing alone, might not justify a reversal of the case, yet, when taken with the errors in the instructions hereafter mentioned, is sufficient, in the circumstances of this particular case, to constitute reversible error. In so holding, however, we do not approve the practice that is becoming increasingly prevalent in such cases of counsel, by stating the purpose for which a question will be asked, thus securing an advance ruling on whether such questions will be proper. The better practice is to ask the direct question and thus secure a direct ruling on it. The rulings of the trial court should not be made in colloquys between itself and counsel as to how it would rule if the specific question were propounded. The trial court should refuse thus to rule in advance as to whether a specific question would be proper, if asked, and counsel should not be satisfied with anything less than a direct ruling on the question. Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Columbia Investment Co. v. Alameda Land Co., 87 Or. 277, 168 P. 64, 440: Wigmore on Evidence (2d Ed.) 168, § 117. However, under the circumstances of this case, we do not feel justified in holding that counsel is now precluded from making the point because he failed to propound the specific question. We will, therefore, treat the matter as if the proper questions had been asked and objections had been sustained, as the record indicates that this would have been the trial court's ruling, had the questions been asked.

We are satisfied that the District Court of Appeal properly disposed of this question, and also the question as to the instructions involved. We therefore adopt as part of the opinion of this court the following portions of the opinion of the District Court of Appeal, Third Appellate District, written by Mr. Justice pro tem. Shields:

[3] "We think that this action of the court and this ruling was clearly erroneous. 'Nothing is better settled or more rational than that an indictment for one crime cannot be supported by proof of another.' People v. Carpenter, 136 Cal. 391, 68 P. 1027, 1028. It is not proper to show the defendant 'to have been guilty of some other offense, for the purpose of raising a presumption, either of law or fact, of his guilt in the case under consideration.' People v. Sears, 119 Cal. 267, 51 P. 325, 327. 'When a person is accused of crime, and placed upon trial, he cannot be required to defend himself against anything but the specific charge, and he cannot be compelled, under the rules of law to maintain the honesty and integrity of his entire life.' People v. Arlington, 123 Cal. 356, 55 P. 1003; 8 Cal. Jur. 58.

"Evidence of other offenses than the one charged, except in exceptional cases not involved here, is incompetent as proof of the charge upon which an accused is on trial. If it gets before the jury by suggestion, or in connection with evidence otherwise competent, it must be disregarded by the jury, and the court, upon request, should definitely so instruct them. Whether or not a prospective juror will be influenced by knowledge of any such previous offense, whether he will be governed by the rule of law which rigidly excludes such a consideration, and whether or not if chosen as a juror, he will obey an instruction by the court to dismiss from his mind all consideration of any separate and different offense of which he may have obtained knowledge in any way, except for purposes of impeachment, is a question of vital importance to an accused person in the circumstances of the defendant here.

[4] "He is entitled to be tried by a fair and impartial jury, wholly free from bias or prejudice. Defendant knew that the fact of his previous convictions would be brought to the attention of the jury if they did not already know of it. He intended to be, and later was, a witness in his own behalf. He had a right to expect that the prosecution would bring out the fact that he had been twice convicted of a felony for the purpose of impeaching him. The defense which he had planned, and later presented, was interwoven with this fact, and required its disclosure. He did not gratuitously introduce this fact to the jury's attention. There was no fact more fundamental to his defense than that he should select a jury which would not be biased by this fact, and regard it as evidence in the case from which they might find or presume his guilt of the charges upon which he was being tried. He had a right to inquire of the panel fully as to the existence of any such bias to enable him to secure his constitutional right of trial before a legally qualified jury."

(The opinion here cites and quotes at length from People v. Carmichael, 198 Cal. 534, 246 P. 62, and from People v. Hosier, 132 App. Div. 146, 116 N. Y. S. 911, affirmed 196 N. Y. 506, 89 N. E. 1107.)

[5, 6] "Other questions raised on this appeal relate to instructions given and refused. One instruction given by the court was erroneous, particularly so in the circumstances of this case. In it the jury was told: 'If the jury find to a moral certainty and beyond a reasonable doubt that the defendant W. S. J. Ranney did, at and in the County of San Joaquin, State of California, and on or about the 20th day of July, 1926, unlawfully take the property of the Harris Manufacturing Company * * * it will be your duty to bring in a verdict of guilty of grand theft, a felony, as charged and set out in the first count of the indictment on file herein; otherwise you should acquit him on said first count.' A like instruction was read in reference to each of the remaining twenty counts of the indictment. This instruction did not define unlawful; it did not instruct the jury that before they could convict the defendant

they must also have found that the 'taking' was felonious, or otherwise criminal. It made no reference to any distinction between what was criminally unlawful and civilly unlawful. Under the instruction they were to convict the defendant in either case.

"The jury were told twenty-one times by this instruction that if they found that the defendant unlawfully took the property involved that they should find him guilty of the crime charged. But there are many acts of 'taking' of property which are unlawful but are not criminal, and which would not justify a conviction of felony. Section 511 of the Penal Code illustrates this, wherein it provides that a certain appropriation of property is not criminal if made under a claim of title 'even though such claim is untenable,' in other words, 'unlawful.' The law is so stated in People v. Lapique, 120 Cal. 25, 52 P. 40. So in People v. Ephraim, 77 Cal. App. 29, 245 P. 769, 772, in a prosecution for embezzlement, the court say that 'it was incumbent upon the appellant to prove that she had appropriated the money openly and avowedly and under a claim made in good faith, but it was not necessary for her to prove that her claim was a valid one upon which she might recover in law.'

"Countless decisions might be cited to show that an act may be unlawful and not be penal. Words and Phrases, First, Second, and Third Series, Unlawful; 39 Cyc. 829. The word unlawful in connection with a contract for the use of a machine, does not mean a criminal use, but any use in violation of the contract. Cortelyou v. Charles Eneu Johnson Co. (C. C.) 138 F. 110. Unlawful in relation to the acts of a corporation may mean acts only ultra vires. Dunbar v. Am. Tel. & Tel. Co., 238 Ill. 456, 87 N. E. 521. Unlawful is not synonymous with criminal, 'To speak of an act as unlawful is not equivalent to saying it has been denounced as a crime. "Every criminal act is illegal or unlawful, but illegal or unlawful acts may not be criminal."' State v. Tinkler, 72 Kan. 262, 83 P. 830. So the use of the word 'unlawfully' in an instruction relative to embezzlement will not supply the place of the word feloniously or fraudulently. 'Many things are unlawfully done which are not crimes because the criminal intent is wanting.' State v. Cunningham, 154 Mo. 161, 55 S. W. 282, 287. When the broad meaning of the word 'unlawful' is thus understood, the error of an instruction which directs the jury to convict upon the mere finding that the defendant had committed an unlawful act, is very apparent.

"The instruction complained of here was particularly inappropriate to the facts of this case, which in the briefest way and according to the testimony of the defendant were these. Defendant was acting as manager of the Harris Manufacturing Company. He sold some $83,500 worth of preferred stock which at the time stood in the name of four of the directors of the company, the sale being made in the interest of and for the benefit of the company. These four directors individually promised and agreed to pay him for his services in selling the stock a commission of 15 per cent. which was to be paid out of the funds of the company, from time to time, as the finances of the company might permit. The four directors required, however, that the money was to be taken without the knowledge of the remaining director, a Mr. Henry. The sums taken as specified in each of the seven counts upon which he was convicted, as defendant testified, were part of this 15 per cent. commission which he had been so authorized to withdraw. Defendant relied upon this authority, as he claimed it to exist, to justify his admitted taking of the money. It was the theory of the prosecution that the four directors never made any such promise, and that it would have been an unlawful transaction had they done so. The real question before the jury in such a state of the evidence and in finding upon each of the counts in the indictment was as to whether or not the defendant fraudulently and with a felonious intent appropriated the money as charged in the respective counts. It will be readily seen that if the four directors promised the defendant the 15 per cent. commission and told him to take it as he did, even if they had no legal right to make such promise or to authorize such taking, if the defendant believed that they had, and acting upon such claimed authority, he took the money in good faith, he would clearly be committing no crime. But his taking would have just as clearly been 'unlawful'; and the jury were instructed to convict him if the taking were unlawful.

[7] "So stated, the error in the instruction is obvious. It is contended, however, that other instructions given in connection with the one now in question, supplied the deficiencies, and together with it, completed a fair presentation of the law. It is doubtful if any separate or detached instruction could be held to have cured the error in this instruction, given at the end of the charge, and twenty-one times repeated. It contains a definite direction, upon the finding of a certain fact, to find the defendant guilty. It is the rule that in the case of instructions which so direct a conviction, the instruction must state all of the conditions necessary to a legal conviction, which this instruction admittedly did not. But waiving these considerations, the qualifying instruction relied upon by the respondent is insufficient for that purpose. The greater portion of this latter instruction (page 1652, vol. 5, Reporter's transcript) is practically in the terms of section 511, Penal Code. By it the jury was told that if a person in converting property to his own use

does so under a bona fide claim of title thereto, he is not guilty of the crime of grand theft, although his claim of title was not good. Continuing, the court further instructed: 'If you find * * * that the defendant appropriated property owned by the Harris Manufacturing Company and by said company entrusted to said defendant, and the defendant laid claim to the property so appropriated, such claim of title, if preferred in good faith, is a sufficient defense, even though the claim is untenable.'

"So far this instruction is a correct statement of the law, and directly applicable to the facts of this case. It so far differs from the instruction in which the jury were told that if they found that the defendant 'unlawfully' took the sums mentioned in the various counts of the indictment, that they should convict him, as to tell them that even if his claim of title to the property 'was not good' or 'untenable,' if made in good faith, that they should not convict him. Whether or not this instruction so far supplied the deficiencies of the first instruction, and limited the forces of the specific direction to convict the defendant, if the jury found that he had 'unlawfully' taken the sums withheld, we do not have to decide, for reasons which we will briefly discuss. At the end of and concluding this instruction the court said: 'But this provision would not excuse the unlawful retention of the property of the Harris Manufacturing Company to offset or pay demands held against it by defendant.' This concluding part of the instruction should not have been given; there is no theory of the case to which it is appropriate. The prosecution contended that the defendant took the sums mentioned in the different counts of the indictment without any right or authority whatever. Defendant contended, not that he retained the money appropriated by him to pay any debt or claim which he had against the company, but that he took it as provided in the first portion of the above instruction, and as provided in section 511 of the Penal Code, under a claim of title to it, and in pursuance of a definite direction of four of the directors of the company, instructing him to do so.

"Ordinarily the giving of an irrelevant instruction is of no consequence in a case, and the giving of this portion of the instruction given here would not constitute error in itself. But in this case it could not fail to have misled the jury. There having been no theory of the case to which it was appropriate, the jury might quite properly have taken it as having been given as applicable to the facts of the case they were considering. So understood the jury were told, substantially, by the first portion of the instruction that if the defendant took the property under claim of right, and in good faith although unlawfully he should be excused, and in the second and concluding portion, that if he retained the property unlawfully, he should not be excused. Such an instruction so confused and apparently contradictory cannot be held to have explained and properly qualified the direct instruction first above mentioned, to convict the defendant if the jury found that he took the property in question unlawfully. Other instructions relied upon to supplement and qualify the instruction first above mentioned need not here be referred to. It is enough to say that in no portion of the charge was the jury told that the taking, or retention of the money mentioned in the indictment, must, in any aspect of the case, have been fraudulent or felonious before the defendant could have been convicted. State v. Cunningham, 154 Mo. 161, 55 S. W. 282."

While we approve the foregoing discussion, as applied to the facts of this case, we do not mean to hold that in every case such an instruction would constitute reversible error We have grave doubts as to whether, in a case where the defendant denied having taken the property, either unlawfully or feloniously, but, if the taking, if proved, would necessarily constitute a felonious taking, error could be predicated on such an instruction. But, in this case, as already pointed out, defendant's defense was that the taking was unlawful, but not felonious.

[8] Respondent contends that the defendant is precluded from claiming that the giving of the instructions complained of constituted error, for the reason that defendant offered 21 instructions in substantially the same form. Respondent relies on the well-settled rule that, where a defendant offers an instruction, he is precluded from basing error thereon. However, that rule has no application to the facts of this case, for the reason that the instructions offered by defendant were radically different from those given by the trial court. The instructions offered by the defendant were to the effect that, if the jury found that the money was not unlawfully taken, they should acquit the defendant. The instructions given, as already pointed out, were the converse of these instructions, namely, if the money was unlawfully taken, then the jury must find defendant guilty. The instructions offered by defendant, although not as apt as could be drawn, state a correct principle of law; the instructions as given, as already pointed out, under the facts of this case, state an erroneous principle of law. There is no merit in this contention.

The judgment and order appealed from are reversed.

213 Cal. 36

STATE BAR OF CALIFORNIA v. ROLLINSON.

S. F. 14096.

Supreme Court of California.
June 26, 1931.

1. Attorney and client 🔑53(1).

In proceeding to revoke attorney's license for making false affidavit when applying for admission, statements respecting attorney's character *held* relevant.

2. Attorney and client 🔑40.

Attorney's false affidavit, when applying for admission, regarding disbarment proceedings against him did not warrant revocation of license, where proceeding had been dismissed.

> The evidence disclosed that respondent's professional conduct during five years or more of practice in state had been without reproach, and that the disbarment proceeding commenced in another state had been commenced in bad faith and had been dismissed on motion of proponents thereof without a hearing upon the merits, before respondent's application for admission to practice law in state, and that he had been advised by judge of court in which such charges had been pending that dismissal of charges without hearing amounted in substance to such withdrawal thereof as would place respondent in position as though such charges had never been made, and that he would therefore be justified in not referring to same in his affidavit.

Petition by the State Bar of California to revoke the license of Charles W. Rollinson as an attorney at law. The license was revoked by the District Court of Appeal (291 P. 431), and respondent applies to the Supreme Court for a review of the decision of the District Court of Appeal.

Revocation of license set aside, and respondent restored to right to practice law.

Overton, Lyman & Plumb, of Los Angeles, for petitioner.

Dana R. Weller, Chas. J. Orbison, and Don S. Irwin, all of Los Angeles, for respondent.

PER CURIAM.

Charles W. Rollinson applied to this court for a review of the decision (291 P. 431) of the District Court of Appeal in and for the Second Appellate District, Division 1, revoking his license to practice law in the state of California. The proceeding before said tribunal was initiated by the State Bar of California through the presentation on or about April 28, 1930, of a petition on behalf of that body praying that the license of said Rollinson, the petitioner herein, to practice law in this state, which license had been issued to him by said court on or about March 23, 1925, be revoked. In support of its petition the State Bar alleged as the only ground for the granting thereof that the license of said petitioner then issued had been fraudulently procured through the concealment by Rollinson of the fact that some years previously, while he was a practitioner before the bar of the state of Indiana, proceedings for his disbarment had been instituted in that state, which proceedings had been subsequently dismissed. Upon a hearing upon said petition a stipulation as to the facts had been entered into between the representatives of the State Bar and the petitioner herein and which stipulation formed the basis for the order made by said tribunal revoking the license of this petitioner and which, relying in the main upon said stipulated facts, he herein seeks to have reviewed. The facts as therein agreed to may be more briefly stated as follows:

On or about May 29, 1912, Charles W. Rollinson, after a course of training pursued in the schools and colleges of Indiana, of which state he was a native, and after an examination, was duly and regularly admitted to practice as an attorney and counselor at law in all the courts of said state. He then engaged and continued in the practice of the law therein successfully and creditably for the period of about ten years. While thus engaged and on or about June 15, 1922, a disbarment proceeding was instituted against him in the circuit court of Marion county, Ind., said proceeding being entitled "State of Indiana on Relation of Lewis A. Coleman v. Charles W. Rollinson." An examination of the record herein shows that the complaint in said proceeding consisted in the main of generalities and was unverified. The defendant in due course appeared to oppose said petition, to demand that the same be made specific and be verified. Shortly thereafter the venue of said proceeding was changed from the circuit court of Marion county to the circuit court of Hancock county, state of Indiana. Subsequent to the change of venue and on or about May 16, 1923, an amended complaint was filed in said proceeding, consisting of specific averments of alleged unethical practices on the part of said defendant, who thereafter through a firm of attorneys filed in said latter court a motion to strike out certain of the specifications embraced in said amended complaint upon specified grounds, which motion was granted by said court. Thereafter the plaintiff in said proceeding filed two supplemental complaints, to which the defendant responded with specific denials and with motions to strike out certain portions of the further specifications thereof. Thereafter and without any further hearing upon the merits of said pending proceeding, the plaintiff and relator therein on or about October 4, 1924, filed in open court a written motion to dismiss said proceeding, which motion was informally granted upon said date. In the meantime and while said proceeding was still pending, Charles W. Rollinson began to contemplate removal to California, and carried his purpose in that direction into effect by coming to California and establishing his residence here and in the city of Los Angeles during the month in the year 1924 preceding the dismissal of said disbarment proceeding. Having done so, on or about December 24, 1924, he presented an application to the District Court of Appeal of the State of California in and for the Second Appellate District, Division 1, for admission to practice law in the state of California. He accompanied his application with an affidavit in the form and substance required by the rules of said court, in which affidavit he proceeded to set forth the facts with relation to his citizenship of the United States and of his admission to practice law in the state of Indiana and of the fact that he had been engaged in actual practice in said state for a period of at least three years within the period of seven years immediately preceding the filing of his said application. He further set forth therein and in the printed form thereof the statement:

"3. That so far as affiant is aware no charges of unprofessional conduct or proceedings for disbarment have been filed against said affiant before any bar association, court or other body.

"4. That affiant has never been charged before any court with crime amounting to either felony or misdemeanor involving moral turpitude."

The matter of the admission of said Rollinson was referred to the state board of bar examiners for examination as to his moral character and other qualifications, and being favorably reported thereon by that body, the said District Court of Appeal on March 23, 1925, made and entered its order admitting said Rollinson to practice as an attorney and counselor at law in and before all of the courts of the state of California upon his taking the oath of office and signing the roll of attorneys, which being done the license herein sought to be revoked was duly issued to said petitioner and he then and thenceforward entered upon and for a period of more than five years thereafter engaged in the practice of the law in this state. So far as the record discloses, his professional conduct during the five years or more of the practice of his profession in this state has been without reproach. During the year 1930, however, it was brought to the attention of the State Bar of California, which had in the meantime become organized as a public corporation, that the above-quoted statements in the affidavit filed by said Rollinson upon his application for admission to practice law in this state were untrue, and that in point of fact the proceeding for his disbarment as an attorney and counselor at law in the state of Indiana above referred to had been for some time pending in said state and had been dismissed on motion of the plaintiff in said proceeding only a short while before the presentation of the petitioner's application for admission to practice law in this state and the filing of his aforesaid affidavit containing said statements in support thereof. Thereupon the petition on behalf of the State Bar of California was presented to the District Court of Appeal, seeking the revocation of Rollinson's license to practice law in this state upon the ground above set forth. A hearing was had upon said petition during which the stipulation as to the aforesaid facts was entered into and also in the course of which the respondent therein and the petitioner herein offered certain affidavits relating to his attempted disbarment in the state of Indiana and the issue thereof, and also presented a considerable body of certificates and statements made on his behalf by the judges of the several courts before which he had practiced in the state of Indiana, and of various attorneys and counselors at law in said state who had been his fellow practitioners therein, who testified to his high character and professional standing as a member of the Indiana bar during the years of his professional activities in said state.

The stipulation as to the facts shows with respect to the aforesaid offer that counsel for the State Bar stipulated that the matters offered by Rollinson might be used, produced, and received in evidence before said tribunal in lieu of depositions or the testimony of witnesses, subject only to objection on the ground of immateriality. The record herein discloses that the District Court of Appeal in deciding the cause upheld said objection upon the ground that the court was not called upon at that stage of the proceeding to pass upon the respondent's moral qualification. After an extended hearing before said District Court of Appeal, during which the petitioner was examined at length and with much of detail by counsel representing the State Bar, the matter was finally submitted to that tribunal, which thereafter made and filed its decision revoking the license of the petitioner to practice law, and which decision is sought to be reviewed in this proceeding.

[1, 2] Upon the threshold of this inquiry it may be stated as our conclusion from a review of the record that the District Court of Appeal was in error in its refusal to consider the evidence which the respondent of-

fered to produce in the form above set forth as bearing upon the question whether the respondent's action in failing to state in the affidavit accompanying his original application for admission to practice law in this state the fact that prior thereto proceedings for his disbarment had been instituted in the state of Indiana, and which proceedings, without a hearing upon the merits thereof, had been dismissed by the parties instituting the same, constituted such a willful fraud on the part of the petitioner as would suffice to justify the revocation of his license to practice law in this state. That the statements above set forth in the affidavit of this petitioner were untrue has been freely admitted by him both in the hearing before the District Court of Appeal and in the hearing before this court. But as an excuse for his action or inaction in the foregoing regard petitioner, by the aforesaid body of offered evidence, proposed to show not only that his career as a practitioner for a period of ten years or more in the Indiana courts had been honorable and not subject to reproach or criticism, but also proposed to show that the proceedings for his disbarment instituted in the year 1922 before the courts of that state were not begun in good faith and were not founded on facts susceptible of proof affecting his moral character or professional integrity. He also proposed to show that when the proponents thereof had voluntarily moved the dismissal of said charges without a hearing upon the merits thereof and prior to the application of said respondent for admission to practice law in this state, he believed in good faith that the dismissal of said charges had practically wiped out the record of their unfounded presentation, and that when, after he had received from the board of bar examiners of the state of California the form of affidavit which he was required by its rules and regulations to sign, he took said affidavit to the judge of the Indiana court in which the aforesaid charges had been pending, and wherein the dismissal thereof had been filed, and took counsel with said judge as to whether it was necessary for him to disclose in said affidavit the fact that such charges had been made and had been dismissed. He was thereupon advised by said judge that the dismissal of the charges without a hearing by the parties preferring the same amounted in substance and effect to such a withdrawal thereof as would place him in the position as though such charges had never been made, and that he would therefore be justified in not referring to the same in said affidavit; and that acting upon said advice he had signed the affidavit in the form in which it was verified, and returned it to the board of bar examiners of this state. That the judge of whom he took counsel was in error in giving such advice, and that the act of the respondent in signing and verifying the affidavit in the form in which it appears was an error—and it may be said a serious error—is not to be denied. But the aforesaid showing which the respondent offered to make furnished not only evidence of a material character to the effect that the respondent during his years of professional practice in the state of Indiana had justified the reputation which he enjoyed for professional uprightness and integrity, and that the years during which he had practiced law in this state after his admission in California and prior to the institution of the proceeding for the revocation of his license had been marked with a like degree of integrity, but also tended strongly to show that the mistaken concealment by him of the fact that said proceedings had been instituted against him in the state of his former residence and practice and that the same, without a hearing thereon, had been dismissed by the parties instituting the same prior to his removal to California and his application for admission here was not made or contemplated by him with the fraudulent intent of misleading the board of bar examiners or the District Court of Appeal or of preventing an investigation by the latter as to the fact and merits of said former disbarment proceeding. It would have been charitable, we think, on the part of the latter tribunal to assume that the action of the respondent Rollinson in the foregoing regard was not characterized by a fraudulent purpose inconsistent with his past record for both personal and professional uprightness and integrity, but was rather the offspring of a natural hesitation on his part to make known a fact which, if exploited, even though ultimately found baseless, might operate injuriously upon him in seeking to establish himself in his profession and practice in the state into which as a stranger he had come, in an effort to escape from whatever conflicts and enmities might have attended his previous career, and also in seeking to here establish himself in a new and unblemished personal and professional career. The period of five years of honorable and apparently successful practice intervening between the date of his admission to practice in this state and the inception of the aforesaid proceedings in the appellate tribunal, which he here seeks to have reviewed, plead strongly, and we believe convincingly, in favor of the adoption of this charitable view with relation to the petitioner's misstep in signing said affidavit and to his absence of bad faith and intentional fraud in so doing. After a careful review of the entire record herein we are of the opinion that the mere fact that petitioner made such misstep in the circumstances attending his making of the same would not be sufficient in itself to constitute an adequate basis for the finding of a fraudulent intent on his part which would suffice to uphold the order of the appellate tribunal revoking his license to practice law in this state; nor do we think that the authorities to which we have been cited by the proponents in support of said order sustain their position in that regard, since an examination of the cases to which we have been thus cited shows that in each instance the concealment indulged in related to earlier proceedings in other jurisdictions which had resulted in disbarments and did not relate to instances like the present, wherein such earlier and undisclosed proceedings had been instituted in apparent bad faith and had been terminated by the voluntary withdrawal thereof on the part of those instituting the same. It is our conclusion that the petitioner has made a sufficient showing before this court to justify a reversal of the order heretofore made revoking his license to practice law in this state.

It is ordered that the revocation of Charles W. Rollinson's said license be and the same is hereby set aside, and that he be and he is hereby restored to his right to practice law as an attorney and counselor in the state of California conferred upon him by his said license so to do.

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213 Cal. 107

DINSMORE v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE et al.

S. F. 13480.

Supreme Court of California.

July 2, 1931.

1. Automobiles 🔑245(10).

Jitney bus driver's negligence in violating ordinance and statute by not sounding horn and by clearing street car by only two feet *held* for jury (St. 1923, p. 560, § 134).

Evidence tended to show also that street car in question had stopped when bus driver attempted to pass; that injured child, after alighting from street car, had taken one or two steps, but was not seen by driver until only a foot in front of bus; and that five or six seconds elapsed between time child alighted and moment of impact.

2. Automobiles 🔑245(74).

Eight year old boy's contributory negligence in alighting from street car and taking several steps without looking *held* for jury (St. 1923, p. 560, § 134).

Child's contributory negligence was a jury question, for it could not be said as matter of law that child acted unreasonably in taking several steps without looking for automobiles because he expected drivers to follow their usual practice by either stopping or clearing street car by safe distance, especially in view of California Vehicle Act, § 134 (St. 1923, p. 560), regulating speed of motor vehicles and distance by which they must clear stationary street car.

3. Negligence 🔑85(2).

Eight year old child cannot be held to same standard of care as mature person.

4. Insurance 🔑668(3).

That insurer, pursuant to ordinance, issued policy specifying kind of automobile, and that driver was operating such kind when accident occurred, presented jury question respecting insurer's liability.

The facts mentioned were sufficient to make out a prima facie case for jury, since, if jitney bus involved in accident was not in fact the specific automobile covered by policy, insurer had opportunity to make such defense.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Allen Dinsmore, a minor, by Veido Allen Dinsmore, as his guardian ad litem, against the California Highway Indemnity Exchange, an association, and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Edmund J. Holl, of San Francisco, for appellant.

B. P. Gibbs, of Los Angeles, and Barry J. Colding and Theodore Hale, both of San Francisco, for respondents.

PER CURIAM.

This is an action for personal injuries brought by plaintiff, a minor, by his guardian ad litem. Plaintiff, who is a boy of 8, was riding on a street car bound east on Haight street in San Francisco. The car reached Buchanan street, and plaintiff got off the front end, where he was struck by a jitney bus driven by defendant John Volz. He sustained severe injuries, and sued the driver of the bus and California Highway Indemnity Exchange, which had issued to the driver an insurance policy under the provisions of an ordinance of the city and county of San Francisco which made the insurer liable for damages resulting from negligent operation of the bus, up to the sum of $5,000. At the conclusion of the trial, the court, upon motion of counsel for defendants, directed the jury to bring in a verdict for the defendants. Disregarding that order, the jury returned a verdict for plaintiff in the sum of $3,000, which verdict was set aside by the court.

The grounds upon which the verdict was directed are, first, that the evidence fails to show any negligence on the part of the driver; second, that contributory negligence of the plaintiff is shown; and, third, that the evidence does not establish the liability of the defendant insurance company for an injury arising out of the operation of the particular automobile involved herein.

[1] With respect to the first ground, the record shows that the driver of the bus had nine passengers in the car. Two were in the front seat with him, and another was seated on the front door. The driver knew the street very well, saw the street car, and was proceeding to pass it. His machine cleared the street car by only two feet, in violation of the provisions of the California Vehicle Act, § 134. He gave no signal or warning, contrary to a city ordinance requiring the sounding of bell or horn by a jitney bus approaching an intersection. The testimony varies as to the speed at which he was going, the estimates ranging from 10 to 20 miles an hour, which latter figure would constitute another violation of section 134 of the California Vehicle Act. The evidence is also conflicting as to whether the car had stopped when he attempted to pass it, but several witnesses testified that it had. It appears that plaintiff had taken one or two steps after alighting from the car, but the driver testified that he did not see him until he was only a foot in front of the automobile. Several witnesses testified that 5 or 6 seconds elapsed between the time plaintiff alighted and the moment of the impact. We need go no further into this phase of the case. There is obviously sufficient evidence indicative of negligence upon which to go to the jury. See Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125.

The alleged contributory negligence of plaintiff is derived from his own testimony that he did not look in the direction from which the automobile was coming. The following excerpts from the cross-examination cover the point:

"Q. Now, before you got off the street car, Allen, did you look to see if there was any automobile coming? A. No, when I—usually when I get off the street car the machines stop in back.

"Q. You did not look on this special morning? A. No.

"Q. Do you ever look? A. Yes, when I get off in the back I look but when I get off in the front I don't look.

"Q. Why do you look, Allen? A. Because sometimes I want to jump off and sometimes I just get off and walk to the corner."

He was also asked whether he knew that, if he jumped off and an automobile was coming, the automobile would hit him, and he answered that he did; and he also testified that he was walking fast, or running.

[2, 3] It may well be questioned whether this evidence would be sufficient to hold an adult guilty of contributory negligence as a matter of law; but we are satisfied that it can have no such result in the case of a child of 8 years, who cannot be held to the same standard of care as a mature person. See Patania v. Yellow-Checker Cab Co., 102 Cal. App. 600, 283 P. 295. In effect, plaintiff testified that he alighted from the front end of a stationary street car, took several steps, and did not look for automobiles because he expected drivers to follow their usual practice (and, he might have added, the law) by either stopping or clearing the car by sufficient space to permit passengers to alight in safety. We see nothing unreasonable in this notion in the mind of a young child. It was one which was apparently based upon his experiences in the past. He testified, also, on direct examination: "I got off at Buchanan and then I waited until—for my sister to get off, and as I started to go over the machine came along and I didn't know what to do, I got all excited, and the machine came along and hit me." Placed in a position of extreme peril by the conduct of the driver of the jitney bus, it is no wonder that he could think of nothing to do. We are satisfied that this issue, like the other, should have gone to the jury. The case of Moeller v. Packard, 86 Cal. App. 459, 261 P. 315, relied upon by defendants as controlling here, is not in point at all. In that case a child ran from the side of a highway directly into the path of an automobile. This action was characterized by the court as reckless and not excusable even in the case of a child of 8½ years. Counsel for defendants say in their brief: "Except that the child left the side of the highway instead of a street car to plunge into a place of peril, the circumstances of the Moeller Case are strikingly similar to those of the case at bar. * * *" But the similarity begins and ends with the fact that the plaintiff in each case was in a position of peril. The essential distinguishing fact is that, in the Moeller Case, the peril was caused by the child's unreasonable conduct, without any unlawful act by the driver, while here the peril was caused by the unlawful conduct of the driver in attempting to pass a street car, stationary or nearly so, without sounding his horn and without giving it proper clearance.

[4] The final question is whether the court was correct in its view that plaintiff had failed to show liability on the part of defendant California Highway Indemnity Exchange. Counsel for plaintiff first read into the record that portion of the city ordinance requiring a bond or insurance policy of jitney drivers, which provides that the liability thereon shall inure to the benefit of persons injured by the operation of the automobile. He then offered in evidence a policy of automobile liability in-

surance issued by defendant company to defendant Volz, covering a Buick automobile. A rider on the policy, of subsequent date, provided for coverage of a Cadillac machine. A later indorsement stated that the policy was amended to cover the Cadillac instead of the Buick. The defendant Volz testified that he was driving a Cadillac at the time of the accident, and that this was the automobile which had been substituted for the Buick he had driven when he first applied for his jitney license. This was sufficient to make out a prima facie case against the defendant company. If the car was not, in fact, the one covered by the policy, defendants had abundant opportunity to make this defense. They did not; and there was enough evidence for the jury to draw the inference that the policy covered the car which caused the injury. This question, too, should have gone to the jury.

There being no merit in any of the grounds upon which the court directed a verdict for defendants, it follows that the judgment must be, and it is hereby, reversed.

213 Cal. 120

WARE v. McPHERSON et al.

S. F. 14200.

Supreme Court of California.

July 13, 1931.

1. New trial ⚷74.

Amount of damages for personal injuries is committed first to sound discretion of jury, and next to discretion of trial judge.

2. Appeal and error ⚷1004(1).

Verdict will not be disturbed unless so excessive as to suggest, at first blush, passion, prejudice, or corruption on part of jury.

3. Damages ⚷132(7).

$3,000 to boy for injuries to knee, cuts on leg, cut over eye, enlarged nose, and other injuries, *held* not excessive.

> Evidence disclosed that after being hit by automobile plaintiff was carried about 50 feet on fender; that he suffered severe shock, was injured at knee, and in addition had several cuts on both legs, large cut over one eye, with chest, arm, and nose hurting, and nose, arm and eye bleeding; that his knee continued to bother him and hampered his athletic work while at high school until he gave it up; and that his nose had a hump on it which could be rectified only by operation; and that since accident plaintiff had been in run-down and nervous condition, under normal weight, subject to headaches, and inability to concentrate at work.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Howard F. Ware, by Arthur F. Ware, his guardian ad litem, against Charles McPherson and wife, and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Superseding opinion in 293 P. 636.

Treadwell, Van Fleet & Laughlin, of San Francisco, for appellants.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

PRESTON, J.

This case is appealed upon the sole ground that the verdict of the jury, awarding plaintiff $3,000 damages for personal injuries received when hit by defendants' automobile, is excessive. Defendants claim that the trial court erred in denying their motion for new trial based upon the above contention, and ask for a reversal of the judgment entered upon said verdict, or for reduction of the award.

[1, 2] It is elementary that in such cases as this the amount of damages is committed first to the sound discretion of the jury and next to the discretion of the trial judge in ruling upon the motion for new trial. Upon appeal, their decision cannot be set aside unless the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment; that is, unless the verdict is so plainly and outrageously excessive as to suggest, at the first blush, passion, or prejudice or corruption on the part of the jury. Martin v. Shea, 182 Cal. 130, 139, 187 P. 23; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 715, 106 P. 83; Lahti v. McMenamin, 204 Cal. 415, 419, 268 P. 644.

[3] We are of the opinion that, in fixing the verdict in this case, the jury were moved by none of the above elements, and that their discretion and that of the trial court was properly exercised under the conflicting evidence adduced upon the subject of the extent and permanence of plaintiff's injuries. We shall, therefore, close this discussion with a brief statement of plaintiff's injuries and the severity of his experience as shown by some of the competent evidence which appears in the record in sufficient support of the action of judge and jury.

There is evidence that after being hit plaintiff was carried some fifty or more feet on

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the fender of defendants' car going at a speed approximately at thirty to thirty-five miles an hour; that he suffered a severe shock, was injured at the knee, and in addition had several cuts on both legs, a large cut over one eye, with chest, arm and nose hurting, and the nose, arm and eye bleeding. Plaintiff testified that he still felt the effect of these injuries; that his knee continued to and still did bother him to some extent; that it hampered his athletic work while in high school until he finally gave it up. He further testified that although his nose was straight before the accident it is now enlarged and has a hump on it, and he has difficulty at times in breathing. This difficulty, a physician testified, was due to a healed fracture and deviated septum, which could be rectified only by an operation. Medical testimony was also admitted to corroborate plaintiff's claim that he had since the accident been in a run-down and nervous condition, under normal weight, subject to headaches and inability to concentrate at his work.

It is not necessary to review the record further. As above stated, we find ample evidence which, if believed by the jury, constituted sufficient support for the verdict rendered.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

213 Cal. 26

YATES v. EUDEMILLER et ux.

L. A. 11146.

Supreme Court of California.

June 26, 1931.

Rehearing Denied July 23, 1931.

1. **Exchange of property** ⚷8(4).

As respects exchange contract, evidence warranted conclusion that defendants did not rely upon representations of plaintiff regarding building and locality.

2. **Appeal and error** ⚷1058(3).

In specific performance suit, excluding evidence regarding representations made to defendants *held* not prejudicial, where defendants did not rely upon representations, and evidence rejected was brought out on other examination of witnesses.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Suit by J. I. Yates against Charles Eudemiller and wife. From a judgment for plaintiff, defendants appeal.

Affirmed.

William C. Bartlett, Lucas F. Smith, and Hulme, Hastings & Bartlett, all of Los Angeles (Stanley C. Howell, of Los Angeles, of counsel), for appellants.

Arthur A. Weber, and J. C. Dunn, both of Santa Monica, for respondent.

PRESTON, J.

This action to compel specific performance of an agreement for the exchange of certain real properties located in Santa Monica and Venice, Cal., pursuant to written agreement of the parties dated October 20, 1927, was tried by the court without a jury.

Plaintiff, ready at all times to perform, duly tendered a deed to defendants, which they refused to accept and they likewise refused to convey to plaintiff in conformity with said contract. The agreement of exchange consisted of a writing subscribed by defendants, stating that they desired to exchange their described property for that of plaintiff, and appointing D. A. Fearon as agent to secure an acceptance of the proposition, followed by a written acceptance thereof by plaintiff, agreeing to convey his said property to defendant Beatrice Eudemiller.

Upon the claim of defendants that alleged uncertainties in the writing rendered it incapable of specific performance, the court found that said writing was a complete instrument and agreement by which the parties were bound; that it became effective as to all of the parties on said 20th day of October, 1927, and was delivered to said D. A. Fearon by them without reservation, limitation, or condition; and that said Fearon was at all times the agent for all of said parties.

Upon conflicting evidence as to the respective values of the properties to be exchanged, the court found that the said contract of exchange was fair, just, reasonable, and equitable; that the considerations between the parties from one to the other were just and adequate; that said contract was mutual between the parties, and the value to each of the several properties intended to be exchanged was equal; further that the exchange was prevented solely by defendants' neglect and refusal to perform, as above set forth.

Defendants, seeking to justify their nonperformance, relied upon three fraudulent representations alleged to have been made by plaintiff, to wit: That the building to be conveyed by him was a brick building with brick walls, covering the entire lot, whereas the back of the building was found to be stucco with a small yard in the rear, and that there were no colored persons within three blocks of said property, whereas colored persons were seen eating in the building next door. In this behalf, the court found that it was not true that plaintiff so represented to defendants; that on the contrary, plaintiff acted in good faith and defendants did not rely upon any representations made by him.

From the above findings, the court concluded that the case was a proper one for an order of specific performance, and judgment was entered accordingly decreeing that the exchange be consummated and that plaintiff recover costs. Defendants have appealed.

[1] Several of the contentions urged upon appeal are already disposed of by the above recital. There is competent evidence in abundance to support the findings and judgment, showing a complete and effective agreement of exchange executed by these parties, through their joint agent, with a sufficient tender of performance by respondent, refused by appellants. The evidence also thoroughly supports the conclusion that the properties sought to be exchanged were about of an equal value, and that no reliance was placed by appellants upon the fraudulent or any representations of respondent or said agent.

[2] We shall now discuss the effect of certain erroneous rulings made by the trial court in sustaining respondent's objections to the admission of evidence relating to alleged representations made to appellants, without the presence of respondent, by said agent upon the ground that the agent was acting for both parties with their knowledge. Respondent, in effect, concedes that the objections were improperly sustained by the trial court, but argues that the error was not prejudicial, and with this position we are in accord.

We do not desire to go into the evidence at length. It is sufficient to say that the testimony of appellant Beatrice Eudemiller contained practically all of the material evidence of the character contained in the rejected offer of proof. Prior to execution of said agreement and about the middle of October, agent Fearon took said appellant down to visit the property. There was no concealment of the evident fact that the rear walls of the building were of stucco or cement construction, and that the building did not entirely cover the lot. In fact, said appellant stated that plaintiff told her it was not built solid, and that agent Fearon told her there were negroes two or three blocks away. Her testimony, relating this visit, included an account of the statements made by plaintiff and said Fearon which might have constituted representations made to her concerning the property. A witness, one Southall, who was working in a store located in said building, testified that said appellant not only visited it on October 10th, but that he also saw her in his store on October 13th or 14th, accompanied by her son. Said appellant further testified that shortly after signing the agreement, when she again visited the property with her son and saw colored people eating in the building next door, she returned to agent Fearon's office, and told him about it, whereupon he "put his hand to his head" and said, "Well, golly, I did not know that" and told her that she would have to fight it out with respondent.

In short, as ample and abundant support for the findings and judgment appears in the record, and as it is plain therefrom that appellants did not rely to their hurt upon any of the alleged representations made by respondent or said agent, and as, for all practical purposes, the evidence rejected by the court was brought out upon other examination of witnesses, we must hold that appellants' cause was not prejudiced in any manner whatsoever by the errors of which they complain. All of appellants' contentions have received consideration and have been found to be without merit, further discussion being unnecessary.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

DEXTER v. PIERSON et al. *

L. A. 11934.

Supreme Court of California.
June 27, 1931.

Rehearing Granted July 27, 1931.

1. Contracts ⚷129(5).

Provision in mortgage for unlimited waiver of statute of limitations *held* valid, although no such waiver appeared on note (Code Civ. Proc. § 337).

2. Limitation of actions ⚷197(1).

Evidence established that mortgagor's grantee taking subject to mortgage had notice of waiver of statute of limitations by mortgagor, hence was bound thereby (Code Civ. Proc. § 337).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Louie S. Dexter against George M. Pierson and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Edwin J. Miller and Wier Casady, both of Los Angeles, and Robert M. Cordill, of Omaha, Neb., for appellant.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 4 P.2d 932.

J. Irving McKenna and Geo. M. Pierson, both of Los Angeles, for respondent Catherine A. McKenna.

PER CURIAM.

This action was brought for the purpose of foreclosing two mortgages given to secure an indebtedness of $1,600, evidenced by two promissory notes, each in the sum of $800. Each note is dated May 28, 1915, and matures one year from date. The property mortgaged consists of a considerable number of parcels of real property. At the time these mortgages were duly and properly recorded, they constituted a first lien on the real property involved. The notes and mortgages were signed by George M. and Rena W. Pierson, who were acting as trustees for one H. Percival Oates. Oates paid the interest on the notes until January of 1917, since which time no payments of principal or interest have been paid. The mortgagee was one Edward Russek.

Since 1917, the property involved has been in constant litigation. Edward Russek, the mortgagee, died in that year, and his estate, including the two notes and the two mortgages here involved, was distributed to his widow, Rosario Russek. The decree of distribution misdescribed the notes, the description being corrected by order of court, dated December 6, 1927.

In 1920, Ester Russek, as purported assignee, commenced an action to foreclose the mortgages, which action resulted in a judgment of foreclosure. This action was subsequently dismissed in September of 1924.

In April of 1924, Ester and Rosario Russek transferred the notes and mortgages to Louie S. Dexter, the plaintiff and appellant herein, and gave as evidence of the transfer a quitclaim deed to the property. This quitclaim deed was reformed by order of court, dated October 14, 1927, so as to constitute a formal assignment of the notes and mortgages.

In March of 1924, the Piersons, the original mortgagors, conveyed all the real property covered by the two mortgages to L. and Roy Lockwood. Catherine A. McKenna, respondent herein, subsequently secured the Lockwood title to the property.

Louie Dexter, after securing the quitclaim deed mentioned above, started a quiet title action against the Lockwoods and others, but subsequently dismissed as to the Lockwoods. Catherine A. McKenna intervened in that action and took a default judgment against Dexter. This default judgment was subsequently set aside by order of court.

In July of 1926, Dexter commenced this present foreclosure action, naming the Piersons, Oates, Catherine A. McKenna, and others as defendants. The complaint sets forth two causes of action, one on each note and mortgage, and in each cause of action it is specifically pleaded that defendants have waived the bar of the statute of limitations. On various motions and on two trials of this action, five different trial judges have passed on the question as to whether the action is barred by the statute of limitations; three judges ruled that it was not barred, and two that it was. Judgment was finally entered in favor of defendants, principally on the theory that the action was barred. From the judgment so entered appellant has prosecuted this appeal. From an examination of the briefs filed in this case, it appears that neither counsel has shown the diligence in the preparation of the briefs nor the regard for the rules of court expected of counsel in causes pending in this court. In the interests of justice, however, we will consider the merits of the appeal.

The only question worthy of discussion presented is whether or not the statute of limitations has been waived by these defendants. In each mortgage appears the following clause: "* * * The pleading of the statute of limitations as a defense to any demand secured by this mortgage is hereby waived. * * *"

[1, 2] The debt, evidenced by the promissory note, is obviously the "demand" referred to, and, in reference to such "demand," the mortgagor has expressly waived the statute. The fact that no such waiver appears on the face of the note is immaterial. The situation is simply one by which the mortgagor, by a separate writing, has waived the statute of limitations (Code Civil Proc. § 337) in reference to any action based on the note or mortgage. From the facts of the case, it clearly appears that the grantee of the mortgagor had notice of the waiver of the statute by her predecessor in title. It is obvious that, if the waiver is binding against the mortgagor, it is likewise binding on all those who take the property subject to the mortgage and with knowledge thereof. The only question involved, therefore, is whether this waiver, being unlimited as to time, is a binding and enforceable waiver. Although there is a great conflict of authority in other states as to the effect of such unlimited waiver (37 Cor. Jur. 722, section 41 et seq.), the law in this state has been finally settled by the case of Brownrigg v. De Frees, 196 Cal. 534, 238 P. 714. In that case, this court, after a complete review of the authorities, held a waiver for 99 years was valid. In McGee v. Jones, 79 Cal. App. 403, 249 P. 544, on the authority of the DeFrees Case, supra, the District Court of Appeal held an unlimited waiver valid. In Hammell v. Atkinson, 79 Cal. App. 708, 250 P. 1117, the very point now being discussed was decided. In that case, the waiver was to be found in a mortgage, and was in exactly the same words as the waiver here relied on.

The court held that the waiver was valid, and that the statute of limitations was no defense to an action to foreclose.

On the authority of the above cases, the judgment appealed from is reversed.

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213 Cal. 13

WASHINGTON LUMBER & MILLWORK CO. v. McGUIRE.

L. A. 10484.

Supreme Court of California.

June 23, 1931.

1. Payment 🔑16(1).

Where notes were not accepted in lieu of cash payment, there was no "payment" of debt.

[Ed. Note.—For other definitions of "Payment," see Words and Phrases.]

2. Estoppel 🔑75.

Ordinarily owner clothing another with apparent title and indicia of ownership is estopped, as against innocent purchaser for value, to deny he intended to transfer title (Civ. Code, § 1142).

3. Chattel mortgages 🔑6.

One taking title to automobile from conditional buyer to secure loan, giving back conditional sale contract, at most acquired only lien (Civ. Code, § 2924).

4. Fraudulent conveyances 🔑132(1).

Conditional buyer's purported sale of automobile unaccompanied by any change of possession and intended only as security *held* void as against seller's creditors (Civ. Code, §§ 2924, 3440).

5. Fraudulent conveyances 🔑135.

Statute providing that sale of personalty without change of possession is void as against seller's creditors *held* not repealed in part by implication by subsequently enacted statute relating to sale of motor vehicles (Civ. Code, § 3440; Deering's Gen. Laws Supp. 1929, Act 5128, § 45).

6. Statutes 🔑158.

Repeals by implication are not favored.

7. Statutes 🔑159.

There must be irreconcilable conflict between two statutes before later will be deemed to have repealed earlier.

8. Fraud 🔑3.

Case of actionable deceit may be based on negligence as well as on willful misrepresentation (Civ. Code, § 1710).

9. Liens 🔑7.

One taking title from conditional buyer as security for loan and registering transfer *held* entitled to equitable lien, as against original conditional seller who gave conditional buyer indicia of title (Civ. Code, § 1710).

In Bank.

Appeal from Superior Court, Santa Barbara County; T. A. Norton, Judge.

Replevin action by Washington Lumber & Millwork Company against George M. McGuire, in which defendant cross-complained. Judgment for defendant on his cross-complaint, and plaintiff appeals.

Reversed, with directions.

Superseding opinion of District Court of Appeal in 291 P. 458.

Coleman E. Stewart, of Santa Barbara, for appellant.

W. P. Butcher, Jr., of Santa Barbara, for respondent.

LANGDON, J.

This is an appeal from a judgment of the superior court restoring possession of a truck and giving damages for its detention to the defendant herein on his cross-complaint. Plaintiff was originally the registered owner of the machine. Some time in 1925 it entered into a contract of conditional sale with G. H. Hubbard, who paid part of the purchase price and executed promissory notes for the balance. At this time, also, plaintiff indorsed and transferred the certificate of ownership to Hubbard, and the latter thereafter caused a new certificate to be issued, in his own name. Plaintiff later discovered its error, and attempted to correct it by communicating with the motor vehicle department. Before this could be done, however, Hubbard approached defendant, seeking a loan of some money, and defendant agreed to advance it with the truck as security. Nothing appears in the record to indicate that defendant knew of plaintiff's interest. But defendant refused to take a chattel mortgage. Instead he insisted that title be first transferred to him following which he would give Hubbard back a conditional sale contract. This was done on July 3, 1926. Defendant took the indorsed certificate of ownership from Hubbard and registered it in his own name with the department, and then executed the conditional sale contract for the same amount for which he had purported to buy the car. During the period of the negotiations the truck was in Hubbard's yard, and it never left his possession, nor was his use of it interrupted in any respect.

Hubbard defaulted in his payments to plaintiff. The latter repossessed it by stealth;

Hubbard retook it by force; and eventually, after considerable strife among the parties, defendant secured it, and plaintiff brought suit to recover it. Defendant cross-complained, and the trial court gave judgment in his favor for possession of the truck or its value, set at $1,000, and for damages for its detention in the sum of $2,880.

[1] The trial court apparently based its judgment on one of two theories: First, that plaintiff, by indorsing and transferring to Hubbard the certificate of ownership, clothed the latter with the indicia of title, and was consequently estopped to deny that title as against third parties who acted in reliance upon it; and second, that in accepting promissory notes for the balance of the purchase price, plaintiff caused actual title to pass to the buyer.

The second theory may be readily disposed of. The evidence sufficiently shows that the notes were not accepted in lieu of cash payment; and the rule is well settled that the taking of a promissory note does not constitute payment of a debt, so as to discharge it, unless the parties so agree at the time. Western Fuel Co. v. Sanford G. Lewald Co., 190 Cal. 25, 210 P. 419; Merchants' National Bank v. Bentel, 166 Cal. 473, 137 P. 25; First Nat. Bank v. Corcoran, 105 Cal. App. 116, 286 P. 1105. Plaintiff did not, therefore, part with title to the car by accepting the notes.

[2] The more important question relates to the effect of the indorsement and delivery of the certificate of ownership. Through this act plaintiff made it possible for Hubbard to deceive innocent parties by his apparent ownership, and plaintiff would normally be estopped to deny that it had intended to transfer title to Hubbard. The doctrine of estoppel in such cases is expressly stated in section 1142 of the Civil Code, and has been frequently applied in this and other states. See Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067; Democrat-Herald Publishing Co. v. Pettit, 94 Cal. App. 724, 271 P. 910; Pacific Finance Corporation v. Hendley, 103 Cal. App. 335, 284 P. 736; 15 Cal. L. Rev. 505; Ballantine, Purchase for Value and Estoppel, 6 Minn. L. Rev. 87. The court found, upon sufficient evidence, that defendant had no knowledge of plaintiff's actual ownership under the original conditional sale contract, and this finding places defendant in the position of an innocent party. Hence Hubbard had the power to give a good title to the machine to defendant.

[3, 4] But the transaction between Hubbard and defendant had no such result. In the first place, it was clearly intended to secure the loan, and therefore, notwithstanding the apparent transfer of title, gave defendant at most a lien upon the property. Cal. Civ. Code, § 2924; Commercial Securities Corporation v. Lindsay Mercantile Company, 92 Cal. App. 91, 267 P. 766; Bonestell v. Automotive Finance Corporation, 69 Cal. App. 719, 232 P. 734; Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674; Arena v. Bank of Italy, 194 Cal. 195, 228 P. 441. But it did not operate to transfer the title for another reason; it was a purported sale from Hubbard to defendant, unaccompanied by any actual change of possession as required by section 3440 of the Civil Code. Defendant testified: "I identified the truck by putting my hand on it." This is obviously not a compliance with the statute. There must be "an immediate delivery" followed by "an actual and continued change of possession." Cal. Civ. Code, § 3440; see Sequeira v. Collins, 153 Cal. 426, 95 P. 876; Pfunder v. Goodwin, 83 Cal. App. 551, 257 P. 119. Defendant, therefore, did not take title from Hubbard; the purported sale was intended only as security, and also was void as against creditors of the seller because of the failure to transfer possession. The title remained in plaintiff throughout all of the transactions.

[5-7] To escape from the above conclusion, defendant advances another proposition of some importance, which we now proceed to consider. It is, briefly stated, that section 3440 of the Civil Code does not apply to the transfer of a motor vehicle, because the California Vehicle Act, passed subsequent to section 3440, provides an exclusive and complete means of transferring such property. This question has not as yet received the consideration of the courts of this state, although it was assumed in one case without discussion that the section did apply. Fletcher v. Commercial Discount Co., 103 Cal. App. 656, 284 P. 990. The section is mentioned also in Samuels v. Barnet, 79 Cal. App. 529, 250 P. 405, but in that case there had been no compliance with the terms of the California Vehicle Act. The problem is, therefore, to be solved upon a consideration of the content and purposes of the two statutes, although, as will appear, there are several cases dealing with analogous situations which indicate what the rule should be.

Defendant's contention is, in effect, that the provisions of section 3440, in so far as they apply to motor vehicles, were repealed by implication upon the enactment of section 45 of the California Vehicle Act (Deering's Gen. Laws Supp. 1929, Act 5128). Section 3440 in terms covers "every transfer of personal property" with certain enumerated exceptions. It is a commonplace observation that repeals by implication are not favored, and that there must be an irreconcilable conflict between two statutes before the later will be deemed to have repealed the earlier. Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896; 23 Cal. Jur. 694, § 84. The two statutes which we are examining are not irreconcilable. Section 45 of the Vehicle Act, after stating the manner in which the certificate of ownership shall be indorsed and sent to the division of motor vehicles for registration, goes on to provide: "(e) Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have been passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

The meaning of this language is quite plain: The formalities specified in the act cannot be disregarded, and no other formalities will operate to pass the title to a motor vehicle. But it does not follow that the formalities required by the act were intended to do away with all statutory requirements on sales of personal property generally. In other words, because these formalities are essential to the transfer of title is no ground for concluding that they are exclusive of all other restrictive provisions. To say, as the section does, that one requirement cannot be disregarded, is not at all the same as to say that all others may be.

An examination of the language of section 3440 leads to the same conclusion. That statute makes express exceptions to its terms, e. g., in the cases of choses in action and ships or cargoes at sea or in a foreign port, and where the person making the transfer does not have possession or control of the property at the time. It has also been held that an exception is implied in the case of growing crops, which are, of course, physically incapable of manual delivery. Rosenberg Bros. v. Ross, 6 Cal. App. 755, 93 P. 284. Under these circumstances the fact that the Legislature has made no express exception in the case of motor vehicles cannot be ignored; and, of course, there is nothing in the nature of a motor vehicle which would make change of possession impossible or difficult.

Still further support for this conclusion may be found in the provisions of the Civil Code and California Vehicle Act with respect to chattel mortgages. Section 2957 of the Civil Code provides, in substance, that a mortgage of personal property is void against creditors of the mortgagor and subsequent purchasers and incumbrancers in good faith and for value unless accompanied by an affidavit of good faith, and unless acknowledged and recorded; and section 2959 requires recordation in the county where the mortgagor resides, and in the county where the property is situated or to which it is removed. In Ruggles v. Cannedy, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L. R. A. 371, the court declared that the recordation required by these sections in the case of chattel mortgages was the equivalent of the change of possession required by section 3440 in the case of all other transfers either of title or lien. See, also, Hopper v. Keys, 152 Cal. 488, 92 P. 1017. The chattel mortgage sections have been recently applied to motor vehicles. Kahriman v. Fitzgerald, 85 Cal. App. 180, 259 P. 90. The Legislature has, in fact, recognized this condition by a subsequent enactment. Instead of enacting, as it should have done if defendant's contention were correct, that a chattel mortgage of a motor vehicle could be made merely by indorsement, delivery, and registration of the certificate of ownership, it provided that no chattel mortgage of a motor vehicle would be valid, except between the parties thereto, unless the mortgagee were registered with the division as the legal owner. California Vehicle Act, § 45¼ (Deering's Gen. Laws, 1929 Supp., Act 5128, p. 3441). The meaning of this amendment, considered in connection with the Civil Code sections, is that registration with the division is essential, but is not exclusive of all other statutory requirements. It is still necessary that the parties execute a proper chattel mortgage, with its affidavit of good faith; and that this mortgage be recorded in the county where the mortgagor resides and where the property is. These statutory protections to creditors and purchasers are not superseded but supplemented by the requirement of registration with the division. If this be true of a chattel mortgage, it must also be true of transactions covered by section 3440, for, as already pointed out, the theory of our legislation in this connection is that the change of possession required by section 3440 is the equivalent of recordation as required by the chattel mortgage sections. Ruggles v. Cannedy, supra; see 17 Cal. L. Rev. 50.

It must be concluded, therefore, that whatever reasons of policy or practical expediency might be advanced in favor of defendant's proposition the Legislature has given no indication of an intention to exclude the transfer of motor vehicles from the provisions of section 3440, and, without such an indication, we must hold the section applicable to them.

[8, 9] The result is that defendant never gained title to the property and plaintiff never lost title to it. But a final question remains: Should the defendant lose all of his investment by reason of his failure to protect his security? He might, of course, have taken a chattel mortgage, which, if in proper form, recorded and accompanied by the registration of the certificate of ownership, would have given him a valid lien upon the property. He did not do this. But the record shows that he did do what he thought was the equivalent; he did register the transfer with the motor vehicle department. His conduct was in good faith throughout the transaction; there was no attempt by him to keep his interest secret; it was at all times ascertainable by inquiry at the department, and, presumably, by inspection of the copy of the certificate required by

law to be kept in the machine. His failure to record a chattel mortgage, or transfer possession of the property, would be a circumstance which would make his rights inferior to ordinary creditors of Hubbard. But is plaintiff in the same position as other creditors? To our minds there is a decided and material difference between its position and that of other innocent third parties. It was its original negligent act which permitted Hubbard to appear as the owner of the car, and which constituted the inducement for defendant to lend money to Hubbard. That representation, relied upon by defendant to his subsequent damage, would seem to present a case of actionable deceit, which in this and many other states may be based upon negligent as well as willful misrepresentation. See Civ. Code, § 1710; 12 Cal. Jur. 745, § 26; Ultramares Corporation v. Touche, 255 N. Y. 170, 174 N. E. 441; 26 Ill. L. Rev. 49.

In addition to such a right of action in tort for negligent misrepresentation, defendant has another means by which his investment may be protected. The contract and, indeed, the entire transaction between Hubbard and defendant was believed by them to convey a security title to defendant. By reason of their failure to comply fully with the technical statutory provisions, the contemplated title did not materialize, but, between the parties and others who are not innocent third parties, an equitable lien should arise in favor of defendant to secure the money lent. The requirements of such a lien are fully met here. "* * * If the intent appear to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows." 3 Pomeroy Equity Jurisprudence 2968, § 1237; see Nau v. Santa Ana Sugar Co., 79 Cal. App. 685, 250 P. 705. There is nothing inequitable in this result, for plaintiff is not an innocent party, and the lien of defendant is measured by the extent of the loss actually suffered by him, a loss which was caused by the plaintiff's own act.

It follows that plaintiff still has title to the truck; but that defendant has a lien upon it for the amount of his loan together with interest thereon. The judgment is therefore reversed, with directions to the trial court to ascertain said sum due, and to take any further evidence and permit such further or amended pleadings as may be necessary to enable it to render judgment in accordance with the conclusions reached herein; and it is further ordered that neither party shall recover costs.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

213 Cal. 111

MERTENS v. BERENDSEN.

S. F. 14164.

Supreme Court of California.

July 2, 1931.

1. Vendor and purchaser 🔑130(1).

In absence of special express requirement of perfect title, it is sufficient if title be marketable.

2. Vendor and purchaser 🔑130(2).

"Marketable title" generally is one free from reasonable doubt.

[Ed. Note.—For other definitions of "Marketable Title," see Words and Phrases.]

3. Vendor and purchaser 🔑130(9).

Encroachment of building along frontage of 35 feet tapering from 2 inches to ⅞ inch *held* not to render title unmarketable.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. A. Allen, Judge.

Action by M. J. Mertens against John C. Berendsen. Judgment for defendant, and plaintiff appeals.

Affirmed.

Superseding 292 P. 1005.

Walter H. Robinson, of San Francisco, for appellant.

Thos. R. White, of San Francisco, and Chas. W. White, of Hayward, for respondent.

LANGDON, J.

This is an action by a purchaser to rescind a contract for the sale of real estate. The plaintiff entered into a written agreement to purchase from the defendant a lot and three-story concrete building on the northeast corner of Kearny and California streets in San Francisco, for the sum of $150,000. A deposit of $1,000 was paid at the time the agreement was signed. The said agreement provided that the purchaser had "seven days in which to report any defects in either title or survey." Within the specified time plaintiff gave notice of rescission and demanded the return of his first payment, claiming that the property encroached upon the street, and that the title was consequently defective. Upon the refusal of the defendant vendor to return the deposit, this action was brought.

There is no dispute about the fact of the encroachment, and the evidence sustains the court's finding in that regard, which reads as follows: "That * * * the building on said premises encroached on property belonging to the city and county of San Francisco for a length along the California street frontage of at least 35 feet and to the extent of two inches on the westerly end, tapering to an encroachment of seven-eighths of an inch to the easterly end. * * * That said encroachment consists only of the marble veneer at base of buildings and a slight overlap of the concrete behind the marble." The record contains uncontradicted evidence that the overlap could be eliminated at a cost of $200.

[1-3] The question presented by these facts is, of course, whether the encroachment renders the title of the vendor defective. In the absence of a special express requirement of, e. g., a "perfect" title, it is sufficient if the title be *marketable*; and a "marketable title" has been defined generally as one free from reasonable doubt. The case of Kenefick v. Schumaker, 64 Ind. App. 552, 116 N. E. 319, fully discusses the meaning and implications of the term. The court there said (64 Ind. App. 552, 116 N. E. 319, page 323): "Such a title must be free from reasonable doubt, and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. It must be so far free from defects as to enable the holder, not only to retain the land, but possess it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value. But a mere suspicion against the title or a speculative possibility that a defect in it might appear in the future cannot be said to render a title unmarketable. It is not required to be free from mere shadows or possibilities, but from probabilities. Moral, not mathematical, certainty that the title is good is all that is required." See, to the same effect, Zelman v. Kaufherr, 76 N. J. Eq. 52, 73 A. 1048; Liberty Oil Co. v. Condon Nat. Bank (C. C. A.) 291 F. 293; and see, also, in general, Howe v. Coates, 97 Minn. 385, 107 N. W. 397, 4 L. R. A. (N. S.) 1170, 114 Am. St. Rep. 723; note, 38 L. R. A. (N. S.) 1.

The effect of encroachments upon the marketability of title is a problem which does not appear to have been directly presented in any California case, but it has received the attention of the courts of other states, and in particular of the state of New York. In this latter jurisdiction a most curious line of decisions may be noticed. The earlier cases, such as Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371, and Broadbelt v. Loew, 15 App. Div. 343, 44 N. Y. S. 159, held that even a substantial encroachment on the public street did not affect marketability, on the ground that there was no likelihood of interference by the city authorities. These cases were subsequently overruled or disregarded because of a change in municipal policy, which is discussed in Acme Realty Co. v. Schinasi, 215 N. Y. 495, 109 N. E. 577, L. R. A. 1916A, 1176. The court there speaks of the increasing density of population and the spread of business districts, and then says (215 N. Y. 495, 109 N. E. 577, 579): "It is familiar recent history that these changed conditions have led to the compulsory removal of building encroachments from areas, streets, and blocks where they had always before been permitted. When the late Mr. Justice Patterson wrote the opinion in the Case of Broadbelt, there was nothing to indicate that there would ever be a radical departure from the early policy of the city with reference to building encroachments on the streets. Since then the change has become an accomplished fact, and its binding force has been recognized in the later judicial decisions." See, also, Perlman v. Stellwagen, 115 Misc. Rep. 6, 187 N. Y. S. 845; Leo N. Levy Corp. v. Dick, 116 Misc. Rep. 145, 190 N. Y. S. 238.

We have before us no evidence of the policy of the municipal authorities of the city of San Francisco, nor would we be disposed to give much weight to such policy in reaching our decision in the instant case. We think that if it should appear that the city has a right of action based upon the encroachment and that the enforcement of that right would cause substantial loss to the owner, the title cannot be said to be free from reasonable doubt. A purchaser should not be compelled to rely upon past acquiescence or mere indifference on the part of city officials to substantial interference with the property rights of the people. Hence we shall treat this case as if the city were prepared to enforce these rights, and we shall determine the question of marketability by considering what would be the result of an action brought by the city against the owner.

The answer seems to be clearly indicated in the cases of Rothaermel v. Amerige, 55 Cal. App. 273, 203 P. 833, and McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134. In the Rothaermel Case, a wall encroached about two inches upon adjoining property. A mandatory injunction was sought to remove it. The court said (page 275 of 55 Cal. App., 203 P. 833, 834): "We have here a case where a bare legal right, unsupported by any damage shown, is sought to be enforced by mandatory writ requiring affirmative personal action to be taken." Further, quoting from 14 Ruling Case Law 317, section 15, the opinion continues: "It is also true, as a general rule, that the court should not interfere by way of mandatory injunction, even though the injury be clearly established, where there has been a long-continued delay in asserting the right, and a remedy exists at law, or where the injury is so slight as to bring it within the maxim de minimis, or full compensation can be made in damages. If there is an adequate remedy at law, no relief will be granted, especially where there is no appreciable damage, and its issuance would require the performance of an act which would be difficult, and involve a considerable expense." In the McKean Case, the encroachment was from one-half to five-eighths of an inch. The trial court refused to order its removal, and awarded nominal damages in the sum of $10. This court upheld the judgment, saying (page 399 of 200 Cal., 253 P. 134, 135): "There was no direct evidence that the encroachment of from one-half to five-eighths of an inch caused any actual damage to plaintiffs, and to our mind the award of the trial court is both wise and just." As a result of these decisions it follows that the encroachment of the building involved herein would give the city no right to have it removed, and the owner could not be required to pay more than nominal damages. This being so, there is, we think, no reasonable probability of either the commencement or the successful prosecution of such a suit, which probability would have to exist before the title could be deemed unmarketable. The problem here turns upon a pure question of law, and this question has, as we have seen, been decided by the courts of this state in holding that neither injunctive relief nor substantial damages may be secured for a slight encroachment.

There is nothing in the cases from other jurisdictions which is inconsistent with the conclusion we have reached. Even in the later New York decisions, the encroachments which were held to render the title unmarketable were substantial ones, which, it was decided, the municipality could have removed, and the removal would have required a considerable expenditure. Thus, in the Acme Realty Co. Case, supra, the encroachments included show windows, oriel windows, and bay windows of masonry, projecting one foot beyond the building line, a portico of limestone projecting one foot, and a stoop projecting four feet. The court found that the cost of removal would be over $5,000, that proceedings by the city authorities were imminent, and that removal would damage the building and decrease its rental and fee value. The opinion states (215 N. Y. 495, 109 N. E. 577, page 580): "In these circumstances it cannot be said that a vendor has a marketable title if his building encroaches upon the public street to such an extent as to threaten a vendee with a substantial loss in the fee and rental value of the premises and a burdensome expense in altering the building to meet the requirements of the law." In Leo N. Levy Corp. v. Dick, supra, walls, buttresses, and a bay window and chimney projected over one foot, and it was claimed that removal would cost $10,000. In Klimas v. Brumbach, 116 Misc. Rep. 299, 190 N. Y. S. 307, there were eighteen encroachments, consisting of store windows, cellar doors, steps, fire escapes, cornices, and pilasters, the largest extent being five inches. It was held that they were substantial and burdensome in view of testimony that the cost of removal would exceed $3,000. But the court said (116 Misc. Rep. 299, 190 N. Y. S. page 307): "Practically all of the encroachments mentioned have been disregarded in various decisions. * * * In the Acme Case the court found it impossible to ignore oriel windows of solid masonry construction from the foundation up, which encroached one foot over the street line, because they could not be removed without defacing the entire building, but platforms, steps, and show windows were not considered serious." And in Gelman v. Herrmann, 118 Misc. Rep. 290, 193 N. Y. S. 174, where four bay windows projected one and one-half feet, and the cost of removal and remodeling of the front of the building would only be $300, the court gave specific performance to the vendors, saying (118 Misc. Rep. 290, 193 N. Y. S. 174, page 176): "The premises in question are more than a mile from the business center of Buffalo; the likelihood of interference with the bay windows is very remote; the expense of reconstruction is very slight; the encroachment is trivial; the rental value of the premises is not affected; the value of the premises has in no wise suffered." Some doubt is expressed in Perlman v. Stellwagen, supra, as to whether any encroachment can be regarded as negligible; but most of the authorities clearly distinguish between an immaterial overlap causing no actual damage and removable at slight cost, and a substantial encroachment, requiring costly removal. See Maupin on Marketable Title to Real Estate (3d Ed., 1920) p. 868.

We are therefore satisfied with the trial court's conclusion that the title to the property was marketable, and that the contract of sale was valid and enforceable.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.

213 Cal. 50

PEOPLE v. McINTIRE.

Cr. 3413.

Supreme Court of California.
June 29, 1931.

Rehearing Denied July 27, 1931.

1. Witnesses 🔑63.

Occasional illicit intercourse of defendant and witness *held* insufficient basis for attempted statutory marriage without license; hence witness was not incompetent as defendant's wife (Civ. Code, §§ 55, 79).

2. Witnesses 🔑78.

Defendant claiming that witness was his wife and incompetent to testify in prosecution against defendant had burden of establishing that they had lived together as man and wife, justifying attempted statutory marriage without a license (Civ. Code, §§ 55, 79).

3. Automobiles 🔑356.

Whether claimed intoxicated motorist striking pedestrian was guilty of second-degree murder or manslaughter *held* for jury (Pen. Code, § 192, subd. 2).

4. Automobiles 🔑355(6).

Conviction for driving automobile on public highway while under influence of intoxicating liquor *held* supported (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537, § 44).

5. Automobiles 🔑355(8).

Conviction for failing to stop and render aid after automobile accident *held* supported (St. 1923, p. 562, § 141, as amended by St. 1929, p. 554, § 62).

6. Automobiles 🔑358.

Verdict finding defendant guilty of failing to stop and render aid after automobile accident could not support conviction of second-degree murder (St. 1923, p. 562, § 141, as amended by St. 1929, p. 554, § 62).

> Verdict could not support conviction of murder in second degree, since the unlawful act of the defendant in failing to stop and render aid to the person whom he had previously injured occurred after and not in commission of the homicide.

7. Criminal law 🔑1184.

Evidence supporting conviction of driving automobile on public highway while intoxicated *held* of such doubtful force as to justify changing conviction of murder in second degree to manslaughter (St. 1923, pp. 553, 562, §§ 112, 141, as amended by St. 1929, pp. 537, 544, §§ 44, 62).

In Bank.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

W. R. McIntire was convicted of murder in the second degree, of driving a motor vehicle while under influence of liquor, and of failing to render aid to person after having collided with and having caused personal injury to such person, and he appeals.

Modified in part and otherwise affirmed, and remanded, with instructions.

Superseding opinion of District Court of Appeal in 292 P. 675.

Paul Taylor, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Ralph O. Marron, Deputy Atty. Gen.; Buron Fitts, Dist. Atty., and John Oliver, Deputy Dist. Atty., both of Los Angeles, for the People.

RICHARDS, J.

This appeal is from a judgment of conviction of the defendant based upon the verdict of the jury finding him guilty upon each of three charges contained in an information filed by the district attorney of the county of Los Angeles. In count 1 the defendant was charged with the crime of murder in the second degree; in count 2 with the offense of driving a motor vehicle while under the influence of liquor, in violation of section 112 of the California Vehicle Act (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537, § 44), making the same a felony; and in the third count of failing to stop and render aid to a person after colliding with and causing personal injury to such person, in violation of section 141 of said act (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62), also a felony.

The facts out of which each of these charges arose were that on January 1, 1930, between the hours of 6 and 8 o'clock p. m., one Margaret Towers was struck by an automobile driven by the defendant at the intersection of Atlantic boulevard and Hubbard street in the county of Los Angeles. Mrs. Towers, accompanied by her daughter, granddaughters, and grandson, was crossing Atlantic boulevard from east to west in the pedestrian lane when she was struck by defendant's automobile and suffered the injuries which resulted in her immediate death. The defendant at and prior to the time of the casualty was accompanied in his car by a girl named Ruby Burroughs. After striking Mrs. Towers the defendant traveled about 100 feet and stopped his car and started back to the scene of the accident. When about half way back he was met by a man who had witnessed the collision and who told him, "You have killed that lady"; whereupon the defendant, without going further, returned to his car and drove off. After going a short distance he was stopped by a man who asked if they had been drinking, to which it was replied by Ruby Burroughs that the defendant had taken a drink or two that afternoon; whereupon the man suggested that some one else should drive the car, and Ruby Burroughs undertook to drive it and did so for some distance, when the defendant resumed his place as the driver of the car, driving it to the home of a friend in Glendale, where certain incidents bearing upon the defendant's state of intoxication, to be hereinafter referred to, occurred.

[1, 2] The appellant makes a number of contentions upon this appeal. The first is that the trial court committed reversible error in permitting Ruby Burroughs to be called and examined as a witness for the people. In support of his objection to the calling and examination of this witness before the trial court, the defendant put forward the claim that between the time of the commission of the offenses charged in the information and the date of the trial the defendant had married Ruby Burroughs, and hence that at the time she was called and sought to be examined as a witness she was his wife, and for that reason incompetent to testify as a witness against him without his consent. In support of this claim the defendant offered evidence tending to show that a marriage ceremony under the provisions of section 79 of the Civil Code had taken place before a clergyman and without a license. Section 79 of the Civil Code provides: "When unmarried persons, not minors, have been living together as man and wife, they may without a license, be married by any clergyman. A certificate of such marriage, must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made." In further support of said claim the defendant offered certain evidence which, according to his contention, established that prior to the celebration of such purported marriage he and Ruby Burroughs had been living together as man and wife. This evidence, however, was sharply disputed by the prosecution, which produced quite convincing testimony of Ruby Burroughs' mother, of her employer, and of a number of other witnesses, showing that during the period of several months preceding the casualty out of which the charges against the defendant arose, and during which period he claimed to have lived with Ruby Burroughs in the relation of man and wife, she was living at home with her mother, where her clothing was kept, and from which home she was rarely absent at night, and then only at occasional week-ends; that her mother and her employer knew nothing of her relations with the defendant; that she was known to all of her friends and acquaintances as Ruby Burroughs, and that other than her occasional and meretricious intercourse with the defendant they had never lived together as man and wife. The legislative intent in the adoption of section 79 of the Civil Code and in the assertion therein concerning the requirement as to persons seeking to avoid the effect of section 55 of the Civil Code requiring the solemnization of a marriage in the manner therein provided was fully discussed by this court in the case of Sharon v. Sharon, 79 Cal. 633, 22 P. 26, 131, wherein the court clearly points out that the creation of the relation of husband and wife contemplates a course of conduct involving the assumption of those marital rights, duties, and obligations which are usually manifested by married people. In the case of Campbell v. Campbell, L. R. 1 Sc. Div. App. 200, 211, the subject of what would suffice to constitute cohabitation as husband and wife was quite aptly described as follows: "It is holding forth to the world by the manner of daily life, by conduct, demeanor and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors and acquaintances to these representations and their continued conduct, then habit and repute arise and attend upon cohabitation. The parties are holden and reputed to be husband and wife." The occasional illicit intercourse of the defendant and Ruby Burroughs could not, therefore, have furnished the basis for their attempted marriage under the provisions of section 79 of the Civil Code, and it seems quite plain from the record herein that the sole reason why they went through the form of marriage prescribed by said section was in order to prevent the prosecution from calling and examining Ruby Burroughs as a witness in this case. The defendant's contention that upon making proof of the performance of the ceremony provided in section 79 of the Civil Code a sufficiently conclusive presumption arose that the marriage relation had been created, and that such marriage could not be made the subject of a collateral attack, such as was made upon it in the instant case, has no merit. The defendant having undertaken to disqualify Ruby Burroughs as a witness for the prosecution upon the ground that at the time she was his wife, and that she had become so through conformity with the provisions of section 79 of the Civil Code, had cast upon him the burden of showing to the satisfaction of the trial court that his prior relations with her were such as to show that they had been living together as man and wife. Having failed to sustain that burden the defendant was not entitled to urge such disqualification, and the trial court committed no error in requiring Ruby Burroughs to be sworn and testify.

[3, 4] The next contention of the defendant is that the evidence was insufficient to support the verdict of guilty of murder in

the second degree. We do not deem it necessary to review in detail the evidence in the case further than to state that the practically uncontradicted evidence in the case shows that the defendant ran down and killed the deceased while driving his machine upon the wrong side of the street and while crossing a pedestrian intersection where the decedent was walking with her family in plain sight and where she had the right to be. No sufficient justification or excuse was offered by the defendant for his conduct in the foregoing regard and for the reckless driving of his machine which resulted in the decedent's death. It is the defendant's contention that the evidence of his act and conduct at the time was at most only sufficient to justify a verdict of manslaughter. But this in our opinion was a matter which, under proper instructions from the trial court, it was the function of the jury to decide. In this connection it becomes necessary to also consider the evidence offered in support of each of the other two counts contained in the information, since, in order to justify a verdict of guilty of murder in the second degree, as distinguished from a verdict of manslaughter, it would be necessary to show that the act of the defendant, if involuntary, was done in the commission of an unlawful act amounting to a felony. Pen. Code, § 192, subd. 2. We shall, therefore, in this connection consider the further contention of the defendant that the evidence was insufficient to sustain either the second or third count of the information. By the second count the defendant was charged with driving an automobile while under the influence of intoxicating liquor, in violation of section 112 of the California Vehicle Act. The defendant insists that the evidence is insufficient to support this charge. There is evidence, however, given by Ruby Burroughs to the effect that the defendant before starting out with her upon the fatal ride took one or two drinks from a bottle or flask of whisky which he carried with him. There is also the evidence of another witness that during the course of the afternoon the defendant drank some wine; and added to this there is evidence that within a short time after the casualty the defendant was seen by several witnesses at the home of his friends in Glendale, and that he was then in a state of maudlin intoxication. We think this evidence abundantly sufficient to sustain the verdict of the jury against the defendant upon the second count in the information, and also sufficient to establish the fact that the defendant at the time he struck and killed the woman was engaged in the commission of a felony under the provisions of section 112 of the California Vehicle Act.

[5-7] The defendant's next contention relates to the insufficiency of the evidence to justify his conviction upon the third count of the information charging his failure to stop and render aid to a person after having collided with and caused personal injury to such person, in violation of section 141 of the California Vehicle Act. The evidence in the case showed that the defendant stopped his car after the impact and within about 100 feet of the place of its occurrence; that he started back toward the scene of the accident but when about halfway was met by a witness who informed him that he had killed the woman; whereupon he immediately and without either verifying the statement or otherwise approaching and offering to render aid, as required by section 141 of the California Vehicle Act, turned immediately and left the scene without any further pretense or effort in the way of a compliance with the requirements of said section of the California Vehicle Act. We are satisfied that from this showing the jury were entitled to return a verdict finding the defendant also guilty under this count in the information. We do not, however, hold that the charge and conviction of the defendant under the third count of the information would have rendered him liable to and properly convicted of the charge of murder in the second degree, since the unlawful act of the defendant in failing to render aid to the person whom he had previously struck down and, as it appeared, had killed occurred after and not in the commission of the homicide. This constitutes the distinction between murder in the second degree and manslaughter. The conviction of the defendant of the former crime must therefore rest solely upon his guilt of the charge of driving an automobile while under the influence of intoxicating liquor immediately prior to and at the time of his collision with the deceased. While we have hereinbefore held the evidence sufficient to sustain his conviction of this offense, we are constrained to hold from a consideration of the entire record that the evidence in that regard is of such doubtful force as to have upheld a verdict of the jury either way, and, this being so, we are disposed to give to this defendant the benefit of the doubt and to hold that a verdict of manslaughter would have sufficiently satisfied the course of justice in the particular situation herein presented.

It is therefore hereby ordered that as to count 1 of said information the judgment is hereby so modified as to find and adjudge the defendant guilty of manslaughter instead of murder in the second degree. The cause as to said count is remanded to the trial court, with instruction to enter a judgment of manslaughter against the defendant and thereupon to pronounce judgment upon him as prescribed by law. Otherwise the judgment herein is affirmed.

We concur: SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

DAHMS v. GENERAL ELEVATOR CO.*

Civ. 7568.

District Court of Appeal, First District, Division 2, California.

June 30, 1931.

Rehearing Denied July 30, 1931. Hearing Granted by Supreme Court Aug. 27, 1931.

1. **Negligence** ⚷2.

No actionable negligence arises without existence of corresponding duty upon part of person charged.

2. **Negligence** ⚷55.

Generally, independent contractor is not liable to third persons for injuries caused by negligent performance, after completion of job and acceptance thereof.

3. **Negligence** ⚷55.

Independent contractor continues liable after completion of work and acceptance thereof, where work, though not imminently dangerous, is rendered dangerous by defects in performance.

4. **Negligence** ⚷48.

Independent contractor, to become liable after completion of work, must have knowledge of defect and danger to third persons whom he knew or should have known would use work without such knowledge.

5. **Trial** ⚷253(7).

Instruction, directing verdict if jury finds certain facts, must embrace all things necessary to show legal liability.

6. **Trial** ⚷296(8).

Where plaintiff separately charges two acts of negligence, erroneous formula instruction as to one is not cured by correct instruction as to other.

7. **Trial** ⚷253(7).

In action by elevator operator against independent contractor, which repaired elevator, for personal injuries sustained when elevator fell, formula instruction for plaintiff *held* erroneous as omitting essential element.

> Instruction complained of, in substance, told jury to find for the plaintiff if defendant-independent contractor undertook to repair elevator and machinery or parts used in connection therewith in careless or negligent manner rendering elevatŏr unsafe and dangerous for use, and if jury found that unsafe or dangerous condition, if any, was unknown to plaintiff and was proximate cause of injury to plaintiff. Instruction did not state that to hold independent contractor liable, it must have had knowledge of defect and dangerous situation.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Charles Dahms against the General Elevator Company. Judgment for the plaintiff, and the defendant appeals.

Reversed.

John Ralph Wilson and Carl E. Day, both of San Francisco, for appellant.

Hadsell, Sweet & Ingalls and Cleveland R. Wright, all of San Francisco, for respondent.

GRAY, Justice pro tem.

[1] Respondent, who, while operating an elevator in the course of his employment, was injured by its fall, recovered a judgment, based upon a verdict, against appellant, who had been employed over a period of years by respondent's employer to inspect and repair such elevator. The acts of negligence charged were that appellant so negligently inspected and repaired such elevator prior to the accident, as to leave it in such an unsafe and defective condition, that it fell, thereby inflicting the injuries upon respondent. Since there can be no actionable negligence without the existence of a corresponding duty upon the part of the person charged and appellant's contract of employment created no such duty to respondent (Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88), it is first necessary to determine whether such duty was otherwise created.

[2-4] Generally, an independent contractor employed to do given work is no longer liable to third persons for injuries received because of his negligent performance, after he has completed the job and it has been accepted by his employer. To this rule certain exceptions exist of which the following only is here applicable: The contractor continues liable where the work performed is not imminently dangerous in kind, but is rendered dangerous by defect. Wood v. Sloan, 20 N. M. 127, 148 P. 507, L. R. A. 1915E, 766, and note; Healey v. Heidel, 210 Ill. App. 387; Berg v. Otis Elevator Co., 64 Utah, 518, 231 P. 832, 835; notes in 26 L. R. A. 504 and 32 L. R. A. (N. S.) 968. As stated in Berg v. Otis Elevator Co., supra, "the contractor continues liable where the work is turned over by him in a manner so negligently defective as to be imminently dangerous to third persons." It is also essential to the contractor's liability that he have actual or constructive knowledge of the defect and the danger to third persons, whom he knew, or should have known would use it and that such third persons have no such knowledge. Wood v. Sloan, supra; Berg v. Otis Elevator Co., supra.

[5-7] Appellant assigns as error the giving of the following instruction: "If you find

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 7 P.2d 1013.

from the evidence that the defendant General Elevator Company did undertake to repair the elevator in the Wilson Building and certain machinery or appliances used in connection therewith, and if you further find that any such repairs were carelessly and/or negligently made so that said elevator was in an unsafe and dangerous condition for use on the 23rd day of April, 1927, and if you further find that said unsafe and/or dangerous condition, if any, was unknown to plaintiff Charles Dahms, and if you further find that any such unsafe or dangerous condition was the proximate cause of the alleged injuries to the plaintiff Charles Dahms, then I instruct you that your verdict must be against the General Elevator Company, a corporation, and in favor of the plaintiff, Charles Dahms."

"The rule is that where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to a verdict. Pierce v. United Gas & Electric Co., 161 Cal. 176, 184, 118 P. 700, citing Killelea v. California, etc., Co., 140 Cal. 602, 74 P. 157." Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 278, 201 P. 599, 602. "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law." Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237, 238. Where, as here, plaintiff separately charges two acts of negligence, an erroneous "formula" instruction as to one act is not cured by correct instructions as to the other act, because it is impossible to tell for which act the jury rendered its verdict. Sterne v. Mariposa Commercial, etc., Co., 153 Cal. 516, 97 P. 66. An examination of the instruction in light of the law as above stated, clearly shows an omission of the essential element of appellant's knowledge of the defect and danger. There is no need of setting forth at length the testimony on this issue because both parties in their briefs concede its materiality, its conflicting nature, and the different inferences to be drawn therefrom. It is apparent, therefore, that the giving of this instruction was prejudicial and requires a reversal.

What has been said as to the substantive law, applicable to the case, renders unnecessary a discussion of the sufficiency of the present evidence to support the verdict because a guide has been given to test the sufficiency of the evidence to be presented upon a retrial.

For the foregoing reason the judgment is reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

115 Cal.App. 221

DAY v. LAGUNA LAND & WATER CO. et al.

Civ. 6688.

District Court of Appeal, Second District, Division 2, California.

June 27, 1931.

Rehearing Denied July 27, 1931.

1. Contracts 🔑123(1).

Contract between former internal revenue agent and taxpayer corporation, made shortly after agent's resignation, *held* contract to aid in prosecution of claim against United States (5 USCA § 99).

> Rev. St. U. S. § 190 (5 USCA § 99) makes it unlawful for any former government officer or employee to act as attorney or agent for prosecuting any pending claim against the United States, within two years next after he shall have ceased to be such officer or employee. Contract between taxpayer corporation and former internal revenue agent, made shortly after agent's resignation, required latter to aid taxpayer corporation in establishing that report of another revenue agent concerning additional income tax liability was erroneous, and that additional liability alleged did not as a matter of fact exist.

2. Contracts 🔑141(3).

Claim of taxpayer corporation against United States *held*, under evidence, not pending at time of contract with former internal revenue agent, requiring latter to aid in prosecution of claim (5 USCA § 99).

> Former internal revenue agent testified that tax returns of corporation were turned over to him to make customary investigation of tax liability; that at time of his resignation as internal revenue agent the investigation had merely reached a preliminary stage; and that agent had not reached point where he knew whether or not corporation owed government any additional taxes or not. Immediately upon agent's resignation from department becoming effective, he was relieved by another agent.

3. United States 🔑113.

Taxpayer's contention that amount of tax shown by income tax return was correct *held* not "claim against United States" within statute restricting prosecution of claims in department by exofficers or employees (5 USCA § 99).

> [Ed. Note.—For other definitions of "Claim Against United States," see Words and Phrases.]

4. United States 🔑113.

Statute authorizing adoption of rules governing agents representing claimants before United States Treasury Department *held* to indicate nature of qualifications within authority of Secretary of Treasury to impose (5 USCA § 261).

> Act July 7, 1884, § 3, 23 Stat. 258 (5 USCA § 261), provides in substance that Secretary of Treasury may prescribe rules and regulations governing recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of necessary qualifications to enable them to render valuable service, and otherwise competent to advise and assist claimants in presentation of their cases.

5. United States 🔑113.

Circular promulgated by Secretary of Treasury of United States, prohibiting appearance before department by attorney or agent who acquired knowledge through connection with treasury department, *held* authorized (5 USCA § 261).

> Circular No. 230 promulgated by the Secretary of the Treasury under authority of Act July 7, 1884, § 3, 23 Stat. 258 (5 USCA § 261), provides in substance that no attorney or agent shall be permitted to appear before the Treasury Department in connection with any matter to which such attorney or agent gave personal consideration, or as to the fact of which he had actual personal knowledge while in the service of the Treasury Department, and likewise no such attornney or agent shall receive assistance of any one formerly in the service of the Treasury Department and having such personal knowledge.

6. United States 🔑113.

Term "personal consideration," within circular promulgated by Secretary of Treasury regulating appearance of agent or attorney before department, means such attention as would put attorney or agent in possession of facts use of which would be improper.

7. United States 🔑113.

Regulation of Secretary of Treasury pertaining to claimant's attorney or agent who acquired knowledge through connection with Treasury Department *held* intended to prevent moral wrong involved.

8. Appeal and error 🔑927(3).

On appeal from judgment of nonsuit, plaintiff's testimony must be given all favorable inferences.

9. Contracts 🔑123(1).

Contract between former internal revenue agent and taxpayer corporation, made shortly after agent's resignation, to aid in prosecution of claim against United States, *held* not contrary to law, public policy, or good morals (5 USCA §§ 99, 261).

> At time former internal revenue agent resigned from treasury department, his investigation of taxpayer's income tax return had merely reached a preliminary stage, and had not reached point where he knew whether any additional tax would ever be claimed by government or whether corporation would have claim against the government. Contract with taxpayer corporation required former internal revenue agent to ascertain and determine whether or not additional tax liability asserted by government was proper or not.

10. Work and labor 🔑24(1).

In action for services rendered as income tax expert, variance *held* not to exist between evidence and counts in complaint based on reasonable value of services.

> First count in complaint was for reasonable value of services performed at defendant's request. The second cause of action was substantially the same. Third count was to recover for work, labor, and services at their reasonable value. Evidence tended to show that agreement was to pay reasonable value of services rendered, and to establish reasonable value of such services.

11. Appeal and error 🔑999(1).

Whether breach of original contract engaging services of income tax expert changed obligation of expert was question for jury and not for appellate court.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Floid S. Day against the Laguna Land & Water Company and others. Judgment for the defendants, and the plaintiff appeals.

Affirmed in part, and reversed in part.

James Westervelt and Clarence A. Singer, both of Los Angeles, for appellant.

Biby & Biby and John E. Biby, all of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Action was brought by plaintiff against the defendant corporation and certain of its stockholders for the recovery of the reasonable value of services alleged to have been rendered as an income tax expert in resisting a claim of the government for additional income taxes for the years 1918 to 1922, inclusive, which services, it is alleged in the first count, resulted in a saving to the defendant corporation of the sum of $32,820.78, and in the second count a similar saving of $45,167.84. The case was tried before a jury. It appears that plaintiff was employed for several years by the government as an internal revenue agent and income tax auditor; that he was asked by his department to investigate the defendant corporation to see if the proper amount of income tax had been paid for the years 1918 to 1922, inclusive; that he first met the secretary of the corporation November 9, 1923, at which time plaintiff had already sent in his resignation to the government, effective November 30, 1923; that he began such investigation, which "had reached only the preliminary stage" when his resignation became effective and he was relieved by an agent named Sullivan, thereafter entering private practice. Subsequently, and on December 2 or 3, he was given the job of preparing the income tax return of defendant corporation for the year 1923. About January 28, 1924, the report of the agent Sullivan recommending the levy of additional taxes was shown plaintiff by the secretary of defendant corporation, with the result that he was employed, according to his testimony, to ascertain if they could "justly claim relief" from such additional tax, on a contingent basis of "no saving, no fee." Asked what he meant by "no saving," plaintiff answered: "No reduction in tax." It also appears that plaintiff told the secretary that he "could not appear before the department in person" to argue the case, as "I had just quit—having just quit—I had not obtained a permit to practice; that I could prepare the protest but that he, Mr. White, would have to appear in the conference and do the talking, arguing the matter as I might have presented it to him."

At the close of plaintiff's evidence a nonsuit was granted upon motion of defendant. The only reference to said motion and the action of the court thereon in the record before us is in the judgment, which recites that "after the plaintiff had rested his case counsel for said defendants moved the court to nonsuit the plaintiff and render judgment in favor of defendants upon the grounds following: * * * Said motion was thereafter argued and submitted to the Court for consideration, and due deliberation having been had thereon, the said motion was granted and judgment ordered in favor of said defendants and against said plaintiff," and adjudges that plaintiff take nothing by reason of his complaint and that defendants have judgment for their costs and disbursements. From such judgment plaintiff has appealed.

The points evidently argued most strenuously on the motion for nonsuit were: Variance between the allegations of the complaint and the evidence received in support thereof, and that the contract sued upon is prohibited by express mandate of the law as well as being contrary to the policy of express law, and is therefore void. Appellant contends: (1) That the contract is not prohibited by any mandate of law nor contrary to the policy of the law; (2) that it was error to admit any evidence of Treasury Department Circular No. 230; and (3) that there is no variance between the pleading and the proof.

[1] (1) Appellant urges that section 190, Revised Statutes of the United States (5 USCA § 99), which respondent, the defendant corporation, maintains made void the contract in question, is not applicable. Such section reads: "It shall not be lawful for any person appointed [after the 1st day of June, 1872] as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent *for prosecuting any claim against the United States* which was pending in either of said departments while he was such officer, clerk, or employee, *nor in any manner, nor by any means, to aid in the prosecution of any such claim,* within two years next after he shall have ceased to be such officer, clerk, or employee." (Italics ours.) There is no question, in our opinion, but that the contract which plaintiff made required him to aid in the prosecution of a claim against the United States, viz., the claim of the defendant Laguna Land & Water Company that the report of agent Sullivan to the department concerning additional income tax liability of the corporation for the years 1918–1922 was erroneous in the three particulars mentioned in said defendant's protest filed with the department, and that such additional liability did not as a matter of fact exist. There is no question, either, that the employment of plaintiff was within the two years' period fixed by the statute, so if *such claim* was pending in the department at the time of plaintiff's employment therein the section would apply, but otherwise not.

[2, 3] Plaintiff testified that the local office of the department turned over to him the tax returns of the Laguna Land & Water Company for the years 1918 to 1922, inclusive, "and asked me to make customary investigation of their tax liability, that is, and see if they had paid the proper amount of tax; if not, to determine what it should have been." He also said that at the time his resignation became effective his work in the office of defendant corporation had reached only the preliminary stage—that "my investigation of their books had been only of a preliminary nature; I had not reached in that investigation the point where I knew if the corporation owed the government any money or not." It would seem that "such claim" could not by any means have been pending in the department while plaintiff was an employee and that the section cited did not prohibit the making of the alleged contract. Respondent says that each return filed by it "set forth *a claim* that the amount of tax shown to be due for each of said years was the correct amount due, and each and every other statement in said return material as a basis for the computation of the tax in question was *a claim* on the part of respondent that the facts stated were true." We must admit such to be the case, but that is not a "claim against the United States," within the meaning of said section, in our opinion, and no "such claim" under said section came into being until agent Sullivan's report and respondent's protest thereto were filed.

[4, 5] (2) Under such contention respondent also relies upon Circular No. 230, promulgated by the Secretary of the Treasury under authority of section 3 of the act of July 7, 1884 (23 Stats. at L. 258, 2 Fed. Stats. Ann. [2d Ed.] p. 194, 5 USCA § 261). The circular so promulgated reads: "(5) Knowledge Through Connection with the Treasury Department. No attorney or agent shall be permitted to appear before the Treasury Department in connection with any matter to which such attorney or agent gave personal consideration, or as to the facts of which he had actual personal knowledge while in the service of the Treasury Department, and likewise, no such attorney or agent shall receive assistance from anyone formerly in the service of the Treasury Department and having such personal knowledge." Appellant contends that Congress, having already acted upon the subject of barring agents for claimants because of previous service in the department, and by inference, at least, saying that such officers, agents and employees as were not so barred could practice before the department or aid others so to do, and that the secretary could not enlarge the prohibitive feature of the act of Congress by extending it to matters to which such officers, agents, and employees gave "personal consideration" or to facts of which they "had actual personal knowledge while in the service" of the United States. It is to be observed that section 190, Revised Statutes (5 USCA § 99), prevents representation in the prosecution of "any claim" pending in any department while such officer was in the service, or in any way aiding such prosecution. It is also urged that the authority of the secretary was limited to "the recognition of agents, attorneys," etc., "before his department" and to qualifications so to appear, and does not extend to "disqualifying" agents because of any previous connection with the

department or to prohibiting contracts for services "not before" the department. Respondent urges that the language of section 3 of said act of Congress, authorizing the Secretary of the Treasury to "prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department," is a complete grant of power and is not added to or limited in any manner by the further provisions of the act. If the language stood by itself, we would agree with respondent, but the first paragraph is not complete with the language quoted, for following a comma after the word "Department" is the following: "And may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases." Something must have been intended by the language last quoted, and it would seem to be entirely unnecessary if Congress intended to confer the broad powers that could be inferred from that first quoted. We are of the opinion that by the language last quoted Congress intended to indicate the nature of the qualifications or disqualifications which the secretary was authorized to impose.

The language of the regulation is, in our opinion, broader in its prohibitive effect than merely applying to appearance "before" the department, as it prohibits such attorney or agent from aiding or assisting "another in any such matter"; and it would seem also that to sell knowledge acquired in a particular employment, to be used in a claim against the employer, which is the thing the regulation seems to be aimed at, would have such a close connection with the "good character" and "good repute" of such an agent, even though he had left the service, that it would be a proper subject of rule and regulation within the provisions of said act of July 7, 1884, even though the result might be to disqualify such agent from practicing before the department or aiding or assisting another so to do. We therefore conclude that the promulgation of circular No. 230 was within the authority of the secretary, and that the same covers a different and narrower field than section 190, Revised Statutes (5 USCA § 99), which makes the disqualification effective if the claim being prosecuted was pending in any of the departments, and whether it received the personal or any consideration of the agent, or whether it came to his knowledge or not, and apparently regardless of any moral question involved, while the regulation questioned seems to be based upon the moral phase alone, which appears to be authorized by said act. The admission in evidence of said circular, therefore, in our opinion was not error.

[6-9] What, then, is meant by "personal consideration"? The word "personal" would seem to mean something done by the attorney or agent, and we think the word "consideration" is not used as a synonym for "attention," which would include almost anything from slight notice to close scrutiny, but rather that it involves the idea of such attention as would put the attorney or agent in the possession of facts which it would be improper for him to use as against his employer. Certainly the mere fact that a claim was pending would not involve a moral question, unless the attorney or agent used such knowledge for the purpose of soliciting employment against his employer, and such a "fact," viz., knowledge of the pending of a claim in the department in which he had been employed, without more, is not the "actual personal knowledge of facts" that would prevent such agent from accepting unsolicited employment after leaving the service. In our opinion, as said before, the purpose of the regulation is to prevent the moral wrong involved in an agent's using information obtained about a case while employed in the department against his employer after leaving the latter's services. In the instant case, just what information did plaintiff have by reason of his "preliminary work" on the books of the defendant corporation? He knew when he was assigned such work that the government wanted him to verify the tax returns of the corporation for the years mentioned. He also probably knew that the corporation exchanged one million dollars of its capital stock as fully paid for certain leases, and that said corporation had purchased 2,770 acres of land prior to March 1, 1913, which it was subdividing and selling, all of which also appeared from a very cursory examination of agent Sullivan's report, which was shown him. He certainly knew that for income tax purposes the company was entitled to a valuation of said property as of March 1, 1913. Knowing that, and taking his testimony and giving it all inferences favorable to appellant's case—which we must do on a motion for nonsuit (Carter v. Canty, 181 Cal. 749, 186 P. 346)—he still had not reached a point when his resignation became effective where he knew that any additional tax would ever be claimed by the government, or that the corporation would ever have a claim against the government. Giving appellant's evidence such favorable consideration, and disregarding conflicts and unfavorable inferences, we cannot say that the contract in question was either contrary to law, public policy or good morals.

[10] (3) The first count in the complaint is for "the reasonable value of services performed by plaintiff at said defendants' re-

quest and on its behalf and for its benefit, consisting of advice, preparation of documents and other services connected with and resulting in the saving to said defendant Laguna Land & Water Company of the sum of $32,820.78," alleging that said defendant requested plaintiff to render such services and agreed to pay the reasonable value thereof, namely, $8,205.19. The second cause of action is substantially the same, except the saving is alleged to have been $45,167.84 and the reasonable value of the services rendered $22,583.92. The third count is to recover for certain work, labor, and services of the reasonable value of $100, but apparently all the evidence is on the first two causes of action and we fail to find any on the third. The testimony of plaintiff was that he told Mr. White "it was not reasonable for any man to take it upon a day's basis. If I were to save the corporation $50,000 or more as a result of two or three days' work it wasn't reasonable to place that value upon the number of hours it took; that that value should be placed upon the ability to do the work. He agreed with me and wanted to know the price I would make. I told him I thought the fairest thing was the contingent basis, no results—no pay," and that upon that basis he was employed. One expert witness produced by plaintiff fixed the reasonable value of the services at 25 per cent. of the amount saved, and another as $15,000 on the first cause of action and $5,000 on the second. Each count is apparently based on the reasonable value of the services rendered, based on the saving made, which is the contract proved, viewing the evidence in plaintiff's favor, as we must, and we fail to see any variance.

[11] Respondent assumes in its brief that the evidence shows a breach of the original contract under which Mr. White, secretary of the corporation, was to represent respondent before the department, in that an attorney was employed for that purpose; but the evidence is susceptible to the inference that this did not change the obligation of appellant under the agreement, and whether or not it did is a question the jury should determine and not an appellate court.

The motion for nonsuit was properly granted as to the third cause of action, but the issues on the first two causes should have gone to the jury.

The judgment as to the third cause of action is affirmed. As to the first and second causes it is reversed, appellant to recover his costs of appeal.

We concur: WORKS, P. J.; CRAIG, J.

115 Cal.App. 393

H. K. McCANN CO. v. WEEK.

Civ. 7454.

District Court of Appeal, First District, Division 1, California.

July 9, 1931.

Rehearing Denied Aug. 8, 1931. Hearing Denied by Supreme Court Aug. 31, 1931.

1. Corporations 🔑249(1).

In suit by creditor to enforce stockholder's liability, stockholder cannot set up own claim against corporation as set-off against creditor's claim (Code Civ. Proc. § 438).

2. Corporations 🔑249(1).

In creditor's suit to enforce stockholder's liability, stockholder cannot set up own claim against corporation as "equitable" defense in nature of set-off against creditor's claim.

> "Equity" is equality, as distinguished from expediency or individual solicitude.
>
> [Ed. Note.—For other definitions of "Equitable," see Words and Phrases.]

3. Appeal and error 🔑1097(1).

To extent of matters before court on prior appeal of case, law of case is binding.

4. Corporations 🔑237.

In creditor's suit to enforce stockholder's liability, stockholder *held* liable for payment made by creditor for corporation after stockholder became stockholder.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the H. K. McCann Company against E. R. Week, Jr. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Arthur L. Shannon and Winfield Dorn, both of San Francisco, for appellant.

Robert L. McWilliams, of San Francisco, and F. B. Morrill, of Spokane, Wash., for respondent.

PARKER, Justice pro tem.

The action is to enforce the statutory liability of defendant as a stockholder in a corporation known as the Luthy Company. For the purposes of the first branch of the case it may be conceded that plaintiff is a creditor, and that defendant, save and except for the defense hereinafter to be discussed, was liable to plaintiff in an amount proportionate to defendant's share of the issued stock of the corporation at the time of the creation of the indebtedness which is the foundation of the action.

However, in response to plaintiff's claim, defendant entered the plea that he, as well as being a stockholder, was likewise a creditor of the corporation, and that by reason of this fact he was entitled to set off against the claim of plaintiff the corporation's indebtedness to him. It might be well to note here that the claim of defendant is not that he is entitled to a set-off in its strictest statutory sense, but rather it is his contention that his defense is in the nature of an equitable defense in the nature of a set-off. It will be unnecessary to go minutely into the distinction suggested. It may be conceded that a right of equitable defense may exist where the provisions of the Code regulating and defining set-off or counterclaim would not apply. Without the detail of analysis we may at once approach the question involved.

The point to be determined is whether or not a stockholder of a corporation who is also a creditor can, in a suit by another creditor to enforce the stockholder's liability, set up the latter's claim against the corporation as any defense to the claim of the creditor either by way of set-off, equitable defense, or otherwise.

It may be here noted, however, that no issue of fraud, estoppel, waiver, or laches enters into the case.

It is passing strange that the question has never before been directly passed upon in this jurisdiction, and stranger still it seems to come up now on the eve of this state's abandonment of the old Stockholders' Liability Law.

The California statutes have been construed and applied in other jurisdictions. For instance, in Washington, on this same cause of action by the same plaintiff against the father of the present defendant, it was held that the creditor stockholder did have the right of set-off. McCann Co. v. Week, 139 Wash. 183, 246 P. 292, and on petition for rehearing before the court en banc in 141 Wash. 702, 251 P. 858. In noting this citation it may be stated that there was a strong minority dissent.

In New York exactly the opposite conclusion was reached and the Washington case referred to in this language: "The single reported decision we have been able to find that considered this precise question as to section 322 of the California Civil Code held a claim against the corporation might be set off by the stockholder. McCann Co. v. Week, 139 Wash. 183, 246 P. 292, affirmed 141 Wash. 702, 251 P. 858. Both appellate courts divided sharply on the question. The dissenting opinions therein appear to us to assert the correct view." Pacific, etc., Co. v. Opolinsky, 135 Misc. Rep. 265, 237 N. Y. S. 682, 686.

The text-writers on corporation law are almost in accord in holding that under the California statutes the right of set-off is accorded the stockholder creditor, though manifestly their conclusions result from independent reasoning based upon analogies in the general law of corporations. Such being the situation, we prefer to form our own conclusions independent of noncontrolling authority, and resting the same upon the decisions of our own state, which, though not determinative of the point in express language, nevertheless do firmly establish a background from which an easy solution may follow.

In the early case of Mokelumne Hill Canal & Mining Co. v. Woodbury, 14 Cal. 265, it is said: "It would seem, from a just and reasonable construction of the constitutional and statutory provisions upon this subject, that an individual corporator, in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of a principal debtor. His responsibility commences with that of the corporation, and continues during the existence of the indebtedness. It is not in any sense contingent, but is declared to be absolute and unconditional. The remedial effect of these provisions, in which consists their only value, should not be impaired by construction." It is the last clause of the quotation that particularly commends the citation to study. And, obviously, the remedial effect of the provisions is to protect one extending credit to a corporation.

In Morrow v. Superior Court, 64 Cal. 383, 386, 1 P. 354, 355, we find this language: "As to the primary liability of the stockholders of the company for its debts we entertain no doubt. * * * The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation as it would be if the act had made no provision for any other liability than that of stockholders for the debts of the company."

And so running on through an unbroken line of decisions to the case of Williams v. Carver, 171 Cal. 658, 154 P. 472, wherein the court says that the stockholder's liability is no part of the property or assets of a corporation and the right of the creditor to pursue his claim against the stockholder is a personal right of the creditor.

The entire subject is exhaustively reviewed in the case of Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335, 336. In that case we find the following principles adopted: That California is "one of the few states in which the liability of the stockholder is not collateral, but is original, and partakes of the nature of the liability of partners. The result is that an action at law lies 'directly against the shareholders as against partners on their joint contract.' * * * The limitation of the authority of the corporation to in any way enlarge or extend or renew the stockholder's statutory liability is declared in the decisions of this court holding the corporation powerless to extend such liability by a new promise, or by agreement extending the period of the statute of limitations, or by changing the form of the indebtedness."

In Winona Wagon Co. v. Bull, 108 Cal. 1, 40 P. 1077, 1079, the court adopts the following language from an Indiana case (Trippe v. Huncheon, 82 Ind. 307) as to the relation of the corporation to stockholders' liability: " 'The corporation has nothing to do with this liability, nor has it the right or power to represent its members as to this individual obligation. It is a matter between the creditors of a corporation and its members, not as corporators, but as individuals.' "

The respondent's urging the right of set-off or equitable defense is in accord with the foregoing. He contends that it is solely by reason of this detached and individual relationship between a creditor and the stockholder that the set-off should be allowed. The contention seems to be based mainly upon the reasoning of the recognized text-writers and of courts of other jurisdictions resting their decisions upon the text. While the writers found no California authority to support their conclusions, the method of reasoning was comparative. In many of the states throughout the country the stockholders' liability by statute was more in the nature of that of guaranty or secondary liability. In enforcing this liability and in attempting to support the varied legislation upon some legal theory the courts declared that the obligation of the stockholder was allied to the trust fund theory, and that, by reason of the liability of a stockholder being in the nature of the establishment of a trust fund, it would be inequitable to permit the stockholder to set off his own claim against the corporation. After arriving at this conclusion, all other theories seemed to be abandoned and the decisions followed along the trust fund theory alone. Thereafter this became the test. The text-writers, in academic discussion, argued that under the California statute, where there was no element of guaranty or suretyship, the trust fund theory was not applicable. The argument then proceeds to the effect that, the right of set-off being denied because the enforcement of the stockholders' liability created a trust fund, it would follow that, where the trust fund theory did not apply, the right of set-off must be allowed. And thereupon in bold letters these self-created authorities wrote Q. E. D.

Clark on Corporations (3d Ed.) pages 747, 748, presents the viewpoint of the authors as follows: "If it is sought to compel them [the stockholders] each to contribute a proportionate sum to a fund for the payment of all creditors pro rata, a setoff cannot be allowed. Where, however, an action is brought by a single creditor as may be done under some statutes, to enforce a several and original liability, for the sole benefit of the creditor suing, it is held anomalously, by the weight of authority, that upon equitable grounds the stockholder may set off a debt owing to him from the corporation." While a characterization of the weight of authority as anomalous might involve a contradiction of terms, yet it is obvious that a sum held by an individual to be devoted to a specific purpose may be a trust fund in as great a degree as a sum made up of many smaller sums similarly held.

[1] We need pursue the discussion no further. An analysis of the rulings of our own courts, already cited, indicate that a set-off, as here claimed, cannot be allowed. Incidentally we cite the Code section on counterclaim and set-off, section 438, Code of Civil Procedure. We also cite the case of Stevens v. Weisbaum, 87 Cal. App. 664, 262 P. 762, 764, wherein on a claim of one stockholder to set-off, not the stockholder-creditor's claim against the corporation, but only the proportion thereof, which was collectible against the plaintiff creditor who happened to be himself a stockholder, the court says: "As to the counterclaim asserted * * * there is no showing that the" amount "represented an indebtedness growing out of the same transaction, or that it bore any relation whatsoever to the employment of the" plaintiff. "It could not legally be set off against any judgment rendered in this action." In Kaye v. Metz, 186 Cal. 42, 198 P. 1047, 1049, we find this language: "In order to warrant a set-off, 'the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity.' "

[2] We may now pass to the claimed equities compelling the allowance of the claim of respondent, if not by way of legal set-off, then by way of equitable defense in the nature of a set-off. As respondent throughout answers every contention of appellant with the one word "equity," it might be well to consider the practical meaning of the word. While courts and writers are inclined to reach the heights of panegyric in framing an all-embracing definition of the term, yet, in the main, they meet in common agreement that "equity is equality." In every instance where principles of equity are sought to be applied, the idea of equality compels consideration of the rights of all parties concerned.

Equality must be distinguished from expediency or individual solicitude. Where a stockholder in a corporation, by advances or loans or payment of certain obligations of the latter, bolsters up the credit of the corporation or provides for its existence to the end that others might extend it credit, there surely can be no equality in delaying or withholding the demand of the creditors until the stockholder has been restored to his original position.

Adopting the thought of Bridges, J., in the Washington case, McCann Co. v. Week, 141 Wash. 702, 251 P. 858, let us suppose that A enters a mercantile establishment and says to the owner, B: "I am starting out C in business and I want you to extend to him credit for whatever he might order. Bear in mind that the solvency or credit of C is of no concern to you. I stand personally, primarily and directly liable to you for any indebtedness incurred by him. For the purposes of this credit you may forget C entirely and consider the transaction as between you and me." Accordingly B does extend credit to C. Then when he looks to A for payment, could it be held that the latter could defend against the claim of B successfully by showing that C owed A an amount greater than the claim of B?

We hold the trial court erred in allowing the defendant herein his set-off against the claim of appellant.

[3] Respondent contends, however, that, if such a strange and remarkable thing should happen that we hold the set-off not allowable, the judgment must be affirmed for another reason. He contends that there is no liability upon him as a stockholder for the all-sufficient reason that the debt or obligation sued on arose prior to the time that he became a stockholder in the corporation. This same case was before the Supreme Court, and the opinion of the court is found in H. K. McCann Co. v. Denny, 205 Cal. 147, 270 P. 190. Necessarily, to the extent of the matters before the court, the law of the case has been made. The matter was determined and a hearing in bank denied. If respondent has any quarrel with the holding, he might prevail upon the higher tribunal to change its views. Fortunately, or unfortunately, as the case may be, we can give no comfort to him.

Respondent, however, argues that all the Supreme Court had before it was the question of the statute of limitations as the same applied to the enforcement of a claim against stockholders on their statutory liability. Obviously, before the court could determine whether or not the statute had run, it must first determine when the cause of action arose. This is exactly what the court did, holding that, since the obligation of the corporation could not arise until plaintiff had paid the bills of the corporation under the agreements in evidence, upon such payment, for the first time the liability of the stockholders of the corporation by reason of such payment would arise. We think the decision makes the law of the case.

[4] The case was tried below upon an agreed statement of facts, from which it appears that some of these payments were made before defendant became a stockholder and some were made after. As to the latter respondent would be liable.

We might here note that the complaint was in two counts. The second count was disposed of in the opinion of the Supreme Court noted, and is out of the case entirely.

We do not feel that the record before us is such that we may order the entry of an exact judgment in the court below, but, from what has preceded and with the opinion of the Supreme Court determining other controverted points, it would appear that the further action of the trial court would be more or less perfunctory.

The judgment is reversed, with directions to the trial court to enter its judgment pursuant to the views herein and in the opinion of the Supreme Court expressed.

We concur: TYLER, P. J.; KNIGHT, J.

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115 Cal.App. 180

CORCORAN et al. v. WARD et al.

JENNINGS v. SAME.

Civ. 7834.

District Court of Appeal, First District, Division 2, California.

June 25, 1931.

Rehearing Denied July 25, 1931. Hearing Denied by Supreme Court Aug. 24, 1931.

1. Appeal and error ⚷766, 767(1).

Failure to comply with rules respecting form of briefs may result in striking brief from file or dismissal of appeal.

2. Automobiles ⚷245(13).

Whether driver of defendant's truck, involved in head-on collision, was on wrong side of highway, *held* for jury.

3. Automobiles ⚷244(10).

Testimony of driver of defendant's truck, involved in head-on collision on highway curve, that he did not see other automobile until moment of impact, *held* sufficient to show negligence.

4. Automobiles ⚷245(37).

Testimony concerning marks upon highway and position and condition of cars after accident *held* for jury in resolving conflict respecting point of impact.

5. Evidence ⚷588.

Unless testimony respecting marks upon highway and position and condition of cars after accident cannot possibly be reconciled with testimony of prevailing party's witnesses, testimony is not "inherently improbable" (Code Civ. Proc. § 1844).

6. Evidence ⚷588.

Testimony of driver respecting place and manner of head-on collision *held* not inherently improbable (Code Civ. Proc. § 1844).

Appeals from Superior Court, Santa Clara County; F. B. Brown, Judge.

Actions by Marie F. Corcoran and another, and by Aleta Jennings, against J. M. Ward and another. From judgments in favor of plaintiffs, defendants appeal.

Affirmed.

See, also, 300 P. 129.

Myrick & Deering and Scott, of San Francisco, and Maurice J. Rankin, of San Jose, for appellants.

Glensor, Clewe & Van Dine, of San Francisco, and D. T. Jenkins, of San Jose, for respondents.

SPENCE, J.

Two separate actions were brought to recover for personal injuries sustained by Marie F. Corcoran and Aleta Jennings, respectively, and these actions were consolidated for the purpose of trial. Judgment upon two verdicts for $30,000 each were entered, and appeals by defendants from both judgments are presented on one transcript.

[1] At the outset we deem it appropriate to state that appellants' brief contains no topical index and fails to present each point separately under an appropriate heading showing the nature of the question to be presented, as required by rule VIII of the Rules of the Supreme Court and the District Courts of Appeal. These rules are designed for the assistance of the court in determining the questions presented on appeal as well as to guide opposing counsel in answering the points raised. Failure to comply with the rules may result in striking the briefs from the file or even dismissal of the appeal; and, if no such action is taken, complaint should not be made in the event that some point, hidden in the pages of a lengthy brief without an appropriate heading, is not discussed in the opinion. In the present case a reading of appellants' brief leads us to the conclusion that the main contentions are that the evidence was insufficient to show negligence on the part of appellants and that the verdicts were excessive, and we will proceed to a consideration of these contentions.

[2-6] The question of negligence in the present case was, in our opinion, a question of fact upon which the determination of the jury is conclusive. The accident happened late at night on June 15, 1928, upon a curve on the main highway at what is known as Dawson's Corners near Sunnyvale in Santa Clara county. This curve may be described as a sweeping slightly banked curve with an improved surface twenty feet in width. In approaching this curve traveling from San Jose toward San Francisco, the highway runs in a northerly direction and turns at the curve and proceeds in a westerly direction. Appellants' truck, which was heavily loaded, was traveling toward San Francisco with appellant Sweeney driving and his wife accompanying him. Respondents were traveling toward San Jose in a Chrysler automobile belonging to Mrs. Jennings' husband with Mrs. Corcoran driving. The lights on both cars were burning, but the two vehicles collided in a head-on collision about half way around the curve. From what has been said it follows that, in traveling upon their respective right sides of the highway in making the curve, appellants' car should have remained on the outer half of the road and respondents' car should have remained on the inner half of the road.

There was a sharp conflict in the evidence relating to the point of impact. Respondents tried the case upon the theory that their car traveled in the proper position at all times and that the collision was caused by the negligence of appellant Sweeney in driving the truck upon the wrong side of the highway. Appellants defended upon a similar theory, claiming that the truck traveled in the proper position and that the collision was caused by the negligence of Mrs. Corcoran in driving respondents' car on the wrong side of the highway. There was evidence to sustain either theory. It is conceded by appellants that Mrs. Corcoran's testimony sustained respondents' theory, but it is claimed that her testimony "is not sufficient to overthrow the overwhelming array of evidence to the contrary." We assume from the authorities cited that it is claimed that her testimony was inherently improbable and did not create a substantial conflict, for it is elemental that the testimony of one witness who is entitled to full credit is sufficient proof of any fact in a civil case. Code Civ. Proc. § 1844.

There were only three eyewitnesses to the accident who testified to the facts surrounding it; Mrs. Jennings having lost her recollection of the events through the injuries received. These witnesses were Mrs. Corcoran, who testified for respondents, and Mr. Sweeney, one of the appellants, who was driving the truck, and Mrs. Sweeney, his wife, who testified for appellants. Further testimony bearing upon the question of negligence related to the position and condition of the cars after the accident, the marks upon the highway, and the location of various bits of wreckage. Referring to the eyewitnesses, the record shows that Sweeney was thoroughly discredited by his own testimony, and the jury was warranted in disregarding his entire version of the accident. In addition, it appears that, if the jury gave any credence to his testimony, such testimony was sufficient in itself to show an entire want of care on his part. He testified on several occasions that he was not aware that any other car was approaching until the moment of impact, and, when asked to tell how long a time elapsed between the time he saw the lights of the other car and the time of impact, he illustrated with a hand clap and said, "That quick." We may further add that on the trial Sweeney on several occasions illustrated his version of the positions of the cars at various times by using two small model automobiles in connection with diagrams of the scene of the accident. It is impossible to determine from the record just what motions he went through before the jury, and it may be as claimed by respondents that one of his illustrations involving the movement of the cars was entirely in accord with respondents' contentions.

From the discussion in appellants' brief it appears that appellants are endeavoring to prove that respondents' theory and Mrs. Corcoran's testimony in support of that theory were inherently improbable through the evidence relating to the marks on the highway and position and condition of the cars after the accident. Preliminarily we may state that the testimony tended to show that as a result of the collision the cars became enmeshed and the Chrysler was thrown to the right side of the truck; that the truck proceeded ahead along the highway in the general direction in which it was traveling before the accident, making a gradual turn to the right and running some distance off the outer edge of the highway before coming to a stop; that the Chrysler was either pushed backward ahead of the truck or dragged along at the right side of the truck until it became disentangled and stopped on the outer edge of the highway facing in the opposite direction from that in which it was traveling prior to the accident. The front tires of the Chrysler were torn off, and it is claimed by appellants that the marks on the highway were made by the metal rims of the Chrysler's front wheels. These marks were all on the outer half of the highway. The photographs introduced as exhibits showed that the front of the Chrysler was almost completely demolished; the greatest damage being done to the right front portion. The damage to the track was all on the right front side. From these facts it is argued by appellants that the collision must have occurred on the outer half of the highway. On the other hand, respondents contend that, if the collision occurred on the outer half of the highway, as claimed by appellants, the Chrysler would have been entirely off the highway when dragged along on the right side of the truck. Respondents further point out that the testimony shows that one of the headlights of the Chrysler and a large amount of broken glass were found on the inner half of the highway, that some of the broken glass was found entirely off the inner edge of the paved portion of the highway, and that on the following day the ear drop worn by Mrs. Jennings was found in the dirt off the inner edge of the highway. All of this testimony was properly before the jury to be considered by them in resolving the conflict in the testimony of the various witnesses relating to the point of impact. The difficulty with appellants' argument relating to the marks on the highway is found in the fact that no satisfactory evidence was introduced to show whether the Chrysler was pushed backward in its original course after the accident, thereby making these marks, or whether the Chrysler was immediately thrown to the right side of the truck, making the marks as it was dragged along in this position. Although Sweeney testified that immediately following the impact the Chrysler moved backward in the direction from which it had come, he could not say whether it moved in that direction as much as one foot. On further examination he was asked: "Q. You don't know, so it may have started to swing to your right at the very moment of impact, as far as your recollection goes?" He answered: "I don't know." If we could assume that these marks started at the exact point of impact and indicated the position of the front wheels of the Chrysler at the very moment of impact, there would be some merit in appellants' contention, but we are not warranted in making these assumptions. It is also possible under the evidence to assume that these marks did not start at the point of impact, but were made after the Chrysler was thrown to the right side of the truck.

The complexity of forces operating on two rapidly moving vehicles in collision with one another often makes it exceedingly difficult to reconstruct the manner of the happening of the accident from testimony concerning the marks found upon the highway and the positions and condition of the cars after the accident. This is more particularly true when the collision occurs while the vehicles are rounding a curve. Unless the testimony in this regard cannot by any possibility be reconciled with the direct testimony of the witnesses for the prevailing party relating to the manner in which the collision occurred, it cannot be said that such direct testimony is inherently improbable. Although the case is not analogous on its facts, a somewhat similar contention to that of appellants was made in Kroell v. Lutz (Mo. App.) 210 S. W. 926, 928, where the court said at page 928: "It is urged that no combination of forces could have left the two cars in the respective positions they were left in, if the collision happened the way plaintiff's witnesses say it did, and hence we are asked to set aside the judgment because it rests wholly on testimony in conflict with well-known physical laws. But manifestly this is not the case. Bodies, when acted upon by different forces at different angles, move along a line called the resultant of all those forces; and the momentum of the two moving cars, the sudden impact and stopping of the front portions thereof, the swinging around or skidding of the heavy rear portions thereof, thus suddenly arrested in their forward movement, the interlocking and taking off of one wheel, and the resistance caused by ploughing up the asphalt, all done in an instant of time and with terrific force, are sufficient to present such a complexity of forces and resultants as to afford no idea of where the two cars would go or what they would do, and the only way to find out would be to survey them after they ceased movement." Under the evidence in the present case, we are unable to say that the testimony of Mrs. Corcoran was inherently improbable. In our opinion it created a substantial conflict in the evidence relating to the point of impact and the manner in which the accident happened and the implied finding of negligence on the part of appellants was amply sustained.

It is further asserted by appellants that the verdicts are excessive. This assertion is made, but less than one page of appellants' brief is devoted to the subject. A reading of the record discloses that any attempt to outline the frightful injuries received by the respondents would require several pages. Before the trial court and the jury, appellants' counsel did not attempt to minimize these injuries. In his opening statement to the jury he said: "With respect to the terrible injuries that these two women received, we will introduce no evidence whatsoever. We do not question in the remotest degree, the character, gravity, or severity of these injuries, they are terrible. * * *" Again, on motion for nonsuit, counsel stated: "We concede there is not a question in this case of their frightful injuries, they are terrible injuries. * * *" As counsel has merely asserted on this appeal that the verdicts are excessive without any adequate argument or any reference whatsoever to the record, we cannot believe that this point is seriously urged. However, we have examined the record, and are convinced that under the evidence neither verdict was excessive, and that both are amply sustained.

The judgments appealed from are, and each of them is, affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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115 Cal.App. 283

BARRETT v. HARMAN et al.

Civ. 7527.

District Court of Appeal, First District,
Division 1, California.

June 30, 1931.

1. Negligence 🔑85(2).

Defense of contributory negligence may be invoked in action on behalf of child of age sufficient to exercise discretion for avoidance of injury.

2. Negligence 🔑85(2).

Child is only required to exercise degree of care ordinarily exercised by minors of like age, mental capacity, and discretion.

3. Negligence 🔑136(29).

Capacity of child of 11 to exercise discretion for avoidance of injury *held* for jury.

4. Negligence 🔑122(6).

Until overcome, presumption that child was exercising due care for his own safety *held* "evidence," in accordance with which jury was bound to decide (Code Civ. Proc. § 1963, subd. 4).

[Ed. Note.—For other definitions of "Evidence," see Words and Phrases.]

5. Automobiles 🔑244(55).

Finding that child of 11, struck by automobile while crossing intersection with traffic light in his favor, was not contributorily negligent *held* supported (Code Civ. Proc. § 1963, subd. 4).

6. Trial 🔑108½.

Counsel may ask each juror whether he is interested in any company insuring against liability for negligence.

7. Trial 🔑133(6).

In action for injuries sustained when struck by automobile, counsel's questioning jurors on their voir dire whether they owned any stock or bonds in company insuring motorists for negligence *held* not prejudicial error, in view of court's admonition.

The court instructed the jury that no insurance was an issue in the case, that no insurance company was a party, and that the jurors should ignore any reference to insurance.

8. Automobiles 🔑243(3).

In action for injuries sustained when struck by automobile, evidence that witness detected odor of liquor on automobilist's breath *held* competent.

9. Trial 🔑124.

That counsel asked witness whether he detected odor of liquor on breath of alleged negligent motorist was not misconduct.

10. Appeal and error 🔑1004(1).

Verdict for damages cannot be set aside unless so plainly excessive as to show passion or prejudice.

11. Appeal and error 🔑1004(1).

That amount awarded as personal injury damages may be larger than is ordinarily allowed in such cases is not basis for holding award excessive as matter of law.

12. Damages 🔑132(3).

$3,500 damages for concussion of brain, cutting of salivary gland, and numerous lacerations of face and scalp *held* not excessive.

13. Statutes 🔑74(1).

Statute imputing to automobile owner negligence of person operating automobile with owner's permission *held* not unconstitutional as unauthorized classification (Civ. Code, § 1714¼, as added by St. 1929, p. 566; Const. art. 1, § 11).

> Such statute, Civ. Code, § 1714¼, as added by St. 1929, p. 566, does not violate Const. art. 1, § 11, providing that all laws of general nature shall have a uniform operation, as against contention that no reasonable basis existed for distinction as to owners of vehicles being operated with owner's permission, and those not so operated.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Joseph Thomas Barrett, a minor, by Maria Barrett, his guardian ad litem, against Eva Harman and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellants.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

PER CURIAM.

The above action was brought by plaintiff, a minor, to recover damages for physical injuries alleged to have been caused by the negligent operation of an automobile by defendant Eva Harman. The complaint alleged also that the automobile was owned by defendant corporation, and was being operated by its permission. Defendants denied the allegations of negligence, and averred that plaintiff's negligence proximately contributed to his injuries. The jury returned a verdict against both defendants in the sum of $3,500, and, from the judgment entered thereon, they have appealed.

As grounds for the appeal, it is urged that the evidence shows as a matter of law that plaintiff was guilty of contributory negligence; that by reason of the misconduct of plaintiff's counsel defendants were prevented from having a fair trial; that the verdict was excessive; and that the complaint failed to state a cause of action against defendant corporation.

Mission and Twenty-Second streets in San Francisco intersect, and at the place of intersection Mission street runs north and south, and Twenty-Second street east and west. The injuries complained of occurred at about 9:30 o'clock p. m. on October 11, 1929, while the plaintiff, a boy eleven years of age, was attempting to cross Mission street from the southeast to the southwest corners of the intersection mentioned. There were traffic signs at this corner consisting of red and green lights. According to the evidence, when plaintiff started to cross the signals stopping traffic on Mission street and allowing traffic to proceed on Twenty-Second street had been given. When he reached a point about midway between the corners of the intersection and while within the path marked out for pedestrians, defendant Harman, who was operating an automobile in a northerly direction along Mission street, disregarded the warning signals and drove into the intersection, striking the plaintiff and causing his injuries. It was also testified that another automobile was parked on the east side of Mission street a few feet south of the intersection, and that defendant Harman in approaching drove to the west of the same, entering the intersection at about the center of Mission street. Defendant Harman testified that she failed to see the plaintiff until he was struck, and there was testimony tending to prove that she had been drinking intoxicants shortly before the accident. Furthermore, there was evidence of her admission shortly after the accident that she was at fault. According to the plaintiff, before attempting to cross, he looked in both directions along Mission street, but saw no approaching automobile, and did not see defendant's car before the collision.

[1-5] The defense of contributory negligence may be invoked in an action by or on behalf of a child where the latter was of an age sufficient to exercise discretion for the avoidance of injury; but a child is not held to the same degree of care as an adult, and is only required to exercise that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712. And the rule has been applied where the child sought to

be charged with contributory negligence was considerably older than the plaintiff in the present case. Cahill v. E. B. & A. L. Stone, supra; Bowdoin v. Southern Pacific Co., 178 Cal. 634, 174 P. 664; Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Schroeder v. Baumgarteker, 202 Cal. 626, 262 P. 740; Greeneich v. Knoll, 73 Cal. App. 1, 238 P. 163. The presumption is that the child was at all times exercising due care for its own safety (Code Civ. Proc. § 1963, subd. 4). Until overcome, the presumption was evidence in accordance with which the jury was bound to decide. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027; Smellie v. Southern Pacific Co. (Cal. Sup.) 299 P. 529. Here the child was upon the street at a place where he had a right to be, and where pedestrians were expected to cross. He had looked in both directions, and had obeyed in every respect the traffic signals. The implied finding was against the plea of contributory negligence, and the evidence was amply sufficient to sustain the conclusion of the jury.

Counsel for plaintiff in his examination of several of the jurors on their voir dire asked the following questions: "Do you own any stocks or bonds in any insurance company insuring drivers of automobiles for negligence?" "Do you own any stocks or bonds in any insurance company?" "Have any of you owned any stocks or bonds in any insurance company insuring drivers of automobiles for negligence?" These questions are assigned as prejudicial misconduct.

[6, 7] While it has been held that questions of this character must not be asked for the purpose of informing the jury that the defendant is insured (Eldridge v. Clark & Henery Construction Co., 75 Cal. App. 516, 243 P. 43), nevertheless, it is well settled that it is proper for counsel to ask of each juror whether he is interested in any insurance company insuring against liability for negligence. Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171; Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Murphy v. Shaffer, 58 Cal. App. 453, 208 P. 1003; Potter v. Driver, 97 Cal. App. 311, 275 P. 526; Dermer v. Pistoresi (Cal. App.) 293 P. 78. Moreover, the court instructed the jury that "no insurance is an issue in this case, and no insurance company is a party to this case, so we are not concerned with insurance at all, and the jurors will ignore any reference to insurance." There is nothing in the record which indicates bad faith in asking the questions, and the court's instruction was sufficient to remove any prejudicial effect upon the minds of the jurors. Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739.

[8, 9] It is also complained that plaintiff's counsel was guilty of misconduct in intimating to the jury that defendant Harman was intoxicated at the time of the accident. A witness was asked if he detected the odor of liquor upon her breath, and answered in the affirmative, but the record discloses nothing more. This evidence was competent (Finn v. Sullivan [Cal. App.] 293 P. 639), and misconduct cannot be predicated upon the fact that the question was asked.

[10, 11] The testimony shows that plaintiff's head struck the pavement, causing concussion of the brain, the cutting of the salivary gland, and numerous lacerations of the face and scalp. He was confined to his bed for three weeks. A physician who treated him testified that there was a possibility of future ill effects from the concussion, and that the effects described by the child and his mother might have been caused by the injury. According to the plaintiff, he continues to suffer from dizziness and impaired sight, and his mother also testified to the same effect. The verdict of a jury on the subject of damages cannot be set aside unless so plainly excessive as to warrant the conclusion that it was the result of passion or prejudice (Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 P. 449; Anstead v. Pacific Gas & Elec. Co., 203 Cal. 634, 265 P. 487). There is no absolute rule for determining whether a verdict is excessive (Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601), and awards cannot be so held as a matter of law simply because the amount may be larger than is ordinarily allowed in such cases (James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082). As was said in Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513, 520, "the only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence." The question in the first instance is for the trial court; and in considering an attack upon a verdict as excessive the reviewing court must treat every conflict in the evidence as resolved in favor of the respondent, and give him the benefit of every inference that can be reasonably drawn in support of his claim.

[12] It was held in Davis v. Renton, 99 Cal. App. 264, 278 P. 442, that an award of $5,000 for similar injuries was excessive. In that case, the court pointed out that it did not appear that the subsequent conditions described were due to the physical injuries received, and held that, under the evidence, the verdict was excessive. In the present case, there was evidence tending to prove serious after effects caused by the injury to the child's head; and we cannot say in view

of the evidence that the injuries suffered were not of a permanent character, or that the verdict is so plainly excessive as to warrant the conclusion that it was the result of passion or prejudice.

[13] In addition to the allegations of negligence on the part of defendant Harman, it was alleged and admitted that defendant was the owner of the automobile, and that the same was being used by its permission. It is claimed that section 1714¼ of the Civil Code (St. 1929, p. 566), under which the action is maintained against the corporation defendant, violates the provisions of section 11 of article I of the Constitution that all laws of a general nature shall have a uniform operation, and that the demurrer of this defendant to the complaint should have been sustained. The Code section imputes to the owner of a motor vehicle the negligence of any person operating the same with the owner's permission. No such rule applies to the owners of vehicles not so propelled, and it is claimed that there is no reasonable basis for the distinction. This contention is fully answered in Heron v. Riley, 209 Cal. 507, 289 P. 160, upholding the constitutionality of section 1714½ of the same Code, and requires no further discussion.

The conclusions of the jury appear to be fully sustained, and no error is shown which would justify a reversal of the judgment. The judgment is affirmed.

115 Cal.App. 67

PENN v. DYBA et al.

Civ. 713.

District Court of Appeal, Fourth District, California.

June 17, 1931.

1. Quieting title 🔑10(1).

In quiet title action, plaintiff must show title in herself; it being good defense to show only that plaintiff's title is defective.

2. Appeal and error 🔑1071(1).

If plaintiff's title is successfully attacked in quiet title action, validity of judgment adverse to plaintiff would not be affected by erroneous finding that one defendant was owner.

3. Quieting title 🔑44(4).

Deed from city treasurer, though furnishing prima facie evidence of title, *held* not conclusive in quiet title action.

4. Quieting title 🔑44(3).

In quiet title action, finding that defendant had lien *held* supported by mortgage and trust deed admitted in evidence.

5. Appeal and error 🔑1071(1).

In quiet title action, finding that no owner's name was mentioned in certificate of sale to plaintiff, if error, *held* harmless.

Plaintiff was grantee in a deed executed by the city treasurer in pursuance of sale to satisfy a street improvement bond issued on an assessment for the improvement of the street. The certificate of sale showed that the property was assessed to "unknown owner," so that no owner's name was mentioned in the certificate and the finding was literally true, the case was not tried on the theory that a personal demand upon the property owner was required, and the failure to make such demand was not an element contributing to the court's decision, so that the finding complained of, if erroneous, might be regarded as superfluous.

6. Quieting title 🔑44(3).

In quiet title action by one holding deed from city, evidence supported finding notice to redeem did not remain upon door of house for reasonable time.

Plaintiff was grantee in a deed executed by the city treasurer in pursuance of a sale to satisfy street improvement bond, and it was contended that the notice of sale and application for deed was not affixed to the door of the house in such fashion that it would remain thereon for reasonable length of time and that it did not remain thereon for reasonable time. The testimony, though to some extent vague and indefinite respecting visit to the house during the thirty-day period succeeding the placing of the notice to redeem on the door of the house, was sufficient to support the finding.

7. Municipal corporations 🔑581.

On sale by city to satisfy street improvement bond, there should be strict, literal compliance with statutory requirements respecting "posting" of notice to redeem (St. 1911, p. 762, § 74, as amended by St. 1921, p. 292, § 8).

The word "post" is defined as to affix to a post, wall, or other usual place for public notices, and the word "affix" means to fix or fasten in any way, to attach physically.

[Ed. Note.—For other definitions of "Affix" and "Post; Posting," see Words and Phrases.]

8. Municipal corporations ⚷581.

On sale by city to satisfy street improvement bond, notice to redeem *held* not properly posted (St. 1911, p. 762, § 74, as amended by St. 1921, p. 292, § 8).

> The testimony showed that the notice was fastened to the door by means of pins which were stuck through the paper at one side and found lodgment in a narrow crevice between the wood of the door and a metal door plate, and the opposite edge of the notice was inserted in a crack between the door and the door jamb and no attempt was made to fasten it there by means of any device.

9. Appeal and error ⚷1050(1).

In quiet title action, admission of evidence which was purely preliminary, though erroneous if standing alone, *held* harmless.

> The plaintiff claimed under deed from city treasurer in pursuance of a sale to satisfy street improvement bond, and the question objected to was whether witness went past house quite frequently and was most general and standing alone obviously subject to objection of irrelevancy, incompetency, and immateriality. However, the witness later testified that he went to the particular house involved in the action, described portions of house which he inspected, and did not see on property notice to redeem which plaintiff maintained was placed on front door.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Quiet title action by Laura E. Penn against Elizabeth Dyba and others. From an adverse judgment, plaintiff appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Adolph B. Rosenfield, of Long Beach, for respondent Hill.

JENNINGS, J.

Plaintiff appeals from a judgment in favor of defendants.

Upon conclusion of the trial of the issues herein presented, the court found that defendant Elizabeth Dyba was the owner of the real property, title to which is in dispute, and that she owned it subject to a mortgage lien of E. A. Hill and to the lien of a deed of trust held by Mox, Inc., which the court found was subordinate to the mortgage lien of E. A. Hill. Judgment was entered accordingly. No brief has been filed on behalf of Elizabeth Dyba or Mox, Inc., and for the sake of convenience E. A. Hill, in whose behalf a brief has been filed, will be styled respondent, and Elizabeth Dyba and Mox, Inc., will be referred to as defendants.

Appellant was the grantee in a deed executed by the city treasurer of the city of Los Angeles, in pursuance of a sale made by him to satisfy a street improvement bond issued upon an assessment for the improvement of a street. The complaint alleged a cause of action to quiet title. The defendants Elizabeth Dyba, Fidelity Mortgage Corporation, and Mox, Incorporated, appeared and answered, claiming an interest in each defendant superior and adverse to that of plaintiff. Respondent E. A. Hill answered denying that appellant was owner of the property and alleging ownership of a mortgage executed by defendant Elizabeth Dyba to respondent as mortgagee, which it was alleged created a lien right in respondent superior to the claim of appellant.

During the trial appellant introduced in evidence the deed executed to her as grantee by the city treasurer of the city of Los Angeles and rested her case. Evidence was then introduced on behalf of respondent and his codefendants, and at the conclusion of the trial the court made its findings and conclusions of law and rendered its judgment as above indicated in favor of respondent's claim of a mortgage lien superior to plaintiff's alleged ownership of the fee.

Appellant makes four contentions: (1) That the findings are not supported by the evidence; (2) that there is an irreconcilable conflict in the findings; (3) that the decision of the trial court is contrary to law; and (4) that the court erred in admitting certain evidence over appellant's objection.

[1, 2] It is first contended that the court's finding that Elizabeth Dyba is the owner and entitled to possession of the real property, title to which is alleged to be in appellant, is not supported by the evidence. During the trial of the action, no documentary evidence showing title in defendant Elizabeth Dyba was submitted. The only direct evidence relating to this feature of the case consists of the oral testimony of the witness Gustav Mox who testified that the defendant Elizabeth Dyba held title for the builder of the house on the premises; that the property was sold to one Fix in 1926 and that Fix sold it back to Elizabeth Dyba in December, 1926; that in July, 1927, Elizabeth Dyba deeded the property to one Wasson. This rather vague and uncertain testimony relative to the title of defendant Elizabeth Dyba is to some extent supported by a certain mortgage admitted in evidence executed on June 25, 1925, by Elizabeth Dyba who covenanted that she then had title in fee to the premises which are the subject of the present action. This mortgage by suc-

cessive assignments finally became the property of respondent and furnishes the basis for the court's finding that respondent had a lien on the property superior to appellant's alleged title to it. Adopting the contention of appellant that the evidence hereinabove set forth is insufficient to sustain the court's finding that the defendant Elizabeth Dyba is the owner of the property will not avail anything to appellant, for appellant instituted the present action claiming title in herself and seeking to quiet her title against the claims of defendants. The burden was therefore upon her to show title in herself and the assertion of an interest by another who has no title furnishes no ground of complaint. And it is a good defense to an action of this character to show no more than that the title of the one seeking to have it quieted is defective. Williams v. City of San Pedro, etc., Co., 153 Cal. 44, 49, 94 P. 234; Kilfoil v. Warden, 46 Cal. App. 502, 189 P. 303. Therefore, if it be conceded that the court's finding that Elizabeth Dyba is the owner of the property is incorrect and lacking in evidentiary justification, nevertheless if appellant's title has been successfully attacked, the court's decision that appellant is not entitled to a decree quieting her title to the property is manifestly correct.

[3] The first finding of fact wherein the court found that appellant is not the owner of the property is also attacked because it is argued that the deed from the city treasurer furnished prima facie evidence of title in appellant. Here, again, if it be conceded that the deed under which appellant claims was prima facie evidence of title in appellant, nevertheless if it appears by satisfactory evidence that appellant's title is defective, the court's finding is obviously correct. Prima facie evidence is not conclusive evidence.

[4] Findings 3 and 4, wherein the court found that respondents and defendant Mox, Incorporated, have liens against the property by virtue of a mortgage executed by defendant Elizabeth Dyba and a trust deed executed by the same defendant in favor of Mox, Incorporated, are amply supported by the instruments themselves admitted in evidence by the trial court.

[5] It is urged that finding No. 8, to the effect that no owner's name was mentioned in the certificate of sale issued to appellant, is error since the certificate itself shows that the property was assessed to "Unknown Owner." Authorities are cited by counsel for appellant holding that the certificate of a superintendent of streets that the ownership of property subject to assessment is unknown to him is conclusive of the fact thus certified and that the necessity of a personal demand is thereby obviated. It may be conceded that appellant's contention that there was no necessity of personal demand is correct, but it does not follow therefrom that the court's finding that no owner's name was stated in the certificate was error. There was no contention that there was necessity for a demand and the decision of the court is not based upon the failure to make a demand. It is obvious that no owner's name was mentioned in the certificate and that therefore the court's finding was literally true. Since the case was not tried on the theory that a personal demand upon the property owner was required and the failure to make a demand is not an element contributing to the court's decision, the finding complained of, if it is subject to the objection made, may be regarded as superfluous and its inclusion is harmless.

[6] Paragraph 9 of the court's findings is attacked as lacking evidentiary support. The important feature of this particular finding and the feature which is the object of attack by appellant consists of the statement that the notice of sale and the application for a deed which the court found was placed on the front door of the house on the premises was not affixed to the door in such fashion that it would remain thereon for a reasonable length of time and that it did not remain on the door for a reasonable time. The evidence respecting this feature consists of the testimony of C. P. Warden, who described in detail the manner in which he placed the notice to redeem on the front door of the premises and the testimony of three witnesses who testified to visits made by them to the premises during the 30-day period preceding the execution of the deed to appellant by the city treasurer and to the fact that none of them saw upon the front door of the house the notice to redeem. The testimony of these witnesses, including that of the witness Warden, though it is to some extent vague and indefinite respecting visits made by them during the 30-day period succeeding the placing of the notice to redeem on the door of the house, lends sufficient support to the finding in so far as it is a finding of fact. There is bound up in this finding the determination by the court of a legal conclusion which is made the subject of a pronounced, separate objection by appellant which is hereinafter considered.

[7, 8] Complaint is also made that certain findings are irreconcilably conflicting. Close examination of the findings thus criticized discloses that the determination of this contention depends upon whether the trial court properly disposed of the principal legal problem presented in the case.

This problem, which is made the subject of vigorous argument by appellant, relates to the sufficiency of the posting of the notice to redeem by appellant and forms the basis of her separately stated contention that the court's decision is contrary to law. The Improvement Act of 1911 (St. 1911, p. 730) by virtue of whose provisions the proceedings were taken which finally resulted in the sale of the premises and the execution to appellant by the city treasurer of the city of Los Angeles of the deed on which appellant relies, provides in section 74 thereof (as amended by St. 1921, p. 292, § 8) that in case of unoccupied property a written notice stating that the property has been sold to satisfy the bond lien, date of sale, date, number, and series of the bond, the amount due, and the time when the right of redemption will expire must be posted in a conspicuous place upon the property at least 30 days before the purchaser applies for a deed. It was the trial court's decision that the evidence relative to the placing of the notice to redeem by appellant failed to show that it had been properly posted as contemplated by statute. The word "post" is defined in Webster's New International Dictionary (1929) as follows: "To affix to a post (as esp. formerly, before a sheriff's office or in some other public place) wall, or other usual place for public notices; to placard, as to post a notice." The word "affix" is thus defined in the same dictionary: "To fix or fasten in any way; to attach physically; as to affix a seal * * * to attach. * * *" In 31 Cyc. 965, the word "posting," used as a verb, is defined thus: "To attach to a post, a wall, or other usual place of affixing public notices; to advertise; to bring to the notice, or attention of the public by affixing to a post." It is then obvious that having in mind particularly the sense in which the word is used in the statute, the principal object to be attained is to bring to the attention of the owner the fact that he will be divested of title within a limited period of time unless the amount specified in the notice is paid and the property thus freed from the lien of the assessment. It is also to be borne in mind that we are here dealing with property assessed to an unknown owner and the statute is providing for a mode of conveying notice to such owner other than the usual method of personal service. In other words, it is a substitute for personal service and there should be strict and literal compliance with the statutory requirement. Black on Tax Titles, p. 422, § 343 (2d Ed.). The case of Hindle v. Warden, 50 Cal. App. 356, 195 P. 428, sufficiently illustrates the absolute and literal compliance with statutory requirements insisted upon by the courts in a case where service of a notice to redeem is permitted to be given by posting.

The evidence relative to posting the notice to redeem in the present action consisted solely of the testimony of a single witness, C. P. Warden, who described minutely and in detail the manner in which he placed the notice upon the front door of the house. It would unduly lengthen this opinion to incorporate in it the testimony of this witness. Suffice it to say, that the testimony shows that the witness fastened the notice to the door by means of pins which were stuck through the paper at one side of the notice and found lodgment in a narrow crevice between the wood of the door and a metal doorplate attached to it. The opposite edge of the notice was inserted in a crack between the door and the door jamb and no attempt was made to fasten it there by means of any device. If the object of the statute is the giving of notice and this central idea remains even when the owner is unknown and the information contained in the notice is permitted to be conveyed by the substituted method, then so flimsy and temporary an attachment as was here used should not be held to have attained the dignity of legal posting. The court's decision that the notice to redeem the property from the lien of the assessment bond was not posted in the manner contemplated by the statute was correct.

[9] Complaint is made that, over the objection of appellant, the court permitted the witness Mox to answer the following question: "Mr. Mox, did you go past that house quite frequently?" The question was most general and standing alone obviously subject to the objection of irrelevancy, incompetency and immateriality. An examination, however, of the testimony that followed the answer shows that the question was purely preliminary and that the witness later testified that he went to the particular house involved in the action, that he described the portions of the house which he inspected and that on his various visits of inspection he did not see upon the property the notice to redeem which appellant maintained was placed on the front door of the house. No prejudicial error was committed in permitting the question to be answered.

For the reasons hereinabove set forth, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

PACIFIC FINANCE CORPORATION v. BANK OF YOLO.*

Civ. 4346.

District Court of Appeal, Third District, California.

July 3, 1931.

Rehearing Denied Aug. 1, 1931. Hearing Granted by Supreme Court Sept. 1, 1931.

1. Sales 🔑459.

Title to automobiles may be retained by conditional sales contracts and vested either in sellers, or in those taking title from original sellers, by taking up bill of lading with sight draft attached, and then executing conditional sales contract with dealer.

2. Sales 🔑472(3).

Whenever finance company, having taken title from original sellers, enters into conditional sales contract with dealer and sales are thereafter made by dealer, buyers from dealer obtain valid title.

3. Principal and agent 🔑3(3).

Transaction, whereby finance company advanced money to dealer to take up sight draft for automobiles purchased, *held* to constitute "loan" to dealer.

> The facts disclosed that finance company, on dealer's representations that sight drafts and bill of lading for automobiles purchased by dealer had been forwarded to certain bank, delivered to dealer a draft for specified sum reciting that it was in payment of sight draft for automobiles purchased for dealer's account. Thereafter dealer sent draft to bank where it was credited to his account and amount thereof checked out by dealer without paying sight draft for automobiles. Finance company's drafts were drawn with full understanding of all parties that cars should be placed in dealer's sales room to be disposed of at retail to general public, and conditional sales contract entered into between dealer and finance company constituted only security as between them.
>
> [Ed. Note.—For other definitions of "Loan," see Words and Phrases.]

4. Money lent 🔑1.

Money advanced is essentially a "loan."

5. Principal and agent 🔑3(3).

Drafts given by finance company to dealer to pay for automobiles showed dealer had property interest therein and was not mere agent of finance company, as respects bank's liability on dealer's failure to use money to pay for automobiles.

6. Appeal and error 🔑1071(5).

Findings necessary to support judgment being sustained, that fact findings unnecessary to support judgment were not sufficiently sustained was immaterial.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Pacific Finance Corporation against the Bank of Yolo. Judgment for defendant, and plaintiff appeals.

Affirmed.

G. J. Irwin, of San Francisco, for appellant.

Gaddis & McDonald, of Woodland, for respondent.

PLUMMER, J.

The plaintiff sued to recover on account of alleged misappropriation of moneys by the defendant in cashing two certain drafts hereinafter mentioned. From this judgment, the plaintiff appeals.

The record shows that the plaintiff in this action is in the business of financing automobile dealers in the purchase of automobiles, or in taking title to automobiles from vendors when purchased by dealers, paying the vendors therefor, and then entering into conditional sales contracts with the dealers for the resale of said automobiles to the general public.

In the case at bar, an automobile dealer by the name of Hendley was doing business in the town of Woodland. When shipments of cars would arrive in Woodland from the factory consigned to the order of the manufacturer or shipper, a negotiable bill of lading with a sight draft attached for the amount due the consignor would be forwarded to a bank at Woodland, with instructions to deliver the bill of lading against payment of the sight draft. Upon being notified that the shipment had arrived, and that the sight draft and bill of lading were in bank, Hendley would come to Sacramento and give this information to those in charge of the plaintiff's office in the city of Sacramento, and request that it "floor" the shipment for him (flooring the shipment meaning that the Finance Company would pay the sight draft attached to the bill of lading, take up the bill and secure delivery of the automobiles from the carrier and place them on the floor of Hendley's salesroom in the city of Woodland, a conditional contract of purchase and sale covering the shipment of cars being entered into by the plaintiff through its agent at Sacramento and Hendley). Up until the two transactions involved herein, this business had been conducted through the Bank of Woodland.

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*For subsequent opinion see 10 P.2d 68.

On or about the 2d day of February, 1928, Hendley came to the plaintiff's office in the city of Sacramento and informed the plaintiff that a sight draft and bill of lading for automobiles, purchased by him from the Chevrolet Company in Oakland had been forwarded to the Bank of Yolo in the city of Woodland, and thereupon the plaintiff executed and delivered to Hendley the following draft:

"Pacific Finance Corporation

"No. 11102

"Sacramento, Calif. February 2, 1928.

"Pay to the Order of Bank of Yolo $4610.00 Four Thousand Six Hundred ten Dollars In payment of sight draft Automobiles Purchased for account of J. T. Hendley To Pacific Finance Corporation, Pacific Finance Building, Los Angeles, California, Harry G. McClory, For Pacific Finance Corporation."

Hendley took this draft to the Bank of Yolo, or rather, after returning of Woodland, sent the draft, together with a deposit slip, to the Bank of Yolo, which honored the draft and passed the sum mentioned therein to the credit of Hendley. Hendley thereafter, by means of checking against his account, drew out of the bank of Yolo all of the sum of money thus placed to his credit, and did not pay the Chevrolet Company of Oakland for the shipment of cars. Thereafter, and on or about the 5th day of March, 1928, Hendley appeared in the city of Sacramento at the office of the plaintiff and stated that a certain other sight draft and bill of lading for cars shipped to Woodland for the Chevrolet Company, on account of his orders, was in the Bank of Yolo, whereupon the plaintiff executed and delivered to the defendant a certain other draft in the words and figures following, to wit:

"Pacific Finance Corporation

"No. 11111

"Sacramento, Calif., March 5, 1928

"Pay to The order of Bank of Yolo $2323.-51 Two Thousand three hundred twenty-three & 51/100 Dollars In payment of Sight Draft Automobiles Purchased for Account of J. T. Hendley To Pacific Finance Corporation, Pacific Finance Building, Los Angeles, California, Harry G. McClory, For Pacific Finance Corporation."

Hendley either took or sent this draft to the bank at Woodland, whereupon it was honored and the amount thereof placed to the credit of Hendley. Hendley afterwards checked out all the money represented by this draft. At the time of the honoring of this draft by the Bank of Yolo, the Bank of Yolo had in its possession a draft and bill of lading from the vendors of the automobiles purchased by Hendley. This draft was not paid. The record shows that no bill of lading with sight draft attached, representing the first item herein mentioned, for which the draft of February 2, 1928, was intended as payment, ever came into the hands of the Bank of Yolo. The sight draft and bill of lading giving rise to the draft of March 5, 1928, which we have set forth, were returned to the vendors of the automobiles.

Upon the part of the appellant, it is contended that the Bank of Yolo was under obligation to apply the money, represented by the plaintiff's draft, in payment of the sight draft forwarded by the Chevrolet Company, and, not having such draft in its possession, either to ascertain the whereabouts of the same or place the money to the credit of the plaintiff as a depositor. That in the second case it was the duty of the bank to pay the sight draft drawn by the vendors of the automobiles, and deliver the canceled draft, together with the bill of lading, to Hendley, to be forwarded by him to the plaintiff at its office in Sacramento.

The record shows that on several former occasions when automobiles had been purchased, a representative of the plaintiff by the name of McClory always accompanied Hendley to Woodland, personally delivered the plaintiff's draft in payment of the draft drawn by the vendors of automobiles, taking up the canceled draft and the bill of lading. This had only been done when the sight draft and bill of lading of the vendors were forwarded through the bank of Woodland.

The respondent's theory of this case, and the one adopted by the court, is that the relationship established between the plaintiff and Hendley was that of debtor and creditor; that while the transactions were carried out in such form as to place the title of the automobiles in the Pacific Finance Corporation, that the money represented by the drafts was simply so much money paid for the uses and purposes of Hendley, at Hendley's instance and request, thus constituting a loan and creating the relationship of debtor and creditor, and that, when the drafts were placed in the possession of Hendley, he had a property interest therein, in that it was delivered to him to be applied for his uses and purposes in the purchase or in payment, rather, of automobiles ordered by him from the manufacturers.

On the part of the appellant, it is contended that it is simply buying automobile paper, is not loaning money, and that the relationship of debtor and creditor does not exist. It is further contended that, when Hendley went to the Bank of Yolo in Woodland, he was simply acting as the agent of the plaintiff without any property interest in the drafts, and that the bank had no authority whatever to give him credit for the moneys represented by the drafts.

While the conditional contracts of sale entered into between the plaintiff and Hendley provided for the retention of title by the plaintiff, the whole purpose and intendment of the transaction, as disclosed by the record, was to the effect that the automobiles should be placed in the salesroom conducted by Hendley in the city of Woodland, and the automobiles thereafter sold to the general public.

[1, 2] Two propositions of law appear to be so well settled that we need do nothing more than cite the cases where the propositions have been involved: First. That conditional sales contracts are valid, and the title to automobiles may in this manner be retained and vested either in the vendors or those who take title from the original vendors, by taking up the bill of lading with a sight draft attached, and then executing a conditional sales contract with the dealer. Mohr v. First National Bank, 69 Cal. App. 756, 232 P. 748; Arena v. Bank of Italy, 194 Cal. 195, 228 P. 441; Bonestell v. Auto-Motive Finance Corp., 69 Cal. App. 719, 232 P. 734. Second. That whenever a finance company, having taken title from the original vendors, shippers, or manufacturers of automobiles, enters into a conditional contract of sale with a dealer, "floors" the cars for him, that is, places them in the dealer's salesroom for sale to the public, and sales are thereafter made by such dealers to the public, the persons purchasing from the dealer obtain a valid title to the cars so purchased. General Securities Corp. v. Reo Motor Car Co., 91 Cal. App. 16, 266 P. 576; Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067.

[3] What the transaction really was between the Finance Company and Hendley is best shown by the testimony of the witness McClory, the manager of the plaintiff's branch office in Sacramento. We give it in the form of questions and answers. After stating that he had a transaction with Hendley in Sacramento on February 2, 1928, this witness testified:

"Q. Mr. McClory, will you tell us what the transaction was that you had on that date? A. Mr. Hendley came to me and said he had a sight draft against him for some $4,610 through the bank and asked me to pay for the cars.

"Q. Through which bank? A. The Bank of Yolo at Woodland, and asked me to pay for the cars. I gave him a draft and he signed a flooring contract and he gave me a check for what we call his portion, so we issued the draft made payable to the Bank of Yolo, with the notation, 'Payment of sight draft.' Also, Mr. J. T. Hendley's name on it, and he left the office."

The witness, after stating that he had a transaction with Hendley on March 5, 1928, testified as follows:

"Q. What was that transaction, Mr. McClory? A. Mr. Hendley came to me and said that there was a sight draft drawn against him by the Chevrolet Motor Company, through the Bank of Yolo, at Woodland, and told me that he wanted to pay for those cars and then put them on a wholesale (retail) contract to him, which was done."

The record shows that this contract was never fully filled out, but was only signed in blank by Hendley.

"Q. Mr. McClory, on account of the two sums in this, or take it, on account of the sum mentioned in the first draft of February 2d, were you repaid any of those moneys by Mr. Hendley? A. Yes.

"Q. How much; what was the total amount that the Pacific Finance Corporation was repaid by Mr. Hendley on account of that first draft on February 2, 1928? A. He gave us, as I recall, $610."

After refreshing his memory the witness testified that the total sum paid back was $1,315.

"Q. Now, you understood what Mr. Hendley was going to do with these automobiles? A. Well, in the course of his business, yes.

"Q. What was he going to do with them? A. Sell them.

"Q. Where? A. In Woodland.

"Q. He had an agency for both the Nash and Chevrolet automobiles? A. That's right.

"Q. And you gave him that draft for the purpose of enabling him to floor those cars in his place of business, didn't you? A. That's right.

"Q. To exhibit them to the general public, for sale? A. That's right.

"Q. And you knew that he was in the automobile business for the profit that he would make? He bought them at a certain figure from the Chevrolet people and from the Nash distributors, at what they call the wholesale price, and then he sold them to the general public at retail prices; is that correct? A. That's correct.

"Q. And you knew and understood that that was the nature of his business? A. Yes.

"Q. And out of the profit that he made on the cars, or the purchase price that he received for the cars, he had to pay you what you advanced to him plus a certain rate of interest which you charged him. What was the rate of interest which you charged Mr. Hendley? A. One per cent a month.

"Q. You charged him one per cent a month; then you advanced this money to Hendley for the purpose of enabling him to floor these cars in his place of business, in Woodland? A. Yes."

Mr. McClory further testified that the plaintiff did not lend money; that it is in the business of buying retail contracts; and then further testified:

"Q. The only profit that you get in a deal such as you made with Mr. Hendley in this case is the interest that you charge him, at the rate of one per cent a month? A. Yes, sir.

"Q. That is your only profit? A. That is all.

"Q. And Hendley comes to you, if he had an order for cars * * * he comes to your office and tells you that he has made that order, and tells you that he has got to lift that sight draft, and you ask him how much it is, and he tells you; that includes the freight plus the wholesale price of the cars from the distributors, doesn't it? A. He paid the freight separately.

"Q. He paid the freight separately. But he comes into you and tells you that he has ordered certain automobiles from the Chevrolet people in Oakland, the distributors, and he tells you that he has ordered certain cars from the Nash distributors in San Francisco, and you ascertain from him the wholesale price for those cars, for the shipment, don't you? A. That is right.

"Q. Then you asked Mr. Hendley to make a deposit with you for a portion of that purchase price. In this case you say it is $610, isn't that correct? A. We ask him to make that portion as a down payment after we pay for the cars.

"Q. After you pay for the cars? A. Yes."

The witness further testified that Mr. Hendley came to him and said he had a sight draft against him for $4,610 through the bank, and asked him to pay for the cars.

"Q. Through which bank? A. The Bank of Yolo at Woodland, and asked me to pay for the cars. I gave him a draft and he signed a floor contract and he gave me a check for what we call his portion, so we issued the draft made payable to the Bank of Yolo, with the notation 'Payment of sight draft,' also Mr. J. T. Hendley's name on it, and he left the office."

The witness further testified that he did not accompany Hendley to the Bank of Yolo, in relation to either one of the transactions herein referred to, by reason of the fact that his business at said time called him elsewhere.

The testimony in relation to the second draft was in substance identical with the testimony relating to the first draft, showing that both transactions were identical in legal effect.

Irrespective of the designation or name given to these transactions by the respective witnesses, there is no escape from the conclusion that in both instances the plaintiff was advancing money for the uses and purposes of the defendant. The taking of title to the automobiles from the vendors or distributors in Oakland and San Francisco was only a method of securing the repayment of the moneys laid out or expended in the purchase of the sight drafts drawn by the vendors or distributors, and that, as the money was advanced for the uses and purposes of Hendley, the relationship of debtor and creditor immediately came into being. The drafts were drawn at the instance and request of Hendley to pay for cars that he had ordered, with the full intent and understanding of all of the parties that the cars should be placed upon the floors of his salesrooms in Woodland and disposed of at retail to the general public. The conditional contract entered into between Hendley and the plaintiff constituted only a form of security as between them, and would enable the plaintiff to take possession of all of the cars not theretofore sold to the general public by Hendley. While the legal title to the cars, by reason of taking up bills of sale and sight drafts, when such is done, vests title in the Finance Company, a general property interest, nevertheless, remains in the dealer who has ordered the cars, and who has been allowed to take possession thereof for the purpose of making sales. In the case at bar, it appears that Hendley paid at least a portion of the purchase price, and also paid the freight on the shipments separately.

[4] While not within the meaning of the word "loan," as used by the layman, when Hendley asked the plaintiff to pay for the shipment, and the plaintiff delivered to Hendley its draft in payment thereof, it was, in legal effect, the advancement of money for the uses and purposes of Hendley, and upon his implied promise to repay the same, and the method of doing so was by means of a conditional contract of sale and purchase of the automobiles entered into between the parties, which is none other than a loan of money carried out in the manner calculated to secure repayment to the one advancing the money. The fact that no money actually passed from the Finance Company to Hendley does not change the character of the transaction. A loan when money is passed is thus defined in 38 C. J. 126: "A contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrows; the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest. If such is the intent of the parties the transaction will be considered a loan without regard

to its form." The testimony shows conclusively that it was the intent of the parties that the original sum of money advanced should be repaid, with interest at the rate of 1 per cent. per month; that the parties did not intend, and never intended, that possession of the automobiles should be taken by the Finance Company and retained or dealt with as their property, but that title thereto should only be vested in the Finance Company for the purpose of insuring repayment, with interest, of the money advanced. Money advanced is essentially a loan. Puget Sound Telephone Co. v. Telechronometer Co. of America, 130 Wash. 468, 227 P. 867; Savings Bank of San Diego v. Barrett, 126 Cal. 413, 58 P. 914. See, also, In re Grand Union Co. (C. C. A.) 219 F. 353, where the transfer of piano leases were involved and the transaction very similar to the transfer of automobile paper. The full face value of the piano leases was not paid. In the present case, the testimony shows that Hendley was required to pay at least a part of the purchase price of the automobiles. In the first transaction, he was required to advance the sum of $610.

That transactions such as we are considering here are in legal effect a form of loan further appears from the case of In re American Fibre Reed Co. (D. C.) 206 F. 309.

[5] On the part of the appellant, as we have stated, it is contended that when Hendley went to the Bank of Yolo with the drafts which we have mentioned, he was acting as the agent of the plaintiff, and that the defendant was put upon notice and should have inquired into the limited powers of Hendley as such agent, and that the transaction was not a loan, and, therefore, the claim that Hendley had no interest whatever in the moneys represented by the drafts. In this particular, our attention is first called to the case of Bowles v. Clark et al., 59 Wash. 336, 109 P. 812, 813, 31 L. R. A. (N. S.) 613. In that case, it appears that Clark, who was the appellant in the action owned certain real property in Seattle; that Fraser was the manager of a concern called the Enterprise Plumbing Company, and, as such manager, contracted with Clark to furnish certain materials. It appears that Fraser had no credit; that between $65 and $70 worth of materials additional were required to complete the work contracted to be performed by Fraser; that Clark gave a check for the sum of $70, payable to the Bowles Company, and Fraser took the check, delivered it to the respondent, and, instead of buying the necessary supplies, had his own account with the Bowles Company credited with a portion of the money represented by the check, and the supplies were obtained by Fraser from the Bowles Company on credit, and, not being paid for, the Bowles Company filed a lien on the property owned by Clark. Upon the trial, the question was presented as to whether Bowles Company should or should not have credited Clark with the whole sum instead of crediting Fraser with the amount of his indebtedness. It was held in that case that Fraser was simply the agent of Clark, had no interest in the check, and Clark should have been credited with the entire amount. Had Fraser possessed an interest in the check, we think the opinion in the case shows that the decision would have been different. We quote the following from the opinion: "Having a duty then to account for the check, the question remains: Did it so account when it appropriated it to Fraser's use? It seems to us that it did not. It is true that Fraser was the appellants' agent for a special purpose, and it is true also that the respondent, since it was not informed of the special limitations upon his powers, had the right to assume that his powers were such as the circumstances surrounding the transaction made them appear to be. But we think it too much to say that these circumstances were of such a nature as to warrant the belief that the property in the check was the property of Fraser. The check itself contained a distinct warning to the contrary. It was made payable to the respondent, a stranger to the drawer, and not to Fraser, and it is not reasonable to suppose that Fraser would have accepted payment of an obligation due himself in a form which he could not use without the consent and co-operation of a third person."

The court then takes up the fact that the parties all knew that Fraser had no credit, and that no one would deal with him without making further inquiries. Several cases are cited by appellant which uniformly hold that where an agent of the drawer takes a check to the bank, drawn payable to the bank, and the bank credits the agent with the amount represented by the check or draft, instead of placing the same to the account of the drawer, the bank is liable. Sims v. U. S. Trust Co., 103 N. Y. 472, 9 N. E. 605; Apostoloff v. Levy, 186 App. Div. 769, 174 N. Y. S. 828; Bjorgo v. First National Bank of Emmons, 127 Minn. 105, 149 N. W. 3, L. R. A. 1915B, 287. In all of these cases, as we have stated, the question of agency was involved, and not that of ownership in and to the check or draft, or in the proceeds to be derived therefrom.

The respondent calls our attention to the case of Armstrong v. American Exchange National Bank of Chicago, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747, where it was held that drafts similar to those involved in this transaction gave a property interest to the one to whom the drafts were delivered. In that case, however, the telegrams passing between the parties so distinguish it from the circumstances here involved that we do not cite it as an authority.

In the case of Bank of Venice v. Clapp, 17 Cal. App. 657, 121 P. 298, the distinction is drawn between one who has an interest in a check made payable similar in form to those involved here, and where the person presenting the check is only an agent, and it is there held that a bank in paying such a check is relieved from liability. The case of Bank of Venice v. Clapp, supra, supports in every particular the conclusion of the trial court in this action. The face of the draft involved herein shows that Hendley had a property interest therein, and that the money was being advanced by the plaintiff to pay for automobiles purchased by him.

Other questions are presented for our consideration, but they are not of such importance as to require their being set forth in this opinion.

[6] The findings necessary to support the judgment appearing to be sufficiently sustained, the fact that findings unnecessary to support the judgment are not sufficiently sustained is immaterial.

The judgment is affirmed.

I concur: PRESTON, P. J.

HOFSTEDT v. SOUTHERN PAC. CO. et al.

Civ. 4190.

District Court of Appeal, Third District, California.

June 17, 1931.

Rehearing Granted July 17, 1931.

1. Railroads ⚷304.

Violating county ordinance forbidding railroad to block crossing by freight train, with which automobile collided, for over five minutes, *held* negligence per se.

2. Railroads ⚷345(3).

In motorist's action involving collision with freight train, proof of existence and violation of county ordinance forbidding railroad to block crossing for over five minutes *held* properly admitted, although not specially pleaded.

> Proof of existence and violation of ordinance in question was properly admitted, since it appeared that complaint, to which only a general demurrer was filed, alleged in general terms two distinct acts of negligence, one allegation being that train was operated negligently in that it was stopped and was blocking highway, and second allegation being that train was without lights or warning signals, and therefore proof of violation of ordinance was mere evidence of negligence, as charged in first allegation.

3. Appeal and error ⚷891.

In negligence case, involving violation of county ordinance, filing ordinance as evidence in Court of Appeal *held* discretionary and authorized by statute (Code Civ. Proc. § 956a).

4. Railroads ⚷350(15).

Whether motorist was contributorily negligent in hitting unlighted freight train, violating county ordinance by standing twenty minutes on crossing, *held* for court in trial without jury (St. 1923, p. 546, § 99).

> It appeared that regular sidetrack was thought to be too short for train in question, which was accordingly placed on spur track leading to warehouse, and that headlights of locomotive were extinguished, and no lanterns or other lights displayed while trainmen waited for another train to pass; that plaintiff motorist knew spur track was seldom used, and that he was not traveling at excessive speed; that plaintiff's headlights were adjusted to conform to California Vehicle Act (St. 1923, p. 546, § 99), so as to throw rays of light on surface of highway, and therefore at a distance rays would strike highway beneath box cars, which would not be disclosed by legally adjusted headlights until automobile was quite close; and that plaintiff, when three hundred feet from crossing, had met and passed another automobile coming from direction thereof, which would naturally lead to conclusion that crossing was open.

5. Railroads ⚷348(6).

Evidence supported finding that motorist was not contributorily negligent in colliding with unlighted freight train, violating county ordinance by standing twenty minutes on crossing.

6. Negligence ⚷65.

As regards contributory negligence, each case rests upon its particular facts.

7. Negligence ⚷56(1).

Negligence, to be actionable, must proximately cause accident.

8. Railroads ⚷348(2).

Evidence warranted finding that railroad's violating county ordinance, by allowing freight train to stand twenty minutes on crossing, proximately caused motorist to collide with unlighted train (St. 1923, p. 546, § 99).

> It appeared that blocking of crossing by freight train in question for more than five minutes, contrary to county ordinance, contributed to cause of accident, since violation thereof constituted negligence per se, and evidence also showed that driver

of another automobile, after waiting fifteen minutes at crossing, turned around and started back in hope of finding another crossing, and that plaintiff, when three hundred feet from crossing, met and passed the other automobile which misled him into believing that crossing was open.

9. Railroads ⚷337(2).

Whether blocking of crossing by train creates mere condition, and is not proximate cause of collision, depends on particular circumstances.

10. Railroads ⚷350(32).

Where facts are conflicting on question whether railroad's negligence in blocking crossing was proximate cause of accident, question is for jury, or for court in juryless trial.

11. Appeal and error ⚷999(3), 1008(1).

Determination by jury or by court, in juryless trial, that railroad's negligent blocking of crossing proximately caused accident, will not be disturbed on appeal.

Appeal from Superior Court, Merced County; C. W. Miller, Judge.

Action by James A. Hofstedt against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Devlin & Devlin & Diepenbrock, of Sacramento, for appellants.

F. M. Ostrander, of Merced, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment for damages for personal injuries, which were sustained by the plaintiff when his automobile ran into a freight train which blocked the highway crossing, where the cars stood upon a sidetrack.

On the night of June 3, 1928, the defendant's freight train, consisting of a long string of cars to which an engine was attached, was stationed on a spur track adjacent to the main line in the outskirts of Dos Palos, awaiting the passing of another train. It was about 3 o'clock a. m. The headlight of the engine was not burning. A crew of men was in charge of the train. It had been standing on this sidetrack for twenty minutes. During this time the crossing was entirely blocked, contrary to the provisions of a county ordinance. The train was not cut for the crossing. There were no street lamps in the immediate vicinity. No train employee or lanterns were stationed at the crossing to give warning of the blockade. The spur track described an arc westerly as it left the main line and ran to a warehouse some distance away. The highway extended parallel with the main line of the railroad and crossed this spur track in the suburb of Dos Palos. The roadway had a graveled surface. The plaintiff was familiar with this crossing, having frequently traveled that way. He was employed by the Standard Oil Company near that station. Just prior to the accident, he was driving his automobile southerly along the highway parallel with the main line track, for the purpose of going to work. His headlamps were lighted. They had been inspected shortly before the time of the accident, and had been found to be in good condition. As he reached a point in the vicinity of the crossing, he was traveling about thirty-five miles an hour. He was not aware of the proximity of the crossing. Neither the headlight of the engine or other lights were displayed along the train. He failed to see the freight cars in the darkness.

When the plaintiff reached a point three hundred feet from the train which blocked the crossing, he passed another machine coming from the direction of the train. This machine was driven by Vernon Malm, and contained several other occupants. They had attempted to pass the crossing some time before the plaintiff arrived. They discovered the train before they reached the crossing. Their attention was attracted to it by the light from the headlamp of the engine shining upon the warehouse. Almost immediately after their arrival at the crossing this headlight was turned out, leaving the train in darkness. After waiting at the crossing for some time, they turned their machine about and retraced their course to find another crossing. When they reached a point about three hundred feet from the barricaded crossing they passed the plaintiff's car going toward the train. They anticipated his ignorance of the presence of the train at the crossing and attempted to warn him, but he failed to hear them. After the plaintiff passed the glare of the headlamps of the passing machine he was within about sixty feet of the track before he first saw the box cars which blocked his course. He immediately applied his brakes with full force. On account of the graveled surface of the roadway and the rapid speed of his machine, he was unable to avoid a collision. In attempting to prevent a head-on collision he turned his machine up the track, but ran into the cars and sustained injuries thereby. Suit was brought against the railroad company. The case was tried by the court sitting without a jury. A judgment for damages was rendered against the defendant in the sum of $857.50.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The appellant contends that the findings and judgment are not supported by the evidence; that the plaintiff was guilty of contributory negligence, and that the court erred in admitting evidence of the violation of a county ordinance prohibiting railroad trains from blocking a highway crossing for a period of time in excess of five minutes, without the ordinance having been specially pleaded in the complaint.

[1] It is conceded the freight train completely blocked the crossing for a period of at least twenty minutes. This was in violation of a Merced county ordinance, which provided that it was unlawful for any railroad company to block any highway crossing in the county with passenger or freight cars for a period of time in excess of five minutes. The violation of this ordinance, therefore, constituted negligence per se on the part of the appellant. 19 Cal. Jur. 632, § 65; Houston B. & T. Ry. Co. v. Price (Tex. Civ. App.) 192 S. W. 359; Fife v. Chicago & A. R. Co., 174 Mo. App. 655, 161 S. W. 300; Jarrell v. New Orleans & N. E. Ry. Co., 109 Miss. 49, 67 So. 659.

[2, 3] The appellant contends that the court erred in permitting proof of the existence and violation of this county ordinance, for the reason that it was not specially pleaded in the complaint. We think not. Upon application therefor, the respondent was permitted, over the objection of the appellant, to file a duly authenticated copy of the ordinance, upon the hearing of the cause in the District Court of Appeal. The right to file this ordinance as evidence in the District Court of Appeal is discretionary and is authorized "in the interest of justice" by the provisions of section 956a of the Code of Civil Procedure. It was not error to permit evidence of negligence in blocking a public highway with a freight train in violation of a county ordinance, without first specially pleading the ordinance. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 669, 98 P. 1063, 1066, 16 Ann. Cas. 1061; Opitz v. Schenck, 178 Cal. 636, 174 P. 40; Andreen v. Escondido Citrus Union, 93 Cal. App. 182, 187, 269 P. 556; 2 McQuillin's Municipal Corporations (2d Ed.) 992, sec. 898; 16 Ann. Cas. note, page 1064. In the Cragg Case, above cited, it is said: "The cause of action here alleged was not [founded upon] a violation of the ordinance, but [upon] the negligence of the defendant, and the ordinance was simply evidence offered to show such negligence. Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action."

The negligent blocking of the crossing was alleged in the complaint in general terms, as follows: "Said train was being operated carelessly and negligently, in that it was stopped and was blocking the public highway. * * *" Proof of the fact that this obstruction of the highway was prohibited by a county ordinance is mere evidence of the negligence charged. It is true that the complaint also charged another separate element of negligence by adding to the preceding allegation the following language, to wit: "And was without lights or warning of any sort or nature to advise travelers upon said highway at said switch crossing that said train was so stopped and blocking said crossing." This latter paragraph in nowise changes the application of the foregoing rule, with respect to pleading an ordinance when it is relied upon as mere evidence of negligence. The complaint alleges two distinct acts of negligence. The first consists of blocking the crossing by means of freight cars. The violation of an existing ordinance is proof of this alleged negligence. The other specific charge of negligence was the failure of the defendant to warn travelers along the highway of the presence of the train by means of lights or otherwise. A general demurrer to the complaint only, was filed. There was no error in admitting evidence of the violation of the ordinance under the circumstances of this case, without requiring the ordinance to have been specially pleaded.

[4, 5] The question of the plaintiff's contributory negligence was a problem for the determination of the trial judge, under the circumstances of this case. We are of the opinion there is ample evidence to support the findings of the court that, "plaintiff was exercising due care and caution and was not guilty of contributory negligence." The plaintiff was not running his automobile at an excessive rate of speed. His headlights were in good condition. He knew this spur track was seldom used. He had no reason to anticipate that it would be used on this occasion for the stationing of a freight train. Much less could he have anticipated it would be used as a sidetrack for a long freight train so as to completely block the crossing of the highway for a period of twenty minutes or more. This spur track was used on this occasion only because the regular sidetrack was thought to be too short for the long string of cars. It was dark. The headlight of the engine was extinguished so that the train was left in utter darkness. No lantern was displayed as a warning along the train or at the crossing. The plaintiff had just met and passed another automobile three hundred feet from the crossing, coming from the direction of the train. This approaching machine would naturally lead one to conclude that the crossing was open. A reasonable person would not assume this passing machine had run unscathed through a solid barricade of box cars. The plaintiff's headlights were necessarily adjusted to conform to the requirements of the California Vehicle Act so as to throw the rays

of light down upon the surface of the highway. At a distance, the rays of light from his lamps would strike the highway beneath the box cars which stand some three feet above the surface of the track. The box cars would not be disclosed by legally adjusted headlights until the machine was reasonably close to the track.

It is true that the plaintiff admitted that "I did not remember that there was a railroad there; I had forgotten about the spur track at that time." It seems only fair to assume, in support of the judgment, that he meant he did not realize that he was then in the immediate vicinity of the crossing. It may not be reasonably said that one, at his peril, must recall and correctly register in his mind the relative locations of every physical object along a highway. Common knowledge teaches us that physical objects and visible landmarks are located in the minds of men with relation to other objects. Without the aid of other recognized landmarks, it is exceedingly difficult to accurately catalogue and locate, in the darkness, well-known objects along the highway. In the darkness, one may recall that a certain crossing or object exists, but he may be greatly deceived as to its exact locality. It is therefore not strange that the plaintiff failed to realize that he was in close proximity to this particular crossing. Moreover, it was a mere service track leading to a warehouse belonging to the Standard Oil Company. It was seldom used for any purpose. The plaintiff's mind would naturally not be impressed with the same degree of danger at this particular crossing which he should recognize with respect to a crossing over a main traveled railway track.

It is true that a visible railroad track is itself a warning of danger. But it is equally true that a railroad track which is invisible on account of darkness or because it is otherwise concealed from view, is not a warning of danger, unless one knows just where to look for it. It is only when one observes, or by the exercise of reasonable care should have observed, a railroad track, or when one knows that it is in a particular place and identifies the locality, that it becomes a warning of danger. Under the circumstances of this case, it may well be said in the language of the court in the case of Gregoriev v. N. W. Pac. R. R. Co., 95 Cal. App. 428, 433, 273 P. 76, 78: "Considering all of the circumstances attending the accident, especially those relating to the physical conditions present at the scene thereof, that respondent's failure to observe the railroad track was not due to a lack of exercise of ordinary care on his part."

In that case the driver of an automobile suddenly came upon a railroad track which ran through an orchard and was partially concealed thereby. Under the circumstances of the present case it seems reasonable to believe the plaintiff was deceived by the utter darkness in which the stationary train was enveloped; by the passing of the Malm automobile within three hundred feet of the train, which indicated an open crossing, and by the fact that the rays of his headlights which were adjusted, as required by law, did not disclose the box cars until his machine was within sixty feet of them. At least, it appears that the facts of this case would justify reasonable minds in differing as to whether the plaintiff acted with due caution in approaching this service track under the circumstances. It is appropriately said in the case of Philadelphia & Reading Ry. Co. v. Dillon, 1 W. W. Harr. (Del.) 247, 114 A. 62, 64, 15 A. L. R. 894: "A traveler on a highway by day or night may expect that it will not be obstructed unlawfully or in such manner as to cause him injury while he himself is in the exercise of due and reasonable care, and what is such care depends on the circumstances of each case."

We are persuaded the record will not warrant this court in holding that the plaintiff was guilty of contributory negligence as a matter of law.

In support of its contention that the plaintiff was guilty of contributory negligence which bars him from a recovery of damages in this case, several cases are cited, in each of which specific acts or omissions on the part of the injured parties are recited as a basis for holding that they were guilty of contributory negligence. In each of these cases, the conclusions of the courts are based upon facts which do not exist in the present record. In the case of Orton v. Penn. Ry. Co. (C. C. A.) 7 F.(2d) 36, 37, in holding the plaintiff guilty of contributory negligence the court said: "The headlights on his automobile were burning brightly, and it must be presumed that they complied with the statute and were of sufficient strength to disclose the cars across the track at a distance of 200 feet from them."

In that case there was evidence that headlights similar to those on the plaintiff's automobile, under the same circumstances which existed at the time of the accident, would actually disclose the freight cars at the crossing one hundred and sixty-five feet away. There is no such evidence in the present case. There would be no excuse for not stopping an automobile within a distance of one hundred and sixty-five feet. Nor does the California statute require headlights on an automobile which will disclose objects on the highway two hundred feet distant. The appellant is mistaken when it assumes that our California Vehicle Act requires any such test. Nowhere in our California Vehicle Act is it provided that headlights are required which will disclose objects on the highway at any specified distance. The language of section

99 of the California Vehicle Act (St. 1923, p. 546), is misconstrued by the appellant. It merely provides, in effect, that when it is so dark that an object cannot be seen on the highway at a distance of two hundred feet, then automobiles must turn on their headlights. This section reads in part: "* * * During the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible a person, vehicle or other substantial object on the highway at a distance of two hundred feet ahead [a vehicle], shall be equipped with lighted lamps and lighted headlights as herein respectively provided. * * *"

In Yano v. Scott Briquet Co., 184 Wis. 492, 199 N. W. 48, in which the plaintiff was held to be guilty of contributory negligence, he was running his automobile contrary to the requirements of the law, with headlights so dim he could not see a distance of more than twenty feet ahead of his machine.

In the case of Allison v. Chicago, M. & St. Paul Ry. Co., 83 Wash. 591, 145 P. 608, the plaintiff was running his machine only fifteen miles an hour, and could have stopped it within a distance of a very few feet. The evidence there showed that his headlights would actually disclose the obstructing cars at a distance of one hundred feet.

[6] In the case of Farmer v. New York, N. H. etc., Co., 217 Mass. 158, 104 N. E. 492, the plaintiff recklessly drove his machine on a stormy night with the curtains down and the windshield up, without slackening his speed, directly into the car which barred his way. Each of these cases relied upon by the appellant as authority for the assertion that the plaintiff in the present case was guilty of contributory negligence as a matter of law, may be easily distinguished from the case at bar. Each case must be determined upon its particular facts.

[7] Finally, it is asserted the defendant railroad company is not guilty of negligence which proximately caused the accident. We have held that the violation of the Merced county ordinance, with respect to the blocking of highway crossings, constitutes negligence per se. It is true that all negligence is not actionable. In the present case the blocking of the crossing must not amount to negligence only, but it must have also been the proximate cause of the accident, to render the defendant liable for the damages which resulted therefrom. We have held that the evidence is ample to support the finding that the plaintiff was not guilty of contributory negligence. Assuming that the plaintiff was not guilty of contributory negligence, it then necessarily follows that the cause of the accident was the unlawful blocking of a crossing. Knowing that this highway was used by vehicles, the defendant should have anticipated that a machine might attempt to pass the crossing at any moment. It appears to have been an unreasonable use of the spur track to block the crossing for a period of more than twenty minutes, extinguish the headlight of the engine, and leave the train in utter darkness with nothing to warn the drivers of passing vehicles of the presence of the train. It would have been a reasonable precaution for the train crew to have cut the string of cars so as to open the crossing for vehicles. The extinguishing of the headlight on the engine was an act which aggravated the negligence of the defendant.

[8] It is contended that the blocking of the crossing for more than five minutes, which is prohibited by the Merced ordinance, is unimportant. Aside from the fact that the defendant is charged with negligence as a matter of law for violating this ordinance, the continuation of the blocking of the crossing caused the driver of the Malm machine to return. This misled the plaintiff into believing that the highway was open. The headlight was evidently turned out soon after the train was run upon the sidetrack, for Malm arrived before it was extinguished. He waited at the crossing fifteen minutes before he turned back to find another crossing. The blocking of the crossing for a considerable length of time, therefore, did contribute to the cause of the accident.

[9-11] It is contended that the blocking of the crossing for an unlawful period of time created a mere condition, and was not the proximate cause of the accident. In support of this assertion, the appellant relies on the cases of Orton v. Penn. Ry. Co. (C. C. A.) 7 F.(2d) 36, and Gilman v. Central Vt. Ry. Co., 93 Vt. 340, 107 A. 122, 16 A. L. R. 1102. The determination as to whether the violation of a statute or ordinance prohibiting the blocking of a crossing creates a mere condition, and that it is not the proximate cause of the accident, depends upon the circumstances of the particular case. Where there are conflicting facts regarding the question as to whether the negligence of the railroad company in blocking the crossing became the proximate cause of the accident, it becomes a problem for the decision of the trial court or the jury, and a determination that it was the proximate cause of accident will not be disturbed on appeal.

In the case of Gilman v. Central Vt. Ry. Co., which is relied upon by the appellant, there was a steep, slippery grade which had been recently oiled, descending to the blockaded track. This dangerous condition of the street caused the plaintiff to lose control of his automobile. He was unable to stop his machine, and therefore ran into the freight car at the crossing. The railroad company was not to blame for the slippery condition of the street, nor for the apparent defective condition of the plaintiff's brakes. The proximate cause of the accident in that case was the condition of the street, and not the blocking of the crossing. The violation of a statute prohibiting a train from blocking a crossing for a period of time in excess of five minutes, under such circumstances, was not involved in that case. The accident would have occurred regardless of the length of time the crossing was blocked.

In the case of Orton v. Penn. Ry. Co., supra, relied upon by the appellant, the cause was reversed on the ground that the plaintiff was guilty of contributory negligence. In that case it appears that the plaintiff's headlights actually disclosed the presence of the freight cars at a distance of one hundred and sixty-five feet from the crossing. The statute required automobiles to be supplied with headlamps which would disclose objects on the highway at a distance of two hundred feet. There appears no reasonable excuse in that case for the plaintiff's failure to see the freight cars in time to have avoided the accident.

The other railroad crossing cases, cited by the appellant as authority for the assertion that it was not guilty of negligence which proximately caused the accident, are similarly distinguishable from the case at bar.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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115 Cal.App. 323

PEOPLE v. FORD.

Cr. 1158.

District Court of Appeal, Third District, California.

July 1, 1931.

Criminal law 🔑1130(4).

Conviction will be affirmed where no brief is filed and no appearance made for appellants (Pen. Code, § 1253).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Clarence Ford was convicted of grand theft, and he appeals.

Affirmed.

Argyle Campbell, of Monterey, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Merced county of a felony, to wit, grand theft.

The transcript on appeal was filed in this court May 26, 1931. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on July 1, 1931. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

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115 Cal.App. 63

In re ZILKE'S ESTATE.

FREYER et al. v. SAN FRANCISCO PROTESTANT ORPHANAGE SOCIETY et al.

Civ. 7895.

District Court of Appeal, First District, Division 2, California.

June 17, 1931.

Rehearing Denied July 17, 1931. Hearing Denied by Supreme Court Aug. 13, 1931.

1. Wills 🔑489(6).

It appearing no orphans' home bearing name of legatee existed and that there were seven orphans' homes in city, latent ambiguity arose, which might be removed by extrinsic evidence.

2. Wills 🔑440.

No extrinsic evidence being offered to remove latent ambiguity respecting identity of legatee, court could look to will alone to ascertain testator's intention, thus rendering question of propriety of decree of distribution one of law (Civ. Code § 1318).

3. Wills 🔑529.

If bequest is to orphans' "homes" of city, distribution equally to all orphans' homes in city would be proper.

[Ed. Note.—For other definitions of "Home," see Words and Phrases.]

4. Wills 🔑105.

Bequest to "Offens home" of city, there being no institution named "Offens" or "Orphans'" home of city, did not support decree in favor of all orphans' homes, or any particular orphans' home, in city, absent extrinsic evidence of testator's intention.

This was so since decree distributing estate to all orphans' homes in city was based upon speculation and conjecture as to testator's intention.

5. **Wills** ⚷464.

Misspelling and grammatical inaccuracies are ordinarily immaterial, provided intention appears.

6. **Wills** ⚷448.

Construction may not be based on conjecture respecting testator's unexpressed intention in order to avoid intestacy.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Edward J. A. Zilke, also called Ed Zilke, deceased. From a final decree distributing the entire estate in equal shares to the San Francisco Protestant Orphanage Society and others, Louise Freyer and others, heirs at law and next of kin of deceased, appeal.

Reversed.

William L. Southwell and Walter Loewy, both of San Francisco, for appellants.

D. C. Murphy, of San Francisco, for respondent Roman Catholic Orphan Asylum.

H. U. Brandenstein, of San Francisco, for respondent Pacific Hebrew Orphan Asylum and Home Society.

C. W. Slack, of San Francisco, for respondent San Francisco Protestant Orphanage Society.

J. S. Hutchinson, of San Francisco, for respondent San Francisco Ladies' Protection and Relief Society.

J. W. Henderson, of San Francisco, for respondent McKinley Orphanage.

Elliott McAllister, of San Francisco, for respondent Maria Kip Orphanage.

W. E. Cashman, of San Francisco, for respondent Golden Gate Orphanage.

SPENCE, J.

Appellants are the sister and the several nephews and nieces of the deceased. Respondents are seven orphan asylums of the city and county of San Francisco. This appeal is taken upon a bill of exceptions from that portion of the decree of final distribution which distributed the entire estate in equal shares to the seven respondents.

The olographic will of the deceased, which was duly admitted to probate, read as follows:

"When I am dead I wont everyting to go to Offens home of San-Francisco. You find everyting in box 3608 Humbolt Bank. This is my last Will.

"March 20, 1927. Edward J. A. Zilke."

Upon the hearing of the petition for distribution, it was stipulated that appellants are the heirs at law and next of kin of the deceased and "that the following organizations are orphan asylums and that said orphan asylums and each of them are situate in the City and County of San Francisco—(naming the seven respondents)." No further evidence on the subject was offered, and the decree was entered as above indicated. In the briefs, it is assumed by the parties that there is no institution, association, or corporation bearing the name "Offens home of San-Francisco" or "Orphans' Home of San Francisco," and it is further assumed that the seven respondents conduct all of the orphans' homes in San Francisco. We find no evidence in the record to justify these assumptions, but, even if these facts be conceded, we are still of the opinion that the decree must be reversed.

[1, 2] If it appeared that there was no institution bearing the name used in the will, and that there were seven institutions conducted as orphans' homes in San Francisco, a latent ambiguity arose, which ambiguity might have been removed by other evidence. In Taylor v. McCowen, 154 Cal. 798, the court at page 802, 99 P. 351, 353, quoted with approval the following language from Patch v. White, 117 U. S. 210, 6 S. Ct. 617, 710, 29 L. Ed. 860: "It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer the name or description; or * * *" No evidence was offered to remove the ambiguity in the present case, and we are compelled to resort to the terms of the will alone in an effort to ascertain the intention of the testator. Civ. Code § 1318. Under these circumstances, the question of the propriety of the decree is solely a question of law. Estate of Langdon, 129 Cal. 451, 62 P. 73.

[3-5] It is a statutory rule of construction that "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." (Civ. Code, § 1324.) If the will had provided that the estate should go to the orphans' "homes" of San Francisco, we do not doubt that the decree entered would have been proper, assuming, of course, that respondents represented all of the institutions falling in that class. See Estate of Pearsons, 113 Cal. 577, 45 P. 849, 1062, and Estate of Pearsons, 125 Cal. 285, 57 P. 1015. The will, however, provided that the estate should go to the orphans' "home" of San Francisco. Counsel for respondents state that "The case turns solely on the importance of the omission of the letter 's' from the word 'home'," and that such omission is "frail ground indeed for the argument that the will should be invalidated and the charities deprived of the testator's intended benefaction." But who can say from the

terms of the will that the letter "s" was not intentionally omitted and that the testator did not have a particular home in mind as the recipient of his benefaction? This appears to be quite probable when we consider that the testator employed a capital letter at the beginning of the word "Offens," which may be some indication that he was endeavoring to employ the name of some one institution. In any event he used the singular and not the plural, and we are of the opinion that the language used is insufficient to support a decree in favor of all orphans' homes or in favor of any particular orphans' home, in the absence of some evidence other than the will itself to show what the testator's intention was. The situation before us is much the same as though the testator had provided in his will that his entire estate should go to his "niece" and the court had distributed the estate to all of his "nieces" solely upon the showing that there was more than one person answering that description. In such case, it is clear that the decree could not stand. It is true, as contended by respondents, that misspelling and grammatical inaccuracies in a will are ordinarily of no consequence, but this rule is properly qualified in the citation quoted by respondents as follows: "Grammatical inaccuracies are immaterial, *provided the intention appears * * *"* (Italics ours.) 17 Am. & Eng. Ency. of Law (2d Ed.) p. 20.

[6] It may be that the testator intended to leave his property in equal shares to all orphans' homes in San Francisco as a class, or, on the other hand, it may be (and it appears more likely) that he intended a bequest to some particular orphans' home. Whatever his actual intention may have been, he failed to express it with reasonable certainty, and it is impossible to ascertain it from the will itself. Upon the record before us, the decree is based upon speculation and conjecture as to what his intention was. As was said in Estate of Hoytema, 180 Cal. 430, at page 432, 181 P. 645, "Courts are not permitted, in order to avoid a conclusion of intestacy, to adopt a construction based on conjecture as to what the testator may have intended, although not expressed." And again on page 433 of 180 Cal., 181 P. 645, 646, "Only through speculation and conjecture may the construction contended for by appellants be confirmed. And this cannot be countenanced in view of the cardinal rule to the effect that in the interpretation of wills it is not the probable intent which may have existed in the mind of the testatrix which prevails, but only that which is expressed in the language of the will."

For the foregoing reasons, the portion of the decree appealed from is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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115 Cal.App. 256

SOUTHERN PAC. CO. v. GRANGERS' BUSINESS ASS'N.

Civ. 7640.

District Court of Appeal, First District,
Division 2, California.

June 29, 1931.

1. Carriers 🔑100(1).

In absence of ambiguity, language of contract between warehouseman and carrier regarding demurrage governs its interpretation (Civ. Code §§ 1638, 1639).

2. Warehousemen 🔑10.

Contract between warehouseman and carrier *held* to require warehouseman to comply with rules regarding cars handled for its account, and prompt payment of all charges irrespective of whom they were to accrue against.

The agreement stated in substance that warehouseman agreed that, with respect to all cars handled for its account, warehouseman would fully observe and comply with rules and would make prompt payment of all demurrage charges accruing thereunder.

3. Principal and agent 🔑136(3).

Agent signing his own name when he intends to bind principal becomes liable on contract.

4. Carriers 🔑100(1).

Warehouseman *held* liable for demurrage as principal and not as agent for consignees and consignors, where contract purported to be with warehouseman as principal.

5. Carriers 🔑100(1).

Where terminal tariff provided that carrier assumed duty of loading and unloading, but delay was due to warehouseman having exclusive control of matters causing delay, warehouseman *held* liable for demurrage (Civ. Code §§ 3517, 3528).

Although terminal tariffs provided that carrier assumed duty to exclusion of every one else of loading and unloading all grain at warehouse, and reserved to itself the exclusive privilege of charging therefor, carrier had contracted with third party to do unloading, and such third party in turn had employed warehouseman to do the work.

6. Carriers 🔑196.

In action for demurrage, evidence showed warehouseman received notice of arrival of cars as required by tariffs.

7. Carriers 🔑196.

In action for demurrage, evidence *held* not to show that demurrage commenced before expiration of free time.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Southern Pacific Company against the Grangers' Business Association. From the judgment, defendant appeals.

Affirmed.

William P. Hubbard, of San Francisco, for appellant.

A. A. Jones, of San Francisco, for respondent.

GRAY, Justice pro tem.

[1] The operator of a public warehouse, engaged in warehousing, cleaning, and storing grain for shippers, appeals from a judgment in favor of a common carrier for demurrage on cars consigned to such shippers in its care. This judgment is based upon the following agreement between the parties: "Being fully acquainted with the terms * * * of the average basis for settling for detention to cars as set forth in * * * the car demurrage rules * * * *and being desirous of availing ourselves of this alternate method of settlement* * * * we * * * agree * * * (1) that with respect to all cars * * * *handled for* * * * our account * * * we will fully observe and comply with * * * said rules and (2) will make prompt payment for all *demurrage charges accruing* thereunder. * * *" (Italics and numerals ours.) The separate and distinct obligations to be performed by appellant, as promisor, definitely and unambiguously expressed, were twofold: (1) The compliance with the rules as to cars handled for its account, and (2) the prompt payment of all charges, accruing, irrespective of whom they were to accrue against. In the absence of any ambiguity, the language of the contract is to govern its interpretation. Civ. Code §§ 1638, 1639.

[2] By an unwarranted blending of these two distinct promises, appellant argues that, as it promised to pay demurrage charges, accruing on cars handled for its account, and, as the cars were handled for the account of consignors and consignees, who shipped their grain in these cars, in care of appellant, no liability on its part arose. The fallacy of this argument consists of forceably merging two distinct and separate promises into one, contrary to the express terms of the contract, and thereby creating a new qualified promise, not contemplated by the parties, in lieu of two distinct promises, assumed by them. Furthermore, since appellant's business consisted exclusively of warehousing cars consigned to others, in its care, no liability could ever arise under such interpretation, which would therefore violate section 1643 of the Civil Code requiring such interpretation as will make the contract operative and capable of being carried into effect. Appellant's citations, denying liability for demurrage of persons other than consignor or consignee, are not in point because in those cases there was no such contractual assumption of liability as we find in the instant case. If the case entitled In re Tidewater Coal Exchange (D. C.) 292 F. 225, holds, as appellant contends, that, in the absence of ambiguity, the intention of the parties may be ascertained by extrinsic evidence, it is contrary to section 1638 of the Civil Code.

[3, 4] To escape liability under the agreement, appellant argues that the agreement was entered into by appellant solely for the benefit of, and as agent for, all consignees and consignors who should use its warehouse or ship their cars in its care; that this fact was known to respondent; and that the agreement was intended to bind appellant, as such agent, and was entered into with the object of enabling such consignees and consignors to average their demurrage. "The rule has been long and continuously settled that an agent who signs his own name instead of that of the principal when he intends to bind the latter, becomes himself liable, the contract being considered his own. This is true where he * * * is known to be or avowedly acts as such * * * No person in making a contract is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. To exclude the personal liability of an agent, who signs his own name, an intention to bind the principal must appear upon the face of the instrument for although parol evidence is admissible to show that the parties also intended the principal to be bound, it is not admissible to show that they intended the agent not to be bound." 1 Cal. Jur. 819. "To exclude the personal liability of an agent who signs a contract in his own name, the capacity in which he signs must appear upon the face of the instrument. If, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held bound personally although he was known to be or avowedly acted as agent." Ibid, p. 821. Here the correspondence preliminary to the execution of the contract clearly shows that appellant was acting as principal. But, ignoring this fact, still appellant is liable because the contract purports to be with appellant, as principal, without any mention of its alleged agency, or any other statement from which an inference of agency can be drawn.

[5] Appellant next argues that as the terminal tariff provides that respondent assumes the duty, to the exclusion of everybody else, of

loading and unloading all grain at the warehouse, and reserves to itself the exclusive privilege of charging therefor, it assumed all responsibility for any delay, and therefore cannot charge demurrage for delay. While it is true that the tariff so provided, yet, in practice, appellant actually ordered the placing of the cars at its warehouse and unloaded them. Therefore, the delay, if any, was due to appellant, who had exclusive control of the matters which caused such delay. This conclusion is not changed by the fact that respondent had contracted with a third party to do such unloading and such third party in turn employed appellant to do this work. To hold that respondent could not charge for such delay, would be to permit appellant to profit by its fault (Civ. Code, § 3517) and would give greater effect to the form of the unloading arrangements than to their substance. Civ. Code, § 3528.

[6] The tariff provides: "Notice of arrival shall be sent or given consignee or party entitled to receive same by this railroad's agent in writing or, in lieu thereof, as otherwise agreed to in writing by this railroad and consignee" within the time and in the form therein provided. Respondent's witness testified that when the cars arrived in the yard, the required information was written either in a book of one consignee to which appellant had access, or in a book of appellant, as to other consignees and, after sampling by appellant, the cars were moved and placed at appellant's order. Appellant does not claim that it did not receive actual notice, but merely that it was not in the technical form required. But the above testimony shows a literal compliance with the first part of the above-quoted rule, because the notice in the book was written and was given but not sent, either to consignee or appellant, who was the party entitled to receive the same. Since the cars were not moved until so ordered by appellant, after the entry of its arrival in the book, the purpose of the notice was accomplished because the starting time of the demurrage commenced only after appellant was notified.

[7] Relying upon an obviously inadvertent statement of one of respondent's witnesses, which is not in accord with other portions of his testimony, appellant claims that the demurrage, as calculated, commenced before the expiration of the "free time." However, appellant stipulated to the correctness of an exhibit, attached to the complaint, which shows that demurrage was assessed after the expiration of "free time." Another of respondent's witnesses testified that the demurrage was figured only after such expiration.

Finding no error in the record, the judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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115 Cal.App. 210

BANK OF AMERICA OF CALIFORNIA v. GRANGER et al.

Civ. 7823.

District Court of Appeal, First District, Division 2, California.

June 26, 1931.

Rehearing Denied July 25, 1931. Hearing Denied by Supreme Court Aug. 24, 1931.

1. Reformation of instruments 🔑17(1).

As regards reformation, that no mistake was made in use of word or phrase in name of guarantee *held* not controlling where intention was guarantee should be another entity (Civ. Code, §§ 3399–3401).

2. Reformation of instruments 🔑45(16).

Evidence showed object in making guaranties was to secure certain bank, by whatever name known and whether it was entity or branch of another bank, for loans to corporation, though guarantee named was extinct by consolidation and merger (Civ. Code §§ 3399–3401; Deering's Gen. Laws 1923, Act 652, § 31a).

3. Reformation of instruments 🔑45(16).

Evidence *held* to show intention guaranties should protect payee of each note as and when written, though guaranties mistakenly named, as guarantee, bank extinct by consolidation and merger (Civ. Code §§ 3399–3401; Deering's Gen. Laws 1923, Act 652, § 31a).

4. Banks and banking 🔑67.

Guaranties *held* transferable to bank succeeding guarantee bank by consolidation and merger (Deering's Gen. Laws 1923, Act 652, §§ 31a, 31b).

5. Guaranty 🔑36(2).

Guaranties *held* to cover past loans, where they expressly so stated.

6. Guaranty 🔑16(4).

Delaying enforcement of collection of prior loan *held* good consideration for guaranties covering past and future loans by bank (Civ. Code § 1606).

7. Guaranty 🔑45.

Demand *held* unnecessary as condition precedent to enforcing guaranties of repayment of loans (Civ. Code § 2807).

8. Appeal and error 🔑878(2).

On plaintiff's appeal, defendant not appealing could not attack finding that plaintiff made demand before suing on guaranties.

9. Guaranty 🔑16(1).

Subsequently making loan *held* sufficient consideration to support guaranties covering past and future loans.

10. Guaranty 🔑25(1).

Written guaranty imports consideration.

11. Guaranty 🔑16(1).

Return of guaranty to guarantor when he executed second guaranty in larger amount *held* a consideration for latter.

12. Frauds, statute of 🔑119(1).

In action on guaranties, statute of frauds *held* not to prevent reformation, where wrong bank was inserted as guarantee by mistake (Code Civ. Proc. § 1856).

13. Reformation of instruments 🔑20.

If guarantors knew that name of bank, extinct through consolidation, was inserted as guarantee, and intended thus to execute guaranties, though knowing insertion was caused by mistake of lending bank, that would not prevent reformation in action on guaranties (Civ. Code § 3399).

14. Reformation of instruments 🔑44.

In action on guaranties, where plaintiff contended wrong name of guarantee was inserted by mistake, excluding questions to guarantor as to what he intended with respect to name of guarantee, and whether he knew exact name of institution at time of signing, *held* error (Civ. Code § 3401).

> Such rulings were erroneous since very issue before court was that of ascertaining, among other things, what were intended to be legal consequences of guaranties involved, and issue could not be properly determined until all such matters were gone into and evidence was fully before court.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the Bank of America of California against F. B. Granger and others. From a judgment in favor of defendants, plaintiff appeals.

Reversed.

Keyes & Erskine, of San Francisco, for appellant.

A. H. Carpenter, of Stockton, for respondent Haynes.

Cross & Brandt, of San Francisco, for respondent Granger.

True Van Sickle, of Oakland, for respondent Thomas.

STURTEVANT, J.

The plaintiff sued to recover on certain alleged guaranties. The trial court made findings in favor of defendants, and from a judgment entered thereon the plaintiff has appealed.

On April 26, 1927, and for some time prior thereto, the Fernwood Lumber Company, a corporation, was transacting a lumbering business near Arcata in Humboldt county. The defendants were directors of that company. The First National Bank of Arcata, doing a banking business at Arcata, financed the lumber company and that company obtained all of its loans from that bank. On December 5, 1927, the lumber company obtained $3,000 and executed a demand note to the bank in that sum. That note was secured by a deed of trust under the same date. On March 3, 1928, the lumber company received from the bank the sum of $4,500 and executed its note payable August 1, 1928. That note was unsecured. On May 11, 1928, the lumber company received another loan in the sum of $3,500 and executed a note payable October 1, 1928.

On April 23, 1927, United Bank & Trust Company of California consolidated with French American Bank to form United Bank & Trust Company; on December 10, 1927, Security Bank & Trust Company purchased First National Bank of Arcata; on February 4, 1928, United Bank & Trust Company merged with Security Bank & Trust Company to form a merged corporation known as Security Bank & Trust Company; on March 31, 1928, Humboldt Bank and Security Bank & Trust Company consolidated to form United Security Bank & Trust Company; and on November 28, 1928, United Security Bank & Trust Company consolidated with Bank of America to form Bank of America of California.

When the lumber company asked for the loan evidenced by the promissory note dated March 3, 1928, it was informed that it would be necessary for the lumber company to give the bank further security. The manager of the lumber company communicated that fact to the defendant F. B. Granger, and on March 1, 1928, at his residence at San Leandro he executed a written guaranty, in the sum of $5,000, in favor of United Bank & Trust Company *of California*. It contains approximately 700 folios and among others a covenant as follows: "* * * The undersigned hereby guarantees the payment in United States gold coin to said bank of any and all sums of money which the said bank may have heretofore or may hereafter advance or loan to said corporation. * * *" After said written guaranty was delivered to the bank at Arcata the bank made the loan of $4,500 and received the promissory note dated March 3, 1928. Another guaranty in the sum of $5,000 was executed and delivered by M. Haynes on February 29, 1928. Another guaranty was executed by the defendant E. J. Thomas on March 19, 1928. The last-named instrument was in the sum of $8,000.

The plaintiff pleaded its case in three counts. In the first count it pleaded the execution and amount due on three promissory notes and the guaranty executed by the defendant M. Haynes. In the second count it pleaded the same facts except to set up the guaranty executed by the defendant F. B. Granger. In the third count it pleaded the same facts as the first count except to set forth the guaranty executed by the defendant E. J. Thomas. In each count there was inserted a paragraph as follows:

"That said contract of continuing guaranty was executed upon a printed form theretofore in use by said United Bank and Trust Company of California, all of the assets and properties whereof had by consolidation and merger, as hereinbefore alleged, become the property of Security Bank and Trust Company; that upon said form the name of the obligee therein was 'United Bank and Trust Company of California'; that by reason of inadvertence and mutual mistake of the parties to said agreement the name printed upon said form remained unchanged; that said contract was made by and between Security Bank and Trust Company and said defendant, M. Haynes, and that the name of the obligee therein was understood by said parties to be Security Bank and Trust Company and it was intended by the said parties thereto that the said printed form should be changed to conform thereto."

The trial court made a finding negativing said allegations. The plaintiff contends that that finding is not sustained by the evidence. The court found that since the commencement of the action the trust deed theretofore executed by Fernwood Lumber Company has been foreclosed and that the first note has been paid off and that the second note was paid down to $3,737.44 and that on said second note there was due $189.34 as interest and accruing interest from October 28, 1929. As to the amounts due on the notes the parties do not quarrel about the findings made by the court. The entire controversy arises over the findings on the subject of the rights, if any, of the plaintiff growing out of said guaranty.

Before discussing the evidence given at the trial it may be stated that no one of the defendants had any personal loans. Except as herein mentioned, the Fernwood Lumber Company had no loan from any of the institutions herein named; and at no time was any question presented as to whether a loan should be obtained from an institution other than the one represented by Mr. Sorenson, who at all times was the cashier of the bank located at Arcata and the local representative of the entity of which that bank might at any time be a part. The defendant Mr. E. J. Thomas was president of the Fernwood Lumber Company and the principal actor in transacting the business of financing it. He testified that he executed as president each of the three notes. He did so to secure loans from the bank. In transacting the business in the first instance he held conversations with Mr. Sorenson. At times he was referred by Mr. Sorenson to the head bank located at New Montgomery and Market streets in San Francisco. After the first note had been executed, Mr. Sorenson asked Mr. Thomas for a continuing guaranty and on March 19, 1928, he signed one. At that time the company was doing business with the United Bank & Trust Company. After talking to Mr. Sorenson regarding a loan and after Mr. Sorenson had asked for the guaranty, it was Mr. Thomas' intention to give the bank—whatever its name was—such a guaranty as Mr. Sorenson requested. At the time he executed his guaranty it was his understanding that the name of the bank was United Bank & Trust Company. The witness Haynes testified that Mr. Thomas came to his office and discussed the needs of the Fernwood Lumber Company. At that time Mr. Thomas stated to him the substance of the conversation which he had held with Mr. Sorenson and that the latter required the execution of the guaranty. Mr. Haynes signed and when he did so it was his intention to sign the document for the United Bank & Trust Company. In stating that it was his intention to sign the guaranty for the United Bank & Trust Company the witness testified that it was his understanding that such was the name at that time of the bank of which Mr. Sorenson was the manager at Arcata. The witness further testified that at no time did he know the facts regarding the formation or merger of any of the banks. Mr. Granger testified that he knew that the Fernwood Lumber Company was doing business with the bank at Arcata. At the time he signed the guaranty it was his understanding that he was making his agreement with United Bank & Trust Company, the name called for in the paper. The witness testified that Mr. Thomas, the president of the company, was the one that was doing the business. Sometimes he was in San Francisco and sometimes in Arcata. But the witness was at San Leandro and did not have any active part in the transactions of it. He said he understood that the bank named in the guaranty signed by him was located at New Montgomery and Market streets in San Francisco. Being again pressed as to whether it was his understanding that at the time he signed he was doing business with the bank located at New Montgomery and Market streets (United Bank & Trust Company), the witness asked to see the document and then he read from the face United Bank and Trust Company *of California*. The witness in a later passage in his testimony again confused the two names. Before any of the guaranties were signed the witness and Mr.

Thomas called at the bank at New Montgomery and Market streets and there interviewed Mr. McBride and discussed with him the making of the guaranties. After the guaranties had been executed and some time in 1929 the witness again called on Mr. McBride and attempted to negotiate a settlement of the witness' pro rata of the loan so received. The first time the witness went to the bank he met Mr. Duffy. Mr. Thomas went with him. Later they went again or Mr. Thomas went alone. This was before the guaranties were signed. Mr. Sorenson testified as to his official connection with the bank at Arcata. He testified that he received some of the documents from the head office in San Francisco, which was located at New Montgomery and Market streets. The second loan was approved by the head office. The Thomas guaranty was signed in his presence. The Haynes guaranty he did not see until it had been executed and was forwarded to him. At the time the loan was made on December 5, 1927, Mr. Thomas and Mr. Haynes were present. When the question came up for further loans, the witness referred the officers of the Fernwood Lumber Company to the bank in San Francisco. That conversation was held with Mr. Thomas and the witness directed him to call on Mr. Duffy. Mr. Duffy sent to the witness three guaranties in the sum of $8,000 each. It was one of them that was signed by Mr. Thomas in the presence of the witness. Mr. Thomas volunteered to forward one to Mr. Granger and one to Mr. Haynes. But these two instruments were not signed. Those documents had been forwarded to the witness by Mr. Duffy because the bank did not consider itself secured. He sent Mr. Thomas to the bank located at New Montgomery and Market streets, but did not specially send him to Mr. Duffy. The guaranty signed by Mr. Haynes on February 29, 1928, was prepared and executed and thereafter was forwarded to the bank at Arcata. The one signed by Mr. Granger was received by the bank about March 12, 1928. The one signed by Mr. Thomas was signed on March 19, 1928, in the presence of the witness. The witness testified that he never heard there was a mistake in the form of the guaranty. The first loan made was made by the First National Bank of Arcata, the second loan was made by Security Bank & Trust Company, and the third loan was made by United Security Bank & Trust Company.

[1, 2] The first note was payable to the First National Bank of Arcata. The name of the bank was erased by some unauthorized person and United Security Bank & Trust Company was written in. The second note was made payable to Security Bank & Trust Company. The third note was made payable to United Security Bank & Trust Company. It is not claimed that any one of the notes contained an error as to the payee. All three of the guaranties as written were in favor of United Bank & Trust Company *of California*. That corporation consolidated with the American Bank to form United Bank & Trust Company on April 23, 1927—about eight months before the first note was written. But, according to the terms of our statute, United Bank & Trust Company *of California* upon the completion of the consolidation becomes extinct. Bank Act, § 31a (see Deering's Gen. Laws 1923, Act 652, p. 153 et seq.). The question to be reviewed in this court is whether or not the contracting parties were consciously making these formal guaranties in favor of an extinct corporation or did they make a mistake. The respondents point to the foregoing evidence and stress the fact that no single person testified that a mistake was made in the use of any single word or phrase. But that fact is not controlling. F. P. Cutting Co. v. Peterson, 164 Cal. 44, 127 P. 163. At page 47 of 164 Cal., 127 P. 163, 164, the court said: "The fact that the parties used the very words which they intended to use is not always sufficient cause for refusing relief of this character. There may be no mistake as to the words used or to be used, and at the same time there may have been a mutual mistake as to some other matter or fact, affecting the meaning or application of the words, and by reason thereof the contract may not truly express the real intention of both parties; and in that case it may be revised and reformed at the instance of the aggrieved party and enforced accordingly, although the words were carefully chosen." Our statute provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Civ. Code, § 3399. "For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement." Civ. Code, § 3400. "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." Civ. Code, § 3401. Quoting again from F. P. Cutting Co. v. Peterson, at page 49 of 164 Cal., 127 P. 163, 165: "It is apparent from this evidence that the object to be secured by the clause in question was to put Peterson on an equal footing with other dealers in canned tomatoes, in case the association's opening prices and the general market prices thereby fixed should be less than those named in the contract." So in this case, from the evidence it is apparent that the object in making all

three of the guaranties was to secure the bank at Arcata (by whatever name it should be known and whether it was an entity or a branch of some other bank) for loans to Fernwood Lumber Company. Dolvin v. American Harrow Co., 28 L. R. A. (N. S.) 840 note. To hold otherwise is to hold that the bank officials were consciously making loans to a failing concern and instead of taking real security were taking guaranties in favor of a corporation extinct.

[3, 4] Again, looking back over the evidence hereinabove set forth, it is perfectly clear that no one of the parties at any time for any reason intended otherwise than that each guaranty should protect the payee of each note as and when written. The plaintiff contends that the first note became the property of the Security Bank & Trust Company when that company purchased the First National Bank of Arcata; and that by the acts of consolidation or merger the note became the property of the plaintiff. It also contends that the plaintiff had by the acts of consolidation and merger become the owner of the three guaranties and that it is entitled to sue on them. Bank Act, §§ 31a and 31b (Deering's Gen. Laws 1923, Act 652). See, also, 5 C. J. 948. The defendant Granger contends that the plaintiff has no such right because in terms the guaranties did not contain any word or words expressly extending their terms to this plaintiff. As we understand him, he contends that the documents were not transferable. In this contention we think he is clearly in error. The plain language of the sections of the Bank Act is to the contrary. Furthermore, since the enactment of our Civil Code the common-law rule regarding the assignment of a guaranty has been materially modified. Reios v. Mardis, 18 Cal. App. 276, 122 P. 1091; 28 C. J. 942, 1011.

[5-8] On September 25, 1930, the plaintiff filed an amendment to its second amended complaint. The findings were filed the next day and contained findings on the issues so raised. The defendant Haynes states that the amendment was filed without an order or permission from the court and without knowledge or consent of the defendant Haynes. Such facts do not appear from the record before us. The same defendant contends that the guaranties did not cover loans that had been made prior to the execution of the guaranties. By the express language contained in those documents they did. By delaying its hand in enforcing the collection of the prior loan the bank suffered a prejudice which constituted a good consideration for the guaranties. Civ. Code, § 1606. The same defendant claims that no demand was made and that there was no proof to the contrary. No demand was necessary (Civ. Code, § 2807), and besides the trial court found that a demand was made and the defendant has not appealed.

[9-12] Both defendant Haynes and defendant Thomas claim there was no consideration to support their guaranties. The former executed his guaranty on February 29, 1928. The bank made the second loan on March 3, 1928. That act was a sufficient consideration. Civ. Code, § 2793. The defendant Thomas executed his guaranty on March 19, 1928. When he promised to do so and whether before that date, and if so, how long, does not appear. But a written guaranty imports a consideration and the record does not show there was none. Furthermore, the third loan was made May 11, 1928, and, by its terms, his guaranty extended to loans theretofore and thereafter to be made. In none of these statements are we taking into consideration the first loan for, as appears above, that loan has been repaid. Furthermore, the defendant Thomas had theretofore executed yet another guaranty in the sum of $5,000, which was returned to him when he executed the second one. That act also constituted a consideration. These two defendants made the further claim that the guaranties could not be reformed because of the provisions of the statute of frauds. Grant v. Naylor, 4 Cranch, 224, 2 L. Ed. 603. But since the enactment of section 1856, Code of Civil Procedure, that decision is not controlling in this kind of an action. Key v. Vidovich, 58 Cal. App. 710, 714, 209 P. 375.

[13] The defendant Thomas contends that the defendants knew whom they were guaranteeing and that they intended to guarantee only the United Bank & Trust Company of California. We do not think that is the record. However, for the purposes of this decision, assuming such to be the record, then the only effect is to rest the case on a harsher clause contained in our statute. There is certainly no evidence that the plaintiff or its predecessors in interest actually intended to obtain guaranties running in favor of a corporation extinct. Addressing itself to a similar contention in the case of F. P. Cutting Co. v. Peterson, supra, on page 50 of 164 Cal., 127 P. 163, 165, the court said: "If they had declared that they did not then expect that the price list would be printed, and that they approved the wording with that idea, it would be a virtual confession that they believed that the guaranty would be nugatory and intended to perpetrate a fraud upon the defendant if a lower price was fixed by the association without printing the price list. The mistake would then come within the class of mistakes described in section 3399 as 'a mistake of one party, which the other at the time knew or suspected.'" The point is without merit.

[14] While the witness Granger was being examined by the plaintiff he was asked: "What was your intention with respect to the name of the bank to which that guaranty was running at the time you signed it?" Again, he was asked: "Did you know at the time you signed this agreement the exact name of the institution?" To those questions objections were interposed and the objections were sustained. These rulings were erroneous. The very issue before the court was that of ascertaining, among other things, what were intended to be the legal consequences of the several guaranties. Civ. Code, § 3401. That issue could not properly be determined until all such matters were gone into and the evidence was fully before the court.

For the reasons hereinabove indicated the judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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115 Cal.App. 194

CORVELLO v. BAUMSTEIGER.

Civ. 7548.

District Court of Appeal, First District, Division 1, California.

June 26, 1931.

1. Automobiles 🔑244(36).

Finding that negligence of driver in backing truck down street was proximate cause of collision with trolley and injuries sustained by trolley passenger *held* supported.

2. Appeal and error 🔑1002.

Where evidence is substantially conflicting, jury's conclusion will not be disturbed.

3. Trial 🔑234(4).

Instruction concluding with formula that if jury find specified proposition established, verdict should be for particular party, should show circumstances which must concur to warrant verdict.

4. Trial 🔑219.

Instruction concluding with formula that if jury find specified proposition established, to find for particular party, need not contain definition of each legal term used therein.

In such case it is sufficient if the jury be instructed elsewhere as to the meaning of the legal terms.

5. Automobiles 🔑246(22).

Instruction that if negligence of truck driver was one of causes proximately contributing to accident, jury should find for trolley passenger, *held* not defective in not defining negligence.

The court fully and correctly defined the term "negligence" in other instructions, and further instructed jury not to select a single instruction or portion of an instruction, but to consider all of the instructions in determining any issue in the case.

6. Automobiles 🔑168(1).

Driver must keep truck under such control as to enable him to avoid collision if possible by exercise of ordinary care.

7. Trial 🔑253(4).

Negligence instruction in trolley passenger's action against truck driver *held* not objectionable as excluding from jury's consideration negligence of railway company.

Instruction was to the effect that in backing the truck down the street, driver was bound to operate his truck in careful and prudent manner, and required to use his senses of sight and hearing, and to keep proper lookout for approaching street cars and to keep his truck under such control as would enable him to avoid a collision with a street car if by the exercise of ordinary care on his part such collision could have been avoided, and if he failed so to do and his failure to do so was proximate cause of accident, then passenger was entitled to verdict.

8. Negligence 🔑61(1).

To render person liable, it is sufficient that his negligence, concurring with one or more efficient causes other than injured party's fault, is proximate cause of injury.

9. Appeal and error 🔑1004(1).

Verdict for damages cannot be vacated unless so excessive as to show passion or prejudice.

10. Appeal and error 🔑1004(1).

That personal injury damages may be larger than is ordinarily allowed, does not disclose excessiveness as matter of law.

11. Damages 🔑132(6).

$10,000 damages for fractures of both bones of lower leg, causing injured leg to be shorter than the other, *held* not excessive.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Fred Corvello against S. V. Baumsteiger. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ford & Johnson, of San Francisco, for appellant.

Maurice J. Bleuel, of Oakland (Benoni H. McClure, of Oakland, of counsel), for respondent.

PER CURIAM.

The above action was for the recovery of damages for personal injuries alleged to have been caused by defendant's negligence.

The Market Street Railway Company maintains a double-track cable railway along Castro street in San Francisco. On September 14, 1929, it was operating a street car in a northerly direction thereon, and plaintiff was a passenger in the car. At a point between Elizabeth and Twenty-Third streets, which intersect Castro street, a collision occurred between the car and an automobile truck, operated by defendant S. V. Baumsteiger, and as a result plaintiff was injured. A jury returned a verdict against said defendant in the sum of $10,000, and from the judgment entered thereon he has appealed.

It is contended that the verdict is unsupported by the evidence, that the trial court erred in giving certain instructions, and that the verdict is excessive.

The cable car, which was about 30 feet in length, was open in the front and rear. The seats in the open portions were constructed lengthwise of the car, and the plaintiff with other persons was seated on the rear outside seat facing east. The truck mentioned was a two-ton Garford truck about 19 feet in length and over 6 feet wide. The defendant was the owner of a second truck, which had become stalled on the east side of Castro street at a point from 100 to 200 feet south of Twenty-Third street, and his purpose in going to the scene of the accident was to remove the second truck. He drove the truck first mentioned west along Twenty-Third street and crossed the railway tracks at the intersection of this street with Castro street where it stopped. He then looked south along Castro street and saw about two blocks away the approaching car, on which the plaintiff was riding. He then backed his truck across the car tracks in a southeasterly direction, his intention being to back the same along the east side of Castro street to the point where the second truck was standing. When he had crossed the railway tracks a second time, he looked to the south and again saw the approaching car, which was then south of but near Elizabeth street. The distance between the northerly curb line of the latter street and the southerly curb line of Twenty-Third street, according to the evidence, was about 258 feet. Defendant then proceeded to back the truck south along the east side of Castro street, and at a point about 35 feet south of Twenty-Third street the rear left end of the truck came in collision with the portion of the car on which the plaintiff was seated. According to the evidence the stanchions, seat, and the rear of the car were broken by the impact. The car continued its course for about 35 feet, and the rear wheels of the truck when the same stopped rested upon the railway track. According to several witnesses—and the condition of the car supports their testimony—the front and closed portions of the car had passed the truck before the collision; and it was also testified by the plaintiff, another passenger, and the conductor of the car that the truck was suddenly backed against the car. An automobile was parked about 50 feet south of Twenty-Third street, the owner of which, seeing the danger, sought to warn the defendant by sounding his horn. Another witness testified that the car bell was sounded as the car left Elizabeth street and again about 40 feet south of the point of collision. Defendant admits that he heard the horn and also a sound resembling that made by the bell of a street car. He claims, however, that he stopped immediately, but too late to avoid the accident; but, according to the owner of the automobile, defendant when the horn sounded turned the rear of the truck towards the railway track, and in so doing struck the passing car. No reason appears why defendant, instead of attempting to operate his truck on the east side of Castro street, did not after first crossing the intersection proceed south to Elizabeth street and thence north on his right-hand side of Castro street, which course would have been in accordance with the provisions of the statute (California Vehicle Act, Stats. 1929, p. 540). There was testimony that the car stopped when the collision occurred and then started forward, and that this movement was the cause of the damage. There was, however, other evidence sufficient to sustain a contrary finding.

[1, 2] While the record discloses some evidence tending to sustain defendant's contention that the railway company was negligent, the evidence strongly supports the conclusion that defendant's negligent operation of the truck was at least a proximate cause of the injuries received by the plaintiff. There was a substantial conflict in the evidence in this respect, and different inferences might reasonably be drawn from the circumstances of the accident. Where such is the case, the conclusions of the jury cannot be disturbed. 2 Cal. Jur., Appeal and Error, §§ 543, 549.

The instructions of which defendant complains are as follows:

"If you believe from the evidence that the negligence of the defendant Baumsteiger was one of the causes which proximately contributed to the accident then I instruct you that you must find for the plaintiff."

"In backing the truck in question on 23rd street and down Castro street in a southerly direction, if you find that the truck was so backed, its driver, the defendant, Mr. Baumsteiger, was in law bound to operate his truck in a careful and prudent manner. In so backing, if you find he did, under the law he had to use his senses of sight and hearing. He had to keep a proper look-out for approaching street cars and to keep his truck under such control as would enable him to avoid a collision with a street car, if by the exercise of ordinary care on his part such collision could have been avoided, and if you find from the evidence he failed so to do, and that his failure to do so was the proximate cause of the accident, then the plaintiff is entitled to a verdict against defendant."

[3-5] It is contended that in the first instruction there was no attempt to define "negligence," and that the jury might therefore have concluded that the defendant was negligent as a matter of law.

It is the rule that where an instruction concludes with the formula that if the jury find the proposition therein recited to have been established, their verdict should be for a particular party, the instruction should in itself show all the circumstances which must concur to warrant such a verdict (Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 P. 700; Fidelity, etc., Co. v. Paraffine Paint Co., 188 Cal. 184, 204 P. 1076); but it is not necessary that the instruction contain a definition of each legal term used therein. It is sufficient if the jury be instructed elsewhere as to the meaning of such terms. In the case at bar negligence was fully and correctly defined in other instructions given by the court, and they were also told "not to select a single instruction or portion of an instruction but to consider all of the instructions in determining any issue in the case."

[6-8] It is objected that the second instruction was defective in that it omitted all reference to any conduct on the part of the employees of the railway company which would make the latter solely liable to the plaintiff, and erroneously stated that the operators of vehicles upon public streets must under all circumstances conduct themselves so as to avoid collisions. Such, we think, was not the meaning of the instruction, as the jury was told in effect that it was the duty of the driver to keep his truck under such control as to enable him to avoid a collision "if by the exercise of ordinary care on his part such collision could have been avoided." This was a correct statement of the law. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045.

The remaining portion of the instruction, viz., "If you find that he failed to do so, and that his failure to do so was the proximate cause of the accident, then the plaintiff is entitled to a verdict against the defendant," did not have the effect claimed by defendant. This instruction did not exclude from consideration the negligence, if any, of the railway company; but properly told the jury that a finding that defendant's negligence was the proximate cause of plaintiff's injury would justify a verdict in favor of the latter. To render a person liable he need not be the sole cause of an injury, as it is sufficient that his negligence, concurring with one or more efficient causes other than the plaintiff's fault, is the proximate cause thereof. 45 Cor. Jur., Negligence, § 485, p. 920. Under such circumstances each is and both are the proximate cause of the injury. Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

The testimony shows that plaintiff received comminuted fractures of both bones of the lower leg, the bones protruding through the flesh, which was badly lacerated, and that his injuries were very painful. According to a physician, the usual course of treatment was followed, but the bones are not in correct alignment and he is still under treatment. The injured leg is shorter than the other, and this condition will probably be permanent. To straighten the bones another operation will be necessary in the future, and as a result the plaintiff will be confined for about ten weeks. Plaintiff incurred liabilities for hospital expense in the sum of $328.75, and physicians' services in the further sum of $1,000. In addition, the physician testified that a second operation will cost $500, and that the charges named are reasonable.

[9-11] The verdict of a jury for damages cannot be set aside unless so plainly excessive as to warrant the conclusion that it was the result of passion or prejudice. Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 P. 449; Anstead v. Pacific Gas & Elec. Co., 203 Cal. 634, 265 P. 487. There is no absolute rule by which to determine whether it is excessive (Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601), and it cannot be so held as a matter of law simply because the amount may be larger than is ordinarily allowed in such cases (James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082). As the court said in Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513, 520, "the only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence." The question in the first instance is for the trial court, and in considering an attack upon a verdict as excessive the reviewing court must treat any conflict in the evidence as resolved in favor of the respondent, and give him the benefit of every inference that can reasonably be drawn in support of his claim.

In Reneau v. Hirsch, 88 Cal. App. 1, 262 P. 1100, 1102, while the plaintiff's leg was almost entirely severed in the accident, the same was by treatment restored to approximately 80 per cent. of its normal condition, and a verdict for $18,000 for physical injuries, in addition to an award for medical and hospital expenses and for loss of time, was upheld. The court said: "The award of damages made by the jury, and sustained by the trial court, is large, but when the extent and character of the injuries received by respondent and the intense pain and suffering that he endured for so long are all considered, we think the award is not at all disproportionate to the compensation reasonably warranted by the facts." See, also, Harju v. Market Street Ry. Co. et al. (Cal. App.) 299 P. 788.

We are of the opinion that the evidence in the present case reasonably justified the award made by the jury, and that the contention that it was the result of passion or prejudice cannot be sustained.

The verdict on the other issues is also fully supported, and the record discloses no error which warrants the conclusion that the same resulted in a miscarriage of justice.

The judgment is affirmed.

EDWARDS v. JENKINS et al. *

Civ. 7420.

District Court of Appeal, First District, Division 2, California.

June 30, 1931.

Rehearing Denied July 30, 1931. Hearing Granted by Supreme Court Aug. 27, 1931.

1. **Torts** 🔑1.

"Tort" is civil wrong.

"Tort" is a civil wrong, and wrongful intent is one of its essential elements when act is not done wrongfully or in want of due care and diligence.

[Ed. Note.—For other definitions of "Tort," see Words and Phrases.]

2. **Brokers** 🔑35.

Where brokers had sufficient stock to cover holdings of all customers and performance of customer's demand for delivery was made impossible through no fault of brokers, brokers *held* not guilty of conversion.

Evidence disclosed that delivery at time of demand was made impossible through no fault of brokers; that at all times brokers recognized the property of the customer in the stock and at no time asserted any interest therein adverse to the customer.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by B. F. Edwards against Reginald C. Jenkins and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellant.

Sloss & Ackerman and Ackerman, Wayland & Mathews, all of San Francisco, for respondents.

NOURSE, P. J.

Plaintiff sued for the conversion of 500 shares of the preferred stock of the Julian Petroleum Corporation. The cause was tried by the court sitting without a jury, and judgment was entered for defendants. Plaintiff appeals on typewritten transcripts.

The defendants, who were sued under fictitious names, were the San Francisco representatives of a stock brokerage firm doing business under the name of Logan & Bryan, with its principal office in the city of New York. On March 14, 1927, plaintiff directed the defendants to purchase for him 500 shares of preferred stock of the Julian Corporation which, he testified, he directed them to hold, "that it was a matter of speculation, that I would sell it on quick notice * * * I did not intend to take delivery of it at the time." The stock was purchased according to these directions on March 15th, and plaintiff paid the full purchase price. On May 4, 1927, defendants addressed a letter to all their customers holding Julian stock, including the plaintiff, notifying them that, as they did not care to execute any further orders in this stock, they awaited instructions to deliver. On the following day plaintiff appeared at defendants' San Francisco office in response to this notice and was told that his stock had not been returned from the clearing house but that defendants would send or mail it to his office. On May 7th plaintiff again appeared and demanded delivery of the stock. He was told that the certificates had been sent to the main office of the Julian corporation in Los Angeles and should have been returned at that time, but they would be able to make delivery on May 9th.

The letter of May 4th was prompted by rumors in the stock market that Julian stock was overissued. The defendants had in their possession certificates covering 4,645 shares. On May 2, 3, and 4 they sent to the transfer office in Los Angeles certificates covering 1,740 to test the validity of the certificates which they held. As a result of the letter of May 4th, customers took up over 2,000 shares so that, at the close of business on May 5, defendants held 2,385 shares including the 500 owned by plaintiff. When plaintiff appeared at defendants' office at 11 a. m. of that day, defendants had in their "box" a block of 505 shares which could not be segregated to give plaintiff an even 500 shares. This was explained to him and he agreed to return on the following day when the transferred cer-

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*For subsequent opinion see 7 P.2d 702.

tificates were expected from Los Angeles. On May 7th he again appeared, but, as these certificates had not been received, he was directed to return on Monday, May 9th. At the close of business on May 6th trading in Julian stock was suspended. On May 9th the federal court restrained further transfers of Julian stock, but prior thereto the defendants had received 590 shares duly transferred to their nominee. Plaintiff refused to accept delivery of his stock at that time and on the same day commenced this proceeding. When demand was made upon defendants for delivery of the stock, its value was nil.

The foregoing statement is substantially in accord with the very general findings of the trial court. Some evidence was offered by plaintiff which would tend to establish a case more favorable to him upon the facts, but, as we are satisfied that the findings are supported by substantial evidence, it would serve no purpose to discuss the conflicting stories of the transactions.

The appellants have failed to make out a case of conversion. In 26 Ruling Case Law, page 1098, conversion is defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. * * * The act must be essentially tortious." In the early case of Rogers v. Huie, 2 Cal. 571, 572, 56 Am. Dec. 363, the Supreme Court approved the following quotation from Lord Mansfield in 3 Stephen's N. P.: "A mere wrongful asportation of a chattel, does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect of destroying or changing the quality of the chattel." In Steele v. Marsicano, 102 Cal. 666, 670, 36 P. 920, 921, the Supreme Court said: "A demand of the property, and a refusal to redeliver it, do not, of themselves, constitute conversion. They are merely evidence from which a conversion may be established. * * A refusal is not evidence of conversion, unless the party had it in his power at the time to deliver up the goods"—citing Kelsey v. Griswold, 6 Barb. (N. Y.) 436; Johnson v. Couillard, 4 Allen (Mass.) 446. In the Johnson Case the court emphasized the necessity of a showing that at the time of the demand and refusal the defendant "had it in his power to give up the property."

The application of these general rules to the operations of a stock broker is explained in 9 Corpus Juris, page 543, where it is said: "Where a broker buys stock for a client, it is his duty to deliver the same to him on demand on payment or tender of the sum due him thereon, and the refusal of such a demand constitutes a conversion. But until there is a demand and payment or tender by the client, the broker has the right to retain the stock in his own name, unidentified and unseparated; * * * provided he keeps at all times in his possession or under his control an equal amount of similar stock. * * Unless he has especially agreed to do so, the broker is not bound to keep the identical shares bought for the client separate from the mass of other stock; it is sufficient if he keeps on hand an equal number of the same kind."

The text is merely a concise statement of the accepted rule and of the common practice of stock trading. The circumstance that in this case appellant had paid in full for his stock and that in many of the cases cited the stock was bought on margin is one that does not alter the application of the rule. Here the evidence is that respondents did not own any of the Julian stock held by them; it was all carried by them for their customers. It is undisputed that at all the times referred to they had in their possession or under their control sufficient shares of stock to cover the holdings of all their customers, though these shares were not always segregated in certificates to meet the exact demand of each owner. It is also undisputed that the action of respondents in sending certain certificates to the corporation office for transfer was in accord with the usual and customary practice of brokers doing business in the vicinity, and that the delay in returning these transferred certificates to San Francisco was through no fault of respondents.

[1, 2] The unescapable conclusion from the evidence is that the only reason why appellant's demand for delivery of the stock was not complied with was that delivery at the time was made impossible through no fault of the respondents. There was not at any stage of the transaction an assertion of dominion over the stock by the respondents nor a denial of any rights of the appellant therein. Thus all the technical points argued in the brief fall before the fundamental principle that conversion is "essentially tortious" and that to recover the plaintiff must prove a "tort." But a tort is a civil wrong, and a wrongful intent is one of its essential elements when the act is not done unlawfully or in want of due care and diligence. In 26 Ruling Case Law, page 757, it is said that a cause of action in tort will lie whenever one person does damage to another "wilfully and intentionally, without just cause or excuse"; when the act is a distinct legal wrong; and when the act is not done with any intent to produce harm, but is one which, in the exercise of due diligence and skill, might have been foreseen and prevented. When the action is based upon the first element mentioned, willful wrong, as is the case here, intention is essential and becomes a question of fact for the court or jury. Here the trial court found, in the language of respondents' answer, that delivery at the time demanded was impossible, that at all times the respondents recognized the proper-

ty of appellant in the stock, and at no time asserted any interest therein adverse to appellant. These findings, taken with the findings that there was no willful wrong and no wrongful intent, are conclusive.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App. 275

RAINBOW PETROLEUM CO. v. UNION DRILLING & PETROLEUM CO.

Civ. 6815.

District Court of Appeal, Second District, Division Two. California.

June 29, 1931.

Rehearing Denied July 29, 1931. Hearing Denied by Supreme Court Aug. 27, 1931.

1. **Bailment** 🔑9.

One letting to another secondhand oil well drill pipe which hirer inspected *held* not to have impliedly warranted quality (Civ. Code, §§ 1764, 1766).

> It appeared that, at signing of contract, hirer's representative agreed, for consideration, to hire and pay for use of certain pipe and, upon expiration or earlier termination of agreement, to return all thereof or to pay specified rate for pipe or equipment not so returned. Pipe was secondhand and had been used in various wells, of which hirer's representative was informed.

2. **Bailment** 🔑14(1).

Hirer of pipe, agreeing to return or pay specified rate for pipe not returned, *held* responsible for pipe lost in oil well, regardless of negligence.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by the Rainbow Petroleum Company against the Union Drilling & Petroleum Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Newby & Newby and Dee Holder, all of Los Angeles, for appellant.

William H. Cree and E. P. Mulholland, both of Long Beach, for respondent.

CRAIG, J.

In an action upon a contract in writing for the rental of personal property consisting of oil well drill pipe, judgment was awarded the plaintiff, from which the defendant appealed.

[1, 2] It is admitted that the plaintiff and respondent rented and delivered to the appellant certain piping for drilling purposes, that the same was so used, and that with slight exceptions it was returned to the lessor. By the terms of a written contract between the parties it was agreed that appellant should pay a per diem rental for use of the pipe, and that it would compensate respondent for any portions not returned. Upon the institution of this action for agreed rental and the value of missing pipe the defendant for the first time complained of defects alleged to have interfered with the success of its project and to have caused the loss of a portion of the pipe. Such defense was founded upon an asserted implied warranty by the bailor. It affirmatively appeared that in drawing the pipe from great depth it parted, leaving the lost section in the ground. It was secondhand pipe, which had theretofore been used in various wells, of which the hirer was informed. A representative of the latter called at respondent's premises to inspect the pipe, and according to the testimony was advised that little was known as to its condition except as to the use to which it had been devoted, and that "if they wanted to rent it, it was up to them"; that he should "take whatever pipe he wanted out of the pile." Said representative, the superintendent of appellant's drilling operations, testified: "I inspected it as carefully as I could; I threaded it, some places where it wasn't taking, and the collars were pretty thin, still weakened."

The respondent was not the manufacturer, and made no representations as to quality equal to samples exhibited. A mere contract of sale does not imply a warranty. Civ. Code, §§ 1764, 1766. We think the instant case is controlled by those principles applied and supported by a wide range of authorities to the sale of an automobile in Lamb v. Otto, 51 Cal. App. 433, 197 P. 147, wherein it was held that there is no implied warranty on the sale of secondhand machinery; that the buyer having purchased after an examination of the property will, in the absence of any representations by the seller, be held to have purchased entirely upon his own judgment. To the same effect is Alexander v. Stone, 29 Cal. App. 488, 156 P. 998. At the signing of the contract here in question appellant agreed for a consideration, part of which was then paid, to hire and to pay for the use of five thousand feet of four-inch pipe, and upon the expiration or earlier termination of the agreement to return all thereof, or to pay at a specified rate for pipe or equipment not so returned. We find no reversible error in the particulars asserted by appellant. Argument as to the absence of negligence upon its part, in view of the contract mentioned, becomes immaterial.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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115 Cal.App. 93

AHERN et al. v. TULARE LAKE CANAL CO. et al.

Civ. 157.

District Court of Appeal, Fourth District, California.

June 18, 1931.

1. Corporations 🔑123(1).

As between parties, blank indorsement of stock certificate together with oral agreement of pledge is sufficient to create pledge.

> This is true, notwithstanding no transfers of stock or memorandum respecting the transaction are made on the books of the corporation.

2. Corporations 🔑123(12).

Cancellation of stock certificate did not effectually extinguish lien of pledge of stock and when by redemption pledgor again came into ownership, original pledge lien was restored.

3. Corporations 🔑149.

Attaching creditor does not stand in position of bona fide purchaser for value of stock certificate as against pledgee.

> Attaching creditor has in fact parted with nothing of value, but has merely instituted an action in which he utilizes provisional remedy of attachment for purpose of rendering more secure judgment which he hopes to obtain.

4. Attachment 🔑178.

Attachment lien attaches only to debtor's interest in property at time of levy.

5. Corporations 🔑149.

Facts *held* to show that one purchasing debtor's stock at execution sale purchased without notice of prior pledge lien thereon.

> Facts disclosed that the stock certificate issued to the debtor carried on its face an indorsement entitled "irrevocable stock power" containing statement that debtor had for value received sold, assigned, and transferred stock to pledgee. The indorsement contained an assignment in blank and carried the signatures of the individuals composing the debtor partnership, and there was further recognition of the pledge contained in the letter addressed by the debtor to the pledgee, and subsequently another certificate representing the same stock was issued to pledgee as pledgee, and memorandum to this effect was contained in the books of the corporation issuing the stock, and this was prior to the date of the execution sale.

Appeal from the Superior Court, Kings County; K. Van Zante, Judge.

Action to enforce delivery of stock certificate brought by W. J. Ahern and another, copartners, doing business under the firm name and style of Ahern Motor Company, against the Tulare Lake Canal Company and others. From the judgment, defendant Standard Oil Company of California appeals.

Reversed.

Everts, Ewing, Wild & Everts and A. W. Carlson, all of Fresno, for appellant.

A. C. McClellan, of Corcoran, for respondents.

Wallace Sheehan, of San Francisco, for defendant Tulare Lake Canal Co.

JENNINGS, J.

The present action was instituted by respondents to enforce delivery of a certain stock certificate No. 187, representing 948 shares of the preferred stock of the Tulare Lake Canal Company, a corporation, or, in case delivery of said stock certificate should not be had, to recover the value of the shares of stock in said corporation represented by said stock certificate. Respondents' claim to the ownership of the stock is based upon a judgment recovered by them on March 3, 1928, in an action instituted by said respondents against the copartnership of Turner & Von Glahn. This prior action was begun on January 25, 1928, and on said date a writ of attachment was issued out of the superior court of Kings county against the property of the defendants therein, and was directed to the sheriff of the city and county of San Francisco. On January 26, 1928, the said sheriff executed the writ of attachment by levying upon all right, title, and interest of the defendant partnership in and to 948 shares of the preferred stock of Tulare Lake Canal Company. Subsequent to the recovery of judgment in said action and on March 29, 1928, an execution was issued out of the superior court of Kings county directed to the sheriff of the city and county of San Francisco, Cal., and on April 5, 1928, the said sheriff, in pursuance of the writ of execution thus issued, levied upon all right, title, and interest of the partnership of Turner & Von Glahn in and to 948 shares of preferred stock of the Tulare Lake Canal Company, which stock was represented by certificate No. 187, and thereafter on April 18, 1928, sold at public auction the interest of the copartnership of Turner & Von Glahn in and to the said 948 shares of stock represented by certificate No. 187. At the execution sale, respondent purchased the interest of the partnership of Turner & Von Glahn in the said 948 shares of stock of Tulare Lake Canal Company represented by certificate No. 187. The Standard Oil Company of California, appellant herein, filed an answer in the present action alleging that at the time of the execution sale it was, and for a long time prior thereto had been, the pledgee of the said 948 shares of preferred stock of the Tulare Lake Canal Company, said stock having been pledged to secure an indebtedness of more than $7,000 from the copartnership of Turner & Von Glahn to appellant. The Tulare Lake Canal Company also filed an answer alleging that it had no interest in the respective claims of respondent and appellant to said shares of stock, and agreeing at all times to abide by the decision of the court as to the ownership thereof and to transfer the certificate representing said shares of stock, pursuant to the order of the court. The copartnership of Turner & Von Glahn, and the individuals composing the partnership, made no appearance in the action, and judgment went against them by default.

During the trial of the action and after respondent had rested its case, the Tulare Lake Canal Company moved for a nonsuit as to said corporation, and the motion was granted by the court.

For the sake of convenience, the copartnership of Turner & Von Glahn will hereinafter in this decision be referred to as "the partnership," and the Tulare Lake Canal Company as "the corporation."

The record herein presents the following state of facts in addition to those hereinabove recited: On March 25, 1925, the partnership was indebted to appellant in the sum of approximately $7,000. The partnership then owned 948 shares of preferred stock of the corporation, represented by a stock certificate No. 174. To secure the payment of the indebtedness the partnership on said date delivered to appellant said certificate No. 174, which certificate was thus indorsed on the back thereof:

"Certificate for 948 shares of the capital stock Tulare Lake Canal Company. Issued to W. F. Turner and E. C. Von Glahn. Date March 4th, 1925.

"Endorsed: For Value Received ——— hereby sell, assign and transfer unto ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ——— attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises. Dated ——— 19—. In the presence of ————.

"W. F. Turner.
"E. C. vonGlahn."

Certificate No. 174, thus indorsed, was then sent to the San Francisco office of appellant. No transfer to appellant as pledgee or otherwise was made on the books of the corporation, nor was any memorandum made of the transaction by the corporation. On October 14, 1925, the 948 shares of stock represented by certificate No. 174 were sold for nonpayment of assessments theretofore levied against said stock, appellant having theretofore received no notice of such assessments or of the sale. At the sale the stock was sold to an employee of the corporation for the sum of $66.66 and thereupon a certificate numbered 176, representing the 948 shares of the preferred stock of the corporation, was issued to the buyer. Subsequently, and at a time prior to August 2, 1927, the partnership redeemed the said 948 shares of stock by paying the sum of $396.48, which money was obtained by the partnership from the respondent. Thereupon, and on August 2, 1927, certificate No. 176, theretofore issued by the corporation to the purchaser at the sale for delinquent assessments, was canceled and a new certificate No. 182, representing 948 shares of preferred stock of the corporation, was issued to the partnership. This certificate No. 182 was not, however, delivered to the partnership but was sent to the superintendent of the corporation in Kings county to be held by him until the partnership should surrender and deliver over to him the original certificate No. 174. Attached to the face of certificate No. 182 was the following indorsement:

"Irrevocable Stock Power. Issued Aug. 2, 1927 Know all men by these Presents, That Turner and Von Glahn, For Value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto Standard Oil Company of California Nine Hundred and forty-eight (948) Shares of the Preferred Capital Stock of the Tulare Lake Canal Company standing in our name on the books of the said Tulare Lake Canal Company represented by Certificate No. 182.

"And do hereby constitute and appoint ———— our true and lawful Attorney Irrevocably, for us and in our name and stead but to ——— use, to sell, assign, transfer, and make over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that the said Attorney or Its substitute or substitutes shall lawfully do by virtue hereof.

"In Witness Whereof, we have hereunto set our hand and seal at ——— the ——— day of ——— 19—.

"Signed, Sealed and Delivered in the presence of F. P. Warner, H. W. Roche.

"E. C. Von Glahn [Seal.]
"W. F. Turner."

On December 21, 1927, W. F. Turner and E. C. Von Glahn executed a promissory note in an amount of $7,068.79 in the usual form, payable 5 years after date to appellant, and on said date addressed the following communication to appellant:

"December 21, 1927.

"Standard Oil Company of California, 225 Bush Street, San Francisco, California.

"Gentlemen: Referring to our note in your favor of even date herewith, in the sum of Seven Thousand Sixty Eight & 79/100 Dollars to secure which we have pledged with you Nine Hundred and forty-eight (948) shares of preferred capital stock of Tulare Lake Canal Company, this is to advise you that in addition to this indebtedness to you we owe other unsecured creditors about $21,700. Despite the fact that the maturity of this note as expressed on its face is five (5) years from its date, we agree that in the event of any payments to these other unsecured creditors we will make an equal pro rata payment to you.

"From time to time assessments and other charges are levied upon this stock which we have pledged with you. We also agreed to keep these assessments paid and preserve the stock in good standing.

"Upon any breach of the above agreement, the Note shall become due and payable at your office.

"Yours truly,
"Von Glahn & Turner
"By W. F. Turner
"E. C. Von Glahn

"Witness
"E. Pederson
"A. Pederson.
"Witness
"E. P. Warner.
"H. W. Roche."

On January 2, 1928, the partnership addressed a letter to appellant advising appellant that an assessment had been levied against the stock of the corporation owned by the partnership, that the partnership was unable to meet the assessment, and stating that if appellant wished to pay the assessment the partnership would make a note for the amount thus advanced. The amount of this assessment was $94.80, and was paid by appellant to the corporation. The individuals composing the partnership, on January 4, 1928, executed a promissory note for $94.80, payable one day after date. On January 25, 1928, respondent herein filed a suit in the superior court of Kings county against the partnership, and on the same day a writ of attachment was issued out of the superior court directed to the sheriff of the city and county of San Francisco, by virtue of which writ the said sheriff, on January 26, 1928, levied upon any shares of the capital stock of the corporation belonging to the partnership. Judgment was recovered against the partnership in this action on March 15, 1928, and subsequently on March 29, 1928, a writ of execution issued out of the superior court of Kings county directed to the sheriff of the city and county of San Francisco. On March 19, 1928, certificate No. 182 was canceled and certificate No. 187, representing the same 948 shares of stock owned by the partnership was issued by the corporation to appellant as pledgee, and a notation to this effect was entered in the books of the corporation. On April 5, 1928, the writ of execution was levied by the sheriff of the city and county of San Francisco upon all right, title, and interest of the partnership in and to the 948 shares of stock in the corporation represented by certificate No. 187, and on April 18, 1928, the said sheriff issued a certificate of sale conveying to respondent as purchaser all right, title, and interest of the partnership in and to the preferred stock of the corporation represented by certificate No. 187.

At the conclusion of the trial in the present action, the court found that on January 25, 1928, the date on which the prior action was instituted by respondent against the partnership, and at the time of the levy of the writ of attachment on the stock of the corporation, the partnership of Turner & Von Glahn owned the said 948 shares of preferred stock of the corporation free and clear of any pledges, liens or assessments and that by virtue of the levy of the writ of attachment and by virtue of the subsequent levy of the writ of execution and the purchase by respondent at the execution sale, respondent became the owner of said 948 shares of stock free and clear from the asserted pledge lien of appellant. Judgment was thereupon entered in favor of respondent for the delivery of the certificate representing the 948 shares of stock or for its value, which was found by the court to be $3,849.05, in lieu of failure of appellant to deliver the stock certificate to respondent.

It is appellant's contention that the court erred in finding that respondent became the owner of the 948 shares of stock in the corporation free and clear from the alleged pledge lien through its purchase of the stock at the execution sale in the prior action brought by respondent against the partnership. It is obvious, therefore, that the single question presented for determination herein is whether or not there was a valid subsisting pledge of the stock which was in existence at the time it was sold by the sheriff on the writ of execution. Included in this question, however, are a number of elements which require consideration.

[1] It is first contended by respondent that there was no valid pledge of the stock on March 25, 1925, for the reason that no transfer of it was made on the books of the corporation, nor was any memorandum evidencing the transaction made on the books of the corporation. The evidence pointing to the pledging of the stock on March 25, 1925, consists of the testimony of the witness F. P. Warner, and the indorsement appearing on the back of certificate No. 174 hereinabove set out. It will be observed that the indorsement is not dated and is in blank, but that it bears the signatures of the individuals who composed the partnership. This evidence indicates that it was the plan and intention of the partnership to make a pledge of its stock to appellant to secure the payment of the indebtedness of said partnership to appellant. As between the parties themselves, the blank indorsement of the stock certificate, together with the oral agreement of pledge, was sufficient to create the pledge, notwithstanding no transfer of the stock or memorandum respecting the transaction was made on the books of the corporation. Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512; Security, etc., Bank v. Imperial Water Company No. 1, 183 Cal. 488, 192 P. 22; Seymour v. Salsberry, 177 Cal. 755, 171 P. 938; Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 174 Cal. 308, 163 P. 47; Hall v. Cayot, 141 Cal. 13, 74 P. 299; Spreckels v. Nevada Bank, 113 Cal. 272, 45 P. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348; American Trust & Banking Co. v. Union Security Co., 43 Cal. App. 126, 184 P. 508.

In the above-cited decisions, it is clearly recognized that not only is a pledge of corporate stock, where there has been no transfer or memorandum of the transaction made in the books of the corporation, valid as between the parties, but that such pledge is likewise valid against everyone except a bona fide purchaser of the stock without notice of the pledge. We may therefore take it as established that a valid pledge of the stock in dispute was made on March 25, 1925, notwithstanding the absence of any transfer or memorandum relating to the transaction in the books of the corporation.

[2] It is, however, contended by respondent that even though it be conceded that a valid pledge of the stock was made on the abovementioned date, nevertheless, the lien of the pledge was extinguished when the shares of stock thus pledged were sold for delinquent assessments and a new certificate No. 176, representing the same shares of stock, was issued to the purchaser on October 14, 1925. In opposition to this contention, appellant maintains that when the partnership, which originally owned the stock, redeemed it by paying the assessments theretofore levied against it, the lien of appellant's pledge was then restored. The contention of appellant in this connection appears to be well founded. Respondent argues that when certificate No. 174 was canceled through the sale of the stock for delinquent assessments, and a new certificate No. 176 was issued, nothing remained upon which the pledge could operate, but it must be remembered that the certificate was merely evidence of the ownership of the stock, and that the stock itself was the subject of the pledge. Green v. Cavalier (Cal. App.) 290 P. 548. The mere cancellation of the certificate did not effectually and for all time destroy and extinguish the lien of the pledge, and when by redemption the partnership again came into ownership of it, the original pledge lien was restored. This doctrine was enunciated in the case of Jensen v. Duke, 71 Cal. App. 210, 234 P. 876. The case cited relates to real property, and the effect upon a mortgage lien of a sale of the incumbered property under a senior deed of trust, but the reasoning on which the decision is based is as applicable to personal property as it is to realty. It was there said that the lien of the mortgage was admittedly extinguished by the sale of the property under the trust deed, but held that when the land came into ownership of the mortgagor, the lien of the mortgage theretofore extinguished was revived.

[3-5] It is nevertheless contended that at the time the prior action was instituted by respondent herein against the partnership and the writ of attachment issued, respondent had no knowledge of the existence of the alleged pledge lien, and therefore stood in the position of a purchaser for value without notice of the lien, and that the equity of respondent was superior to that of appellant. It cannot be successfully maintained that an attaching creditor stands in the position of a bona fide purchaser for value. He has, in fact, parted with nothing of value, but has merely instituted an action in which he utilizes the provisional remedy of attachment for the purpose of rendering more secure the judgment which he hopes to obtain. An attachment lien attaches only to the debtor's interest in the property at the time of its levy. 3 Cal. Jur., p. 483; National Bank v. Western Pac. Ry. Co., 157 Cal. 573, 576, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391. In National Bank v. Western Pacific Ry. Co., supra, it was held that the purchaser for value of stock in a corporation, which was not transferred on the books of the corporation at the time of an attachment levy in a suit brought by a creditor of the seller, may compel a transfer upon the books of the corporation and the issuance of a certificate for the stock free from the attachment lien. The evidence is clear and conclusive that, at the time of the sale of the stock under the writ of ex-

ecution, respondent was apprised of appellant's lien. Respondent cannot, therefore, be held to occupy the position of a bona fide purchaser of the stock without notice at the execution sale.

Even though it be conceded that the lien of the pledge was entirely and forever extinguished by the sale of the stock on October 14, 1925, for delinquent assessments levied against it, and that the pledge lien was not revived by the subsequent redemption of the stock by the partnership, it must not be overlooked that the new certificate No. 182, issued to the partnership upon its redemption of the stock, carried on its face an indorsement entitled "Irrevocable Stock Power," which indorsement contains the statement that the partnership had for value received sold, assigned, and transferred to appellant the 948 shares of stock in the corporation represented by certificate No. 182; that this indorsement contained an assignment in blank and bears the signatures of the individuals composing the partnership. This certificate was issued on August 2, 1927, and was delivered to the agent of the corporation, to be retained by him until the original certificate No. 174 should be surrendered. Here, then, we have an unequivocal recognition by the partnership, of the pledge. There is further recognition of the pledge contained in the letter of December 21, 1927, addressed by the partnership to appellant, which letter accompanied the note for $7,068.79, executed on the same date. Finally, it is to be remembered that on March 19, 1928, certificate No. 187, representing the same 948 shares of stock originally owned by the partnership, was issued to appellant as pledgee and a memorandum to this effect is contained in the books of the corporation. This date was prior to the date of the execution sale, which took place on April 18, 1928. It cannot therefore be successfully maintained that, at the time the stock of the partnership was sold under execution, respondent purchased the stock without notice of the prior pledge lien of appellant.

For the reasons hereinabove stated, the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

115 Cal.App. 387

PEOPLE v. BETTENCOURT.

Cr. 1157.

District Court of Appeal, Third District, California.

July 8, 1931.

1. Criminal law 🔑808½.

Instruction on reasonable doubt in language of statute with certain minor verbal differences *held* not erroneous (Pen. Code, § 1096).

Court instructed jury on subject of reasonable doubt, in language of Pen. Code, § 1096, with exception that in giving instruction it omitted the letter "a" in the expression, "it is not a mere possible doubt," and also it omitted the words "possible or," so that clause as given to jury read, "and depending on moral evidence, is open to some imaginary doubt," instead of reading "possible or imaginary doubt."

2. Criminal law 🔑829(12).

Refusal of instruction on subject of remoteness of certain testimony, covered by instruction given on subject, *held* not error.

3. Intoxicating liquors 🔑226.

Testimony respecting surrounding circumstances relating to place and frequency of visitors was admissible in prosecution for maintaining liquor nuisance.

4. Criminal law 🔑369(6).

Evidence as to prior sales of liquor was admissible to show character of place and purpose of defendant in maintaining same.

5. Intoxicating liquors 🔑236(9).

Evidence *held* sufficient to sustain conviction for maintaining liquor nuisance.

6. Intoxicating liquors 🔑143.

Fact of keeping place for sale of intoxicating liquor, rather than number of sales, characterizes place as "nuisance."

[Ed. Note.—For other definitions of "Nuisance," see Words and Phrases.]

7. Criminal law 🔑683(1).

That testimony of one of witnesses was given on rebuttal during introduction of main portion of case presented by people presented no ground for reversal.

It did not appear that defendant was prejudiced by virtue of such fact or that he asked for or desired to introduce any testimony contradictory to that of witness, nor did it appear that defendant asked for or desired any additional time in which to counteract testimony so introduced.

8. Criminal law 🔑683(2).

Admitting testimony of witness on rebuttal was within discretion of trial court.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Joseph J. Bettencourt was convicted of maintaining a nuisance, and he appeals.

Affirmed.

James T. Matlock, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J.

The defendant was convicted of the crime of maintaining a nuisance, to wit, a place where alcoholic liquors are unlawfully kept for sale. The defendant moved for a new trial, which was denied. The appeal is from the order denying the motion for new trial, and also from the judgment of conviction.

[1] The first point made for reversal is that the court erred in its instructions on the subject of reasonable doubt, in that it did not give to the jury the instruction found in the case of Commonwealth v. Webster, 5 Cush. (Mass.) 320, 52 Am. Dec. 711. This contention is partly true, but it overlooks the fact that section 1096 of the Penal Code sets forth the language that should be used in instructing the jury upon the subject of reasonable doubt, and no other instruction is requisite. The court gave to the jury all of the section referred to, but in so doing omitted the letter "a" in the expression, "it is not a mere possible doubt," so that the instruction in this particular reads, "it is not mere possible doubt." Also, the court in quoting the section omitted the words "possible or," so that the clause as given to the jury read as follows: "and depending on moral evidence, is open to some imaginary doubt," instead of reading, "possible or imaginary doubt." These verbal errors could have no possible influence upon the minds of the jurors. The intent and meaning of the instruction as given by the court is, in substance, just exactly as set forth in the section of the code. We think it would require more mental acumen than that possessed by the average juror, or even by court or counsel, to appreciate any difference in the legal effect of the expression, "it is not a mere possible doubt," and "it is not mere possible doubt." The same is true of the expression as to "imaginary doubt" or "possible imaginary doubt." While the definition of "reasonable doubt" found in the Webster case sounds a trifle more learned than the precise language used by the Legislature in framing section 1096 of the Penal Code, the wording of the section must be held as authoritative.

[2] The appellant next objects to the failure of the court to give an instruction proposed by him on the subject of remoteness of certain of the testimony. A reference to the instruction given by the court to the jury shows that the contention of error in this particular is untenable for the reason that the court clearly instructed the jury on that subject, and was under no obligations to repeat the instruction already given, even if the instructions proposed by the appellant were not otherwise objectionable, as being argumentative, and also an instruction trespassing upon the rights of the jury as being an instruction upon the weight of the evidence.

[3] It is next insisted that the testimony is insufficient to sustain a conviction, the basis being that most of the testimony relates to sales prior to the 29th day of January, 1931, and are more or less remote. Only in one instance does the defendant deny the sale, that being in relation to the alleged sale of a bottle of gin. The record shows that the defendant maintained a home at the place mentioned in the information; that other persons had been engaged in the unlawful manufacture and sale of intoxicating liquors at that place, and that the defendant himself had previously been arrested for a liquor violation, the testimony as to the defendant's previous violation of the liquor laws having been introduced by himself. The testimony of the different witnesses relative to the sales of liquor by the defendant extended over a period of approximately nine months. Three different witnesses testified as to the purchase of liquor, at the place in question, one of the witnesses testifying that he purchased liquor there a number of times; that he first purchased liquor of some woman at the place in question, and later purchased liquor from the defendant. The testimony of the witness Pieper is sufficient, if accepted by the jury, to show that he had sold him a bottle of intoxicating liquor at the place mentioned in the information, on or about January 29, 1931. Witnesses R. W. DeVaney and H. N. Hobart related to the purchase of intoxicating liquors from the defendant at times preceding the 29th of January, 1931. Other witnesses testified as to the surrounding circumstances relating to the place and the frequency of visitors thereto. That this testimony is admissible is sustained by the following cases: People v. Medalgi, 94 Cal. App. 543, 271 P. 552; People v. Locurto, 97 Cal. App. 185, 275 P. 462; People v. Lamanuzzi, 92 Cal. App. 775, 268 P. 1082. Other cases might be cited, but these are sufficient.

[4] Evidence as to prior sales of liquor is admissible to show the character of the place and the purpose of the defendant in maintaining the same. See cases cited, also: People v. Frankovich, 64 Cal. App. 184, 221 P. 671; People v. Avila, 78 Cal. App. 415, 248 P. 693.

[5] No effort is made to show that the liquor purchased by the respective witnesses was not fit for beverage purposes, and did not contain more than the lawful alcoholic content. The case appears to have been tried upon the theory that the liquor was of the character proscribed by the Volstead Act, and the only questions presented to the jury were as to actual sales and the maintenance of a place for conducting such business. Under such circumstances we think the testimony in-

troduced is sufficient under the authority of People v. Rousseau, 100 Cal. App. 245, 279 P. 819.

[6] Again, it is not the number of sales, but the fact of keeping a place for the sale of intoxicating liquor, that characterizes a place as a nuisance. People v. Mehra, 73 Cal. App. 162 [and cases cited on page 167], 238 P. 802.

[7, 8] That the language used by the witnesses in describing the liquor purchased is sufficient to show its unlawful character is supported by the cases of People v. Silva, 67 Cal. App. 351, 227 P. 976; People v. Mueller, 168 Cal. 521, 143 P. 748, L. R. A. 1915B, 788, and People v. Gray, 67 Cal. App. 549, 228 P. 358. That the testimony of one of the witnesses was given upon rebuttal during the introduction of the main portion of the case presented by the people furnishes no ground for reversal. It was within the discretion of the trial court, and it does not appear that the defendant was prejudiced thereby, or that the defendant asked for or desired to introduce any testimony contradictory of the testimony of such witness. Nor does it appear that the defendant asked for or desired any additional time in which to counteract the testimony so introduced.

A careful reading of the transcript fails to disclose any error upon which a reversal could be predicated. It therefore follows that the order and judgment of the trial court must be, and they are hereby, affirmed.

I concur: PRESTON, P. J.

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115 Cal.App. 324

PEOPLE v. WY SING.

Cr. 1159.

District Court of Appeal, Third District, California.

July 1, 1931.

Criminal law ⚷1130(4).

No brief having been filed for accused on appeal, nor appearance made on his behalf, conviction was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Wy Sing was convicted of violating an act regulating the sale, possession, distribution, and use of habit-forming narcotic and other dangerous drugs and substances, and he appeals.

Affirmed.

D. P. Eicke and C. P. Rendon, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the Superior Court of San Joaquin county of a felony, to wit: Violation of "An act to regulate the sale, possession, distribution and use of habit forming, narcotic and other dangerous drugs and substances, and providing penalties for the violation thereof," approved May 4, 1929 (St. 1929, p. 380), and acts amendatory thereof.

The transcript on appeal was filed in this court May 12, 1931. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on July 1, 1931. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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115 Cal.App. 289

PEOPLE v. LAVINE et al.

Cr. 2023.

District Court of Appeal, Second District, Division 1, California.

June 30, 1931.

Rehearing Denied July 11, 1931. Hearing Denied by Supreme Court July 30, 1931.

1. Criminal law ⚷13.

Provision of statute respecting extortion by threatening to expose secret *held* not so uncertain or indefinite as to impair validity (Pen. Code § 519, subd. 4).

2. Threats ⚷1(1).

"Secret" referred to in extortion statute must be unknown to general public or some particular part thereof, must concern some matter of fact, and must affect threatened person in way unfavorable to reputation or to some other interest (Pen. Code § 519, subd. 4).

[Ed. Note.—For other definitions of "Secret," see Words and Phrases.]

3. Threats ⚷5.

Indictment charging extortion *held* sufficient (Pen. Code § 519, subd. 4).

Indictment charged that on or about certain date defendant unlawfully obtained certain personal property from person named and three others named, and others with consent of such persons, induced by wrongful use of force and fear on part of defendant by threat to expose certain secret affecting such named persons and others.

4. Threats 🔑8.

Statute respecting punishment for attempt to commit crime *held* inapplicable to attempt to commit extortion (Pen. Code § 524, as amended by St. 1929, p. 435, and § 664).

> Pen. Code § 524, as amended by St. 1929, p. 435, provides that every person who attempts by means of threat, such as is specified in section 519, to extort money or other property from another is punishable by imprisonment as specified.

5. Indictment and information 🔑190.

Jury *held* authorized to find defendant guilty of attempt to commit extortion, although indictment charged extortion without any further reference to attempted extortion (Pen. Code, § 524, as amended by St. 1929, p. 435, and § 1159).

6. Criminal law 🔑739(4).

Court properly advised jury to find for people on pleas of prior acquittal and once in jeopardy, where there was no evidence supporting them.

7. Criminal law 🔑185.

Where jury in extortion prosecution failed to agree and was discharged, cause could lawfully proceed to second trial under same indictment, resulting in conviction of attempted extortion (Pen. Code § 519, subd. 5, § 1159).

> Defendant claimed that charge of extortion was abandoned by prosecution and that discharge of jury without verdict, after case had been submitted to them on theory of prosecution for attempted extortion, amounted to acquittal of main charge of extortion, but at all times charge against defendant as set forth in indictment was charge of extortion, and it was only by virtue of such charge, supplemented by provisions in Pen. Code § 1159, that any verdict of attempted extortion could have been rendered.

8. Criminal law 🔑507(4).

If witness in extortion prosecution was merely a feigned accomplice working out of district attorney's office, it was unnecessary that he be corroborated (Pen. Code § 1111).

9. Criminal law 🔑622(1).

In prosecution for extortion, court did not abuse discretion in denying application of defendants for severance of trials.

10. Criminal law 🔑829(1).

Requested instructions covered by instructions given, so far as correct, *held* properly refused.

11. Threats 🔑1(1).

Crime of attempted extortion depends upon acts, mind, and intent of person threatening, and not upon result upon person to be coerced (Pen. Code, §§ 518, 519, 524, as amended by St. 1929, p. 435).

YORK, J., dissenting.

Appeals from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Morris Lavine and another were convicted of an attempt to commit the crime of extortion, and they appeal.

Affirmed.

Paul W. Schenck, of Los Angeles, for appellant Lavine.

Rush & Beirne and William B. Beirne, all of Los Angeles, for appellant Johnson.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

CONREY, P. J.

By indictment presented on the 13th day of March, 1930, the defendants were accused of the crime of extortion, in violation of section 518 of the Penal Code, committed as follows: It was charged that on or about March 10, 1930, the defendants did wilfully, unlawfully, and feloniously obtain certain personal property, to wit $75,000, of currency, etc., from one Charles H. Crawford, and three other persons named, and other persons to the grand jury unknown, with the consent of said persons; which said consent was then and there induced by the wrongful use of force and fear by and on the part of said defendants, to wit, by a threat then and there made and communicated to said four above-named persons and other persons, verbally by said defendants, to expose certain secrets affecting said named persons, and other persons to the grand jury unknown, and each of them; said personal property in money being then and there the property of Charles H. Crawford, etc. The appearances and pleadings of the defendants in the trial court, and likewise in this court, are distinctly separate and apart one from the other. There have been two trials of the action, the first trial having resulted in a disagreement and discharge of the jury. On July 4, 1930, the second trial was concluded by separate verdicts whereby each defendant was found "guilty of attempted extortion, a felony, being an attempt to commit the crime of extortion, a felony, as charged in the indictment." The appeals of the defendants are from the several judgments and from the orders denying their motions for a new trial of the action.

Point one (Lavine brief), is that subdivision 4 of section 519 of the Penal Code, which forms the only basis for the prosecution and constitutes the charging part of the indictment, is void for such uncertainty and indefiniteness that it is unintelligible. Point two is stated as follows: That the indictment embodying the language of section 519, subdivision 4, Penal Code, and nothing more, is insufficient to sustain a conviction.

The crime of extortion is defined by section 518 of the Penal Code as follows: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Section 519 of the Penal Code reads as follows: "What threats may constitute extortion. Fear, such as will constitute extortion, may be induced by a threat, either:

"1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,

"2. To accuse him, or any relative of his, or member of his family, of any crime; or,

"3. To expose, or impute to him or them any deformity or disgrace; or,

"4. To expose any secret affecting him or them."

Comparing the indictment with the foregoing provisions of the Penal Code, it appears that the defendants were charged with the crime of extortion committed by threatening to expose "certain secrets" affecting the named or described persons. In other words, the charge is that the crime was committed by means of threats of the kind described in subdivision 4 of said section 519. Point two rests upon the further claim that the indictment did not conform to other provisions concerning indictments, as found in sections 952 and 957 of the Penal Code. It is provided in section 950 that an indictment must contain, besides the title, etc., "2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 951, as amended in 1927 (St. 1927, p. 1043) provides that an indictment or information "may be in substantially the following form." The form prescribed requires that the indictment shall accuse the defendant of the crime (giving the name thereof), in that on or about a stated day and within the named county the defendant "(here insert statement of act or omission, as for example, 'murdered C. D.')." Section 952 (as amended in 1929 [St. 1929, p. 303]) reads as follows: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." Section 959, as amended in the year 1927 (St. 1927, p. 1041), provides that the indictment "is sufficient if it can be understood therefrom." Here follow five subdivisions, which relate to certain formalities of averment, none of which touch the matter of description or name of the crime, or statement of the acts by means of which the offense was committed. The amendment of the section in the year 1927 consisted of the omission of two subdivisions, which in substance are covered by the second subdivision of section 950 and by section 960. It is provided by section 960, as amended in 1927 (St. 1927, p. 1065) that "No indictment, information, or complaint is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."

In this action, each of the defendants demurred to the indictment upon various grounds, which include the objections which are before us for consideration at this time. The demurrers having been overruled, defendants entered their pleas of not guilty. On May 10, 1930, a mistrial having been declared and the jury discharged, the cause came on for the second trial on June 23, 1930. Defendant Lavine moved for a continuance, which was denied. Defendant Johnson moved for severance, which was denied. Defendants entered pleas of "former acquittal" and "once in jeopardy." Each defendant objected to the jurisdiction of the court, which objections were overruled. Each defendant objected to the introduction of any testimony, and these objections were overruled. The objections of defendant Johnson to the introduction of any evidence were made on the following grounds: "First, that the court is without jurisdiction to try the case on the ground that the statute on which the information is founded, is unconstitutional; second, that the defendant Johnson has been once acquitted on the charge set forth in the indictment; third, that the defendant Johnson has been once in jeopardy of the crime charged in the indictment; fourth, that there is an appeal pending in the District Court of Appeal of the state of California on behalf of the defendant Lavine and that this court is without jurisdiction to try the defendant Johnson jointly with the defendant Lavine because of the fact that that appeal is pending. I further object to the introduction of any evidence in this case upon the ground that the indictment does not state facts sufficient to constitute a public offense." Defendant Lavine made the same motions, based on the same grounds as those above stated. The objections were overruled, and the case proceeded to trial. We find no argument made relating to the so-called appeal of Lavine, which apparently was an attempt to appeal from a nonappealable order.

[1, 2] In relation to point one, supra, we are of the opinion that the provisions of section 519, subdivision 4 of the Penal Code, are not so far uncertain or indefinite as to impair their validity. General terms may be used in a statute to describe things according to the common understanding of such terms. The word "secret" as used in section 519, in connection with the other words and phrases of the section, is definitely clear in its meaning. By reasonable construction it thus appears that the thing held secret must be unknown to the general public, or to some particular part thereof which might be interested in obtaining knowledge of the secret; the secret must concern some matter of fact, relating to things past, present, or future; the secret must affect the threatened person in some way so far unfavorable to the reputation, or to some other interest of the threatened person, that threatened exposure thereof would be likely to induce him through fear to pay out money or property for the purpose of avoiding the exposure.

[3] In relation to point two, we are of the opinion that the indictment, charging the offense in the terms which we have described in the first paragraph hereof, is sufficient to constitute a charge of commission of the crime of extortion. The language used in the indictment was reasonably sufficient to give the defendants notice of the offense of which they were accused.

Point three (Lavine brief) is that defendants could not legally be found guilty of "attempted extortion" when the charge was laid exclusively under section 518 of the Penal Code, relating to the crime of extortion. There are provisions of the Penal Code dealing generally with the subject of attempts to commit crimes. There are also provisions dealing with attempts to commit particular kinds of crimes. Section 664 reads in part as follows: "*Attempts to commit crimes, how punishable.* Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

"1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon conviction of the offense so attempted. * * *" The penalty for committing the crime of extortion by means of any threat such as is mentioned in section 519, is made punishable by imprisonment in the state prison not exceeding five years. (Pen. Code, § 520.)

[4, 5] But since there are provisions made by law for the punishment of the crime of attempting to commit extortion, it follows that the provisions of section 664 have no application in the case now before us. Section 524 of the Penal Code, as amended in 1929, reads as follows: "*Attempts to extort money or property by means of threats.* Every person who attempts, by means of any threat, such as is specified in section 519 of this code, to extort money or other property from another is punishable by imprisonment in the county jail not longer than one year or in the state prison not exceeding five years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment." (St. 1929, p. 435.) Comparing section 520 with the amended section 524, we have the curious instance of a penalty provided for the mere attempt to commit a crime, which penalty may be more severe than the extreme limit of penalty for successful commission of the crime itself. Under the provisions of section 524, as it existed prior to the amendment of 1929, the same description of attempted extortion was punishable only as a misdemeanor. This recent legislation amending section 524 lends some force to the contention of appellants that the crime of attempted extortion is not included within an indictment charging the completed crime of extortion, and that therefore an indictment charging extortion will not support a verdict of guilty of attempted extortion. There is, however, another section of the Penal Code which destroys the force of such contention. Section 1159, Penal Code, reads as follows: "*Jury may convict of a lesser offense or of an attempt.* The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." In substance, the argument of appellants is that section 1159 was not intended to authorize conviction of a greater crime under an indictment charging a lesser crime; that when tested by the present provisions of section 524, as compared with section 520, the crime of attempted extortion has become a greater crime than would be the crime of successful extortion. Nevertheless, we think that this piece of logic does not cover the subject completely. The plain meaning of section 1159 is emphasized by the headnote thereof, which can mean nothing other than that the right of the jury to find a defendant guilty of attempt to commit the crime charged, does not depend upon

any construction of the phrase "lesser offense." As to the pursuasive force of such headnotes, see 23 Cal. Jur., p. 772, and cases cited. We conclude that the jury was authorized to find the defendant guilty of attempt to commit the crime of extortion, although the indictment charged extortion without any further words of reference to attempted extortion.

[6] Point four (Lavine brief) relates to the action of the court in advising the jury to find for the people on the pleas of "prior acquittal" and "once in jeopardy." Since there was not before the jury any evidence in support of those pleas, there could be no error in the jury's verdict, or in the advice from the court relating thereto.

[7] The real contention underlying point four is that the court erred in excluding evidence offered by the defendants to support their special pleas. Hereinabove, we have indicated the proceedings which took place at the first trial of the action, at which time the jury, having failed to agree upon a verdict, was discharged. The pleas of "former acquittal" and "once in jeopardy" are entirely based upon conditions arising out of the fact that at the first trial the case was submitted to the jury on the theory of a prosecution for attempted extortion, and not as a case of extortion. In other words, defendants claim that the charge of extortion was abandoned by the prosecution, and that the discharge of the jury without a verdict after the case had been thus submitted to them, in effect amounted to an acquittal of the main charge of extortion. It must be held in mind, however, that at all times the charge against the defendants, as set forth in the indictment, was a charge of extortion. It was only by virtue of this charge, supplemented by the provisions of the Penal Code (section 1159 in particular), that any verdict of attempted extortion could have been rendered in this action. We think that there is no valid reason for asserting that this cause could not lawfully proceed to a second trial under the same indictment. We are further of the opinion that at such trial the said pleas of "former acquittal" and "once in jeopardy," were entirely without foundation.

[8] Point five (Lavine brief) is that the evidence is insufficient to sustain the verdict, "and herein insufficient corroboration." The argument in support of this claim does not give us a direct statement of the particulars in which the evidence is insufficient. In a general way, however, we gather from the statements of counsel that they are insisting that the evidence does not show what the secret was which the defendants were threatening to expose; and that the evidence of the witness Berman was not corroborated as required by law. It is conceded, however, that if Berman was merely a feigned accomplice "working out of the district attorney's office" he did not need to be corroborated as required by section 1111 of the Penal Code. In that connection they submit to the court, "that this man and his career of crime is so well known in this community that no one, not being a congenital idiot, would believe anything he said under oath or otherwise." Unfortunately for the contention of counsel it happens that the jury, if it chose to believe any statements of Mr. Berman, acted within the scope of its rights and powers. We are further of the opinion that the evidence concerning the nature or description of the secrets, involved in the threats made by the defendants, was sufficiently definite and certain to support the verdict as rendered.

[9] Under the head of "divers and sundry rulings" depriving defendants of a fair trial, we find the appellants claim that the court erred as to each of them, in denying their applications for severance of their trials; that the court erred in admitting and in refusing to strike out certain evidence relating to accusatory statements made in the presence of defendant Lavine. We find neither abuse of discretion nor error in these rulings of the court.

[10] It is contended by defendant Lavine that the court erred in refusing to give to the jury certain requested instructions quoted on pages 132, 135, and 136 of his brief. (The instructions have not been numbered, as they should have been, in the transcript.) In the instructions given by the court to the jury they were informed, among other things, that in order to constitute the crime of attempt to commit the crime of extortion alleged in the indictment, as to each defendant, it was incumbent upon the prosecution to prove to the satisfaction of the jury and beyond a reasonable doubt, each of certain described elements. These elements as stated in the instructions (Clerk's Trans., p. 95) are definitely confined and limited to an intention and attempt to extort money or other valuable property from the person threatened, by means of a threat to expose a secret affecting the person threatened, or affecting a relative, or member of his faimly. In relation to circumstantial evidence, the court instructed the jury as follows: "If the evidence relating to any circumstance in this case is, in view of all the evidence, reasonably susceptible of two interpretations, one of which would point to the guilt of the defendant and the other of which would admit of innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of defendant's innocence and reject that which would point to guilt." We are satisfied that the instructions given to the jury very fully and fairly stated the law of the case; and particularly that they sufficiently covered the matters included in the said requested instruc-

tions, in so far as said requested instructions were correct in their statements of the law.

On reading the brief filed on behalf of appellant Johnson, we find that the assignments of error, although framed in different language, are in their substance, and in their principal elements, the same points relied upon by her codefendant. As to the propositions thus duplicated in the briefs, we have endeavored to give them appropriate attention in the foregoing paragraphs.

[11] Appellant Johnson further contends that the court erred in instructing the jury that in attempted extortion the crime depends upon the acts, mind, and intent of the person threatening, and not upon the effect or result upon the person to be coerced; and in instructing the jury that in the crime of attempted extortion a person may be guilty of an attempt to commit the crime of extortion though he does not, as he intends, produce fear on the part of the person from whom he attempts to extort money. We think that there was no error in the giving of these instructions. In the case entitled In re Magidson, 32 Cal. App. 566, 163 P. 689, 690, the court had under consideration certain evidence relating to a charge of attempt to receive stolen property. In holding that the evidence was sufficient to establish probable cause for the order of commitment, the court said: "There certainly existed the two elements of an attempt, namely, the intent to commit the crime and a direct ineffectual act done toward its commission. The case falls within the spirit and reasoning of the appellate decisions in this state." The rule thus stated was applied to evidence which showed that, notwithstanding the criminal intent, the actual circumstances were such that the attempt could not possibly have succeeded, since the stolen property which the accused sought to remove had been previously discovered and removed by the police. The court reviewed extensively earlier decisions of the Supreme Court and Courts of Appeal of this state, as well as decisions of other states bearing upon the subject.

In People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741, where a defendant was convicted of an attempt to commit the crime of extortion, it was held that the acts proved were plainly sufficient to constitute an attempt to commit the crime of extortion, although in fact the defendant did not succeed in inspiring any fear in the mind of the threatened person. The court said: "The condition of Mrs. Amos' mind was unknown to the defendant. If it had been such as he supposed, the crime could have been, and probably would have been, consummated. His guilt was just as great as if he had actually succeeded in his purpose. His wicked motive was the same, and he had brought himself fully and precisely within the letter and policy of the law. This crime as defined in the statute depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced." We think that the foregoing is a correct statement of the law which should apply here. We are further of the opinion that the conviction of the defendants is based upon a record which is free from prejudicial error.

The judgments, and also the orders denying motions for new trial, from which the defendants have appealed, are, and each of them is, affirmed.

I concur: HOUSER, J.

I dissent: YORK, J.

PARKER v. BOARD OF DENTAL EXAMINERS OF STATE OF CALIFORNIA et al. *

Civ. 7544.

District Court of Appeal, First District, Division 2, California.

June 23, 1931.

Rehearing Denied July 23, 1931. Hearing Granted by Supreme Court Aug. 20, 1931.

1. Physicians and surgeons 🔑**2.**

Purpose of act regulating practice of dentistry is to insure skill and proficiency in practice of profession (Deering's Gen. Laws 1923, Act 2048).

2. Physicians and surgeons 🔑**6(2).**

Statute regulating dentistry, if construed as prohibiting unlicensed person from managing purely business affairs of dental office, would be unconstitutional (Deering's Gen. Laws 1923, Act 2048, §§ 11 (5), 13).

> Dental Act, Deering's Gen. Laws 1923, Act 2048, § 11 (5), declares that practice of dentistry shall include one who manages or conducts as manager, proprietor, or otherwise, a place where dental operations are performed. Section 13 defines unprofessional conduct to include aiding or abetting any unlicensed person to practice dentistry unlawfully.

3. Statutes 🔑**219.**

Interpretation, by dental board and its legal adviser, of ambiguous portion of statute regulating practice of dentistry for long period of years, is entitled to weight.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 14 P.2d 67.

4. Physicians and surgeons ⚷6(2).

One charged with aiding and abetting unlicensed person to practice dentistry could rely on interpretation placed on ambiguous regulating statute by dental board and its legal adviser for long period (Deering's Gen. Laws 1923, Act 2048, §§ 11 (5), 13).

5. Physicians and surgeons ⚷4.

License to practice dentistry can be granted to human being only, not to corporation (Deering's Gen. Laws 1923, Act 2048).

6. Physicians and surgeons ⚷6(2).

Statute declaring it unprofessional for licensed dentist to aid "unlicensed person" to practice dentistry refers only to dentistry which licensed person might practice (Deering's Gen. Laws 1923, Act 2048, §§ 11 (5), 13).

[Ed. Note.—For other definitions of "Unlicensed Person," see Words and Phrases].

7. Physicians and surgeons ⚷6(2).

One receiving dividends on trust certificates issued by corporation leasing offices to dentists *held* not engaged in "practicing dentistry" (Deering's Gen. Laws 1923, Act 2048, §§ 11 (5), 13).

[Ed. Note.—For other definitions of "Practicing Dentistry," see Words and Phrases.]

8. Physicians and surgeons ⚷6(2).

Practicing dentistry under name "Painless Parker Dentist" *held* not to sustain charge of practicing dentistry under assumed or fictitious name, in view of decree authorizing use of such name (Deering's Gen. Laws 1923, Act 2048, §§ 11 (5), 13).

9. Physicians and surgeons ⚷6(2).

Promulgation of system for studying and teaching dentistry, *held* not to constitute "practice of dentistry" (Deering's Gen. Laws 1923, Act 2048, §§ 11 (5), 13).

10. Witnesses ⚷293½.

Action of dental examiners in requiring witnesses to testify, over objection that testimony might incriminate witnesses, and purporting to grant immunity from prosecution, *held* error (Pen. Code, § 1324, repealed by St. 1917, p. 291; Const. art. 1, § 13).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Painless Parker against the Board of Dental Examiners of the State and O. E. Jackson and others, as members of such Board, to set aside an order of the Board suspending petitioner's license to practice dentistry. From an adverse judgment, plaintiff appeals.

Reversed, with instructions.

See also 291 P. 421.

Harry Keyser and John C. Stevenson, both of San Francisco, for appellant.

Jesse W. Carter, of Redding, and Annette A. Adams, of San Francisco, for respondents.

NOURSE, P. J.

This is an appeal from a judgment affirming an order of the dental board suspending petitioner's license to practice dentistry.

The petitioner was tried by the dental board upon an information framed in four counts charging unprofessional conduct. The first count charged petitioner with aiding and abetting the corporation Painless Parker Dentist to practice dentistry unlawfully. The second count charged him with aiding and abetting an unlicensed person to participate in the profits of dental offices. The third count charged the use of an assumed and fictitious name—"Painless Parker Dentist," a corporation. The fourth count charged the use of an assumed and fictitious name—"E. R. Parker System." The dental board found petitioner guilty on all four counts and suspended his license to practice for a period of five years.

"Painless Parker Dentist" was incorporated by articles filed with the secretary of state August 4, 1915. The amount of the subscribed corporate stock was $30 divided into three shares of $10 each. Its designated purposes were "to conduct, own, operate and control dental offices" to manufacture, buy, and sell dental creams, dental apparatus and supplies. E. R. Parker, one of the incorporators, changed his name to "Painless Parker" by decree of court and served as manager and chief surgeon of this corporation. Associated Dental Supply Company was incorporated by articles filed September 1, 1915. The general purposes of this corporation seem to have been the dealing in all kinds of dental supplies and similar merchandise. The petitioner was not a stockholder or incorporator of this corporation. The conduct of the business down to the date of the hearing before the dental board in August, 1929, has been a gradual lessening of the functions of the former corporation and a consequent increase in the functions of Associated Dental Supply Company until the latter secured practically full control of the business and financial operations. Fourteen dental offices were operated in this state by "dentists using the E. R. Parker System." These offices were owned, or leased, by the Associated Dental Supply Company, which in turn had some arrangement with the Painless Parker Dentist Corporation whereby these offices were "leased" to the latter but all the money taken in by these offices was paid directly to the Associated Dental Supply Company. Throughout this period (or at least for the last eight or ten years before the hearing) the Associated Dental Supply Company dealt directly with the managers of the local offices, who in turn deposited all their receipts to the credit of that corporation. The Painless Parker Dentist Corporation has never paid a dividend, has no assets, and no funds on hand. So far as we can ascertain from the record, it has never organized or operated as a corporation, has not, either directly or indirectly, assumed or exercised any control over any of the offices operated by the petitioner or over any of the licensed dentists employed therein; but has simply been used by Painless Parker the individual as his "alter ego" in his conduct of these dental offices, the principal use made of the corporation being the use of the term "Painless Parker Dentist" upon the doors, windows, and letterheads of the petitioner. When this practice was discontinued and the term "Dentists using E. R. Parker System" was adopted does not appear from the evidence. But it does appear without any contradiction that the corporation, as such, has not functioned in the direct management or control of any of these dental offices and has not represented itself as a corporation practicing dentistry but has confined its activities to the appointment of petitioner as its manager, who, in turn, did manage the offices for the benefit of the Associated Dental Supply Company.

In the first count it was alleged that "between the 4th day of August, 1915, and the 31st day of May, 1929," the petitioner did aid and abet an unlicensed person to practice dentistry "by permitting, allowing and authorizing said corporation (Painless Parker Dentist) to conduct, own, operate, and control dental offices throughout the state of California, where dental operations were performed, and carry on the practice of dentistry therein." The basis of the charge is found in the provisions of section 11 of the Dental Act (Deering's General Laws 1923, Act 2048), which declare the practice of dentistry to include one "(5) who manages or conducts as manager, proprietor, conductor, or otherwise a place where dental operations are performed." By section 13 of the act unprofessional conduct is defined to include "aiding or abetting any unlicensed person to practice dentistry unlawfully."

[1, 2] In support of the judgment the respondents argue that any transaction within the purview of subdivision 5 of section 11 of the act constitutes the practice of dentistry; that a corporation may not be licensed to practice dentistry; that any licensed dentist who aids a corporation in the performance of any of the acts mentioned in subdivision 5 is aiding an "unlicensed person" to practice. The appellant argues that the provisions of that subdivision are unconstitutional in so far as they purport to prohibit an unlicensed person from managing the purely business or economic affairs of a dental office, and that the term "unlicensed" dentist refers only to a natural person who might be licensed under the act and not to a corporation owning or operating a dental office.

Bearing in mind that "the ultimate purpose of the Dental Act is to bring about and insure skill and proficiency in the practice of the profession" (Jacobs v. Board of Dental Examiners, 189 Cal. 709, 714, 209 P. 1006, 1008), it must be manifest that, if the quoted provisions of the act mean what the respondents contend that they mean, they are unconstitutional as placing unreasonable restrictions upon the conduct of a lawful business—restrictions which are not referable to the regulatory police powers of the state. State v. Brown, 37 Wash. 97, 79 P. 635, 637, 68 L. R. A. 889, 107 Am. St. Rep. 798; Liggett Co. v. Baldridge, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204. In the Brown Case the Supreme Court of Washington had under consideration the provisions of section 8 of the dental act of that state (Laws 1901, p. 317), which declared it to be a misdemeanor to "own, run, operate or cause to be operated, or manage a dental office." In holding that portion of the act unconstitutional the Washington court said that "to own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible." "But," said the court, "we are unable to say or perceive that the health, moral, or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required."

In the Brown Case the court gave the illustration of the widow of a licensed dentist who assumed control and management of the business of the office, and who, though she employed none but licensed dentists to perform the dental work, would be chargeable under the strict terms of the act. Other illustrations might be added. Thus the administrator, trustee, or receiver duly appointed to manage the estate of a licensed dentist would, under our statute, be guilty of a misdemeanor. Section 12. The manager or proprietor of "a *place* where dental operations are performed" would include the manager and owner of every hospital and clinic permitting such operations, the many charitable agencies maintaining clinics, the infirmaries and guilds maintained and operated by the students in the universities and colleges, the many dental clinics maintained by parents' organizations for the benefit of school children, as well as the owners and managers of buildings where such operations are performed.

Closely resembling the case at hand is Messner v. Board of Dental Examiners, 87 Cal. App. 199, 262 P. 58, 60, where the court of the Third Appellate District annulled an order suspending the license of a dentist on the charge that an unlicensed person was the "manager" of his office. The court said that "Cohn had charge of the purely business end of the dental office, * * * but there is no evidence that he had or exercised the slightest control or direction of the professional work performed in such office." In referring to the provisions of subdivision 5, the court said: "A reasonable construction of the quoted provisions of the statute appears to be that, to come within the terms thereof, one must in some manner, to some extent, directly or indirectly, control or direct some professional service of the kind that dentists are licensed to render."

[3] This is about the same interpretation which was given the quoted portion of the section by the Attorney General of the state as early as 1918 when he advised the dental board that "so much of the business relating to his practice as does not concern the public may * * * be operated through the medium of a corporation. It is the evident intent of the act that the licensed dentist in his dealings with the public shall operate in his own name and that that name shall be the one under which he is licensed, but under the statute it is apparently not made of any concern to the public whether the business of the dentist other than as the public comes in contact therewith, is operated by the dentist himself or by a corporation to which he is responsible in connection therewith, or which may have an interest in the facilities employed or receipts from his practice."

The appellant insists that the foregoing interpretation was made at his request and that he has frequently informed the respondent board of his desire to conform to the law in this respect and has frequently requested the board to inform him of its desires and demands in that respect. In view of the uncertainty of the act, and in view of the fact that petitioner was charged with a violation of its terms over a period of fourteen years, we are inclined to petitioner's view of contemporaneous construction growing out of the interpretations of the board and of its legal adviser and the conduct of the board over that period of time. The ambiguity of the quoted portion of the statute is evident, and, whether we agree with the interpretation of the dental board and the attorney-general, that interpretation, employed over a long period of years, is nevertheless entitled to weight in this proceeding. Thus, in The Pocket Veto Case, 279 U. S. 655, 690, 49 S. Ct. 463, 470, 73 L. Ed. 894, the Supreme Court said: "that a practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" Quotation is from State v. South Norwalk, 77 Conn. 257, 264, 58 A. 759. This principle is more liberally applied to the construction of statutes than to the provisions of a constitution. 6 R. C. L., p. 63, where many cases on the general principle stated in the Connecticut case are cited.

[4] Applying the doctrine to the case at hand, we find, first, that the statute is uncertain where it refers to one who "conducts as * * * proprietor * * * or otherwise a place where dental operations are performed" because if this language includes an owner of a dental office who merely controls the purely business side of the place it is unconstitutional (State v. Brown, 37 Wash. 97, 79 P. 635, 638, 68 L. R. A. 889, 107 Am. St. Rep. 798; Liggett Company v. Baldridge, 278 U. S. 105, 113, 49 S. Ct. 57, 73 L. Ed. 204); and if the words "manage or conduct" cover such functions as do not "call for any of the professional skill required of a dentist but rather that of one trained in business transactions" (Messner v. Board, supra), then the inhibitions of the statute are beyond the scope of the police power of the state; and, second, the statute being uncertain in this respect, the petitioner was entitled to assume from the language of the information that he was required to answer that charge in the light of the interpretation placed upon the statute by the dental board and its legal adviser. For these reasons the demurrer to the first count of the information should have been sustained upon the grounds of uncertainty.

[5] The evidence taken in support of the allegations of the first count does not aid the pleading as it merely tends to prove that, after the incorporation of Painless Parker Dentist, the petitioner became its manager. (Here it should be added that, though the charge in the information covered a period of fourteen years, none of the evidence was tied to that period and much of it was not laid in the state of California whereas it appears that the petitioner was operating during that period in other states.) Upon this charge and evidence he was convicted of aiding and abetting an "unlicensed person to practice dentistry unlawfully." In Ex parte Whitley, 144 Cal. 167, 180, 77 P. 879, 884, 1 Ann. Cas. 13, the Supreme Court, referring to a similar statute, said: "But it must be remembered that the act regulating the practice of dentistry and similar acts are not passed to promote the personal ends of individuals, but as salutary enactments in the exercise of the police power of

the state to legislate for the safety, health, and welfare of the people." To reach this end the dental act has prescribed the method by which a person may obtain a license to practice dentistry, and from the language of the act, a license could be granted to a human being only and not to an artificial creation such as a corporation. The terms of the act, in so far as they relate to the licensing of individuals and to the practice of dentistry, show clearly that they were directed to persons as distinguished from corporations. Similar interpretations have been given to the act regulating the practice of architecture in Binford v. Boyd, 178 Cal. 458, 462, 174 P. 56; People v. Allied Architects' Ass'n, 201 Cal. 428, 435, 257 P. 511; the State Medical Act in Pilger v. City of Paris D. G. Co., 86 Cal. App. 277, 281, 261 P. 328; and the Nebraska Medical Act in State Electro-Med. Inst. v. State, 74 Neb. 40, 103 N. W. 1078, 12 Ann. Cas. 673. In the latter case the Nebraska court said (page 1079 of 103 N. W.): "There was no necessity of legislation to prohibit corporations, as such, from practicing medicine. It is impossible to conceive of an impersonal entity 'judging the nature, character and symptoms of the disease,' or 'determining the proper remedy,' or giving or prescribing the application of the remedy to the disease. Members of the corporation, or persons in its employ, might do these things, but the corporation itself is incapable to do them. The qualification of a medical practitioner is personal to himself. The intention of the law is that one who undertakes to judge the nature of a disease or to determine the proper remedy therefor, or to apply the remedy, must have certain personal qualifications; and, if he does these things without having complied with the law, he is subject to its penalties. Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine, within the meaning of this statute. No professional qualifications are requisite for doing these things."

[6] In view of these authorities it would seem to follow that when the Legislature declared it to be unprofessional for a licensed dentist to aid an "unlicensed person" to practice dentistry it had in mind the practice of dentistry which a licensed person might carry on—"some professional service of the kind that dentists are licensed to render" (Messner v. Board, supra), and did not contemplate a corporation which could not become licensed under the act and which could do no more than conduct the business side of the office.

Putting it in a different form, the evidence discloses that some fourteen years prior to the filing of the information the Painless Parker Dentist Corporation, in some manner not made to appear, appointed the petitioner as its general manager and then ceased to function as a corporation. The petitioner had complete control and management of all the dental offices, employed licensed dentists as local managers of each office, who in turn employed licensed dentists to perform all the dental operations performed therein. If we could treat the corporation as the employer under this evidence, we would still be forced to the conclusion that it was not practicing dentistry under the true meaning of the statute. In this respect the case is the same, except as to the number of operations performed, as Renwick v. Phillips, 204 Cal. 349, 350, 268 P. 368, 369, where the Supreme Court, in affirming a judgment annulling an order of the medical board revoking Renwick's license to practice medicine and surgery, said: "The petitioner was a licensed chiropodist. The said Roy Finney conducted a chiropodist parlor, equipped with a variety of foot remedies and appliances which he prepared and sold there. He employed the petitioner and respondent herein to act as a chiropodist in connection with his said establishment and to give such treatment and perform such operations as only could be done by the holder of a regular chiropodist's license so to do. In so far there was nothing illegal or unprofessional in the relations or conduct of Dr. Renwick in his connection with said Finney at the latter's place of business."

There is a clear distinction between this principle and that involved in the cases cited by respondent. People v. California Pro. Corp., 76 Cal. App. 354, 244 P. 1089, and People v. Merchants' Pro. Corp., 189 Cal. 531, 209 P. 363, were quo warranto proceedings to oust the corporations from the practice of law. The principle is stated in the latter case at page 538 of 189 Cal., 209 P. 363, 366, where the court said: "The essential relation of trust and confidence between attorney and client cannot be said to arise where the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel, and professional services. The attorney in such a case owes his first allegiance to his immediate employer, the corporation, and owes, at most, but an incidental, secondary, and divided loyalty to the clientele of the corporation." To the same effect is Midland Credit Adjustment Co. et al. v. Donnelley, 219 Ill. App. 271. People v. Painless Parker Dentist, 85 Colo. 304, 275 P. 928, was also a quo warranto proceeding heard on a demurrer to a petition which alleged that the corporation was practicing dentistry and advertised to that effect. These allegations being admitted on the demurrer, the Supreme Court of Colorado held that the corporation was employed in an illegal practice as no corporation could be licensed to practice dentistry. People v. State Board, etc., 85 Colo. 321, 275 P. 933, was a proceeding in prohibition which was heard and determined on the record in the former case. As this record disclosed that the corporation was practicing dentistry the supreme court correctly denied the petition for prohibition to restrain the dental board from trying petitioner on a charge that he was aiding the corporation to practice illegally. Pilger v. City of Paris, etc., Co., 86 Cal. App. 277, 261 P. 328, merely holds that the corporation was not liable for the negligence of its employees in a chiropody department maintained by the corporation in its store because the corporation could not practice chiropody.

The cases cited follow the general rule of the authorities which is that the true purpose and intent of regulatory statutes of this character is that one who undertakes to judge the nature of a disease or other bodily ailment, or to determine the proper remedy, must have certain personal qualifications, and that, from the nature of these required qualifications a corporation may not be licensed to practice the profession. Adopting this rule the authorities then hold that when the regulatory statute refers to the licensing of "persons" it intends natural and not artificial persons. Pharmaceutical Soc. v. London and Prov. Suppl. Ass'n, Ltd., 5 L. R. (Appeal Cases) 857.

[7] The second count charged the petitioner with unprofessional conduct in that he aided an unlicensed person named Ramona McShane to practice dentistry unlawfully in that he permitted her to participate in the profits of the dental office owned and operated by "Painless Parker Dentist, a corporation." The evidence in support of the charge was that in 1920 the Associated Dental Supply Company was in need of funds and for that reason executed a trust agreement selling trust certificates in small denominations. Ramona McShane purchased 151 shares at $1 a share. Interest in the nature of dividends was paid to each certificate holder until 1929 when the loan was repaid and the trust dissolved. As the Painless Parker Dentist Corporation leased dental offices from the Associated Dental Supply Company, the respondents found that Ramona McShane participated in the profits of the Painless Parker Corporation, that she therefore practiced dentistry unlawfully, and that the petitioner aided and abetted her in so doing. It would be just as reasonable to say that every stockholder of a bank which has loaned money to the owner of a building in which some dentist has practiced without a license is an aider and abetter in the unlawful practice of dentistry. To interpret the statute as contended for by respondents would make it unconstitutional for the reasons heretofore given, whereas, if the statute is given a reasonable and constitutional interpretation the information and the evidence both demonstrate that Ramona McShane was not practicing dentistry within any sound construction of the act.

[8] The third count purported to charge petitioner with practicing under an assumed or fictitious name in the use of the term "Painless Parker Dentist," and the fourth count charged a similar breach of the act in the use of the term "E. R. Parker System." The evidence was that petitioner, by decree of court, changed his name to "Painless Parker." This name was used by him in his practice of dentistry. The name Painless Parker Dentist was not fictitious. Spreckels v. Grace Darling Hosp. Ass'n, 28 Cal. App. 646, 648, 153 P. 718; Wetenhall v. Mabrey (Cal. Sup.) 286 P. 1015; Andrews v. Glick, 205 Cal. 699, 701, 272 P. 587. There is no evidence in the record to sustain the allegations of this count. All the evidence shows without conflict that petitioner was practicing under the name given him by decree of court which was the name under which he was licensed to practice by respondents.

[9] The fourth count purported to charge petitioner with the practice of dentistry under the false and fictitious name of "E. R. Parker System." E. R. Parker is the name under which petitioner was engaged in business prior to the decree changing his name to "Painless Parker." Under that name he promulgated the system of studying and teaching the practice of dentistry including both the business details and technical matters of the profession. For this purpose manuals and other printed documents were prepared and circulated for the use of those engaged in the dental practice and in many of the offices maintained by petitioner the words "dentists using the E. R. Parker System" were prominently displayed. In support of the allegations of this count the evidence showed no more than that the petitioner used the expression in the *teaching* of the practice of dentistry. Under no possible theory could the transactions detailed be treated as the practice of dentistry.

[10] Finally it is argued that the respondents usurped their authority in this proceeding when they compelled the witnesses French, Jacobs, and Cage to appear before them and give testimony against the petitioner. The argument is that because of section 12 of the Dental Act these witnesses were each guilty of a misdemeanor if the charges contained in the information against the petitioner were true, and that they were, therefore, entitled to be excused from giving testimony against themselves under the provisions of section 13, article 1 of the Constitution.

When the witnesses were called they were advised by their attorneys that they need not testify upon the ground that their testimony might incriminate them, but the respondents refused to heed their objections and ordered them to testify after counsel for the dental board had read to the witnesses the provisions of section 1324, Penal Code, and pretending to act in accord therewith, undertook to grant them immunity from prosecution if they would so testify. This section of the

Penal Code had been repealed in 1917 (St. 1917, p. 291), and hence was not available at the time of the hearing which was in September, 1929. There can be no doubt that these witnesses were led into a false sense of security by the pretended reliance of respondents upon the repealed section and by the pretended assurance of immunity to them which neither the respondents nor their counsel had any possible right to grant. This action of the board is not defended on this appeal, and in view of the rule of Ex parte Clarke, 103 Cal. 352, 37 P. 230, and Hickman v. London Assurance Corp., 184 Cal. 524, 531, 195 P. 45, 18 A. L. R. 742, we cannot see how it could be defended. If this evidence is to be disregarded, there is no evidence to support any charge in the information as the case presented by the dental board rests (with certain exceptions which are immaterial) upon the evidence which the board compelled these witnesses to give in disregard of their constitutional rights. The great weight of the authorities is to the effect that evidence so taken must be treated as no evidence, while on the other hand authorities may be found holding that evidence, no matter how illegally obtained, must be given its full weight. We do not need to decide that question here because we are satisfied from a review of the entire record that all the evidence, including that illegally obtained, wholly fails to support any charge in the information.

The judgment is accordingly reversed, with instructions to the trial court to enter its order annulling the order under review.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App. 175

CORVIN et al. v. SMEAD INV. CO. et al.

Civ. 856.

District Court of Appeal, Fourth District, California.

June 25, 1931.

Rehearing Denied July 13, 1931.

1. Pleading 🔑129(5).

Due execution of contract, true copy of which was attached to verified complaint, *held* admitted, where not denied by answer (Code Civ. Proc. § 447).

2. Brokers 🔑43(3).

Verbal employment of agent to effect exchange of property, and verbal and written promise to pay commission, *held* sufficient to support judgment for commission.

3. Appeal and error 🔑1011(1).

Mere conflict in evidence as to fraud, resolved for prevailing party, furnishes no ground for reversal.

4. Trial 🔑105(2).

Evidence that real estate brokers were duly licensed, admitted before objection thereto, could be considered by trial court in determining whether brokers were licensed.

5. Brokers 🔑86(1).

Evidence not showing real estate brokers' license was canceled before exchange of properties supported finding that brokers were licensed until consummation of exchange (Code Civ. Proc. § 1963, subd. 32; St. 1919, p. 1259, § 20).

6. Brokers 🔑42.

Commissions for procuring exchange of property *held* earned when contract was executed, where contract did not require payment of commissions after transaction, and parties completed exchange, as respects recovery of commissions by brokers licensed when contract was executed (Code Civ. Proc. § 1963, subd. 32; St. 1919, p. 1259, § 20).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Howard Corvin and another, copartners, doing business under the fictitious name of Union Realty Company, against the Smead Investment Company and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Raphael Dechter, of Los Angeles, for appellants.

William Lewis, of Los Angeles, for respondents.

MARKS, J.

Respondents brought their action against appellants for $2,000 alleged to be due them as a real estate commission on an exchange of appellants' property effected through their agency. The answer of appellants denied generally the allegations of the complaint. It contained a special defense of fraud on the part of respondents in the execution of an agreement, whereby appellants promised to pay them a commission of $2,000, and a further defense of the statute of frauds. The trial court gave judgment in favor of respondents in the sum of $2,000, from which appellants have prosecuted this appeal.

The evidence shows that appellants were copartners doing business under the firm name of the Union Realty Company, and, as such, had a broker's license issued to them by the real estate commissioner of the state of California for the year 1927. They employed E. C. Adams as a salesman, who was licensed as such by the real estate commissioner.

Some weeks prior to August 23, 1927, Adams contacted C. R. Smead and was employed by him to effect a sale or exchange of appellants' property, for which services Smead orally agreed to pay a commission of $2,000. Adams brought Smead and William D. House together in an effort to effect an exchange of their properties. He left on his vacation on August 15, 1927, and turned the consummation of the exchange over to Howard Corvin, one of his employers and one of the respondents. Smead repeated to Corvin his oral promise to pay the $2,000 commission. Corvin succeeded in bringing Smead and House together, and effected an exchange of their properties. On August 23, 1927, appellants and House signed a written agreement of exchange, which was prepared by Corvin. Smead signed his own name and that of the Smead Investment Company to this agreement of exchange. Its closing paragraphs are as follows:

> "And I further agree to pay the Union Realty Co., Two Thousand and XX/100 Dollars commission for said exchange.
>
> "Dated at Los Angeles, this 23rd day of August, 1927.
>
> "Smead Investment Co.
> "C. R. Smead."

The actual exchange was consummated, and titles to the properties passed about September 23, 1927, and appellants refused to pay any commission to respondents.

A number of the grounds upon which appellants seek to obtain a reversal of the judgment can be considered under their contention that the evidence is insufficient to support the findings and judgment.

[1] They first urge that there is no evidence of the due execution of the contract of August 23, 1927, by the Smead Investment Company. The complaint is verified and has attached to it as an exhibit a true copy of this contract. The answer of appellants does not deny the genuineness and due execution of this contract, which facts are therefore admitted by them under the provisions of section 447 of the Code of Civil Procedure. Cutten v. Pearsall, 146 Cal. 690, 81 P. 25.

[2] They next urge that there is no evidence of any written authorization to appellants to effect the exchange of their properties, and no sufficient written promise to pay the commission. The evidence discloses the verbal employment of the agents, and a verbal promise to pay the commission as well as the written promise contained in the contract of August 23, 1927. Such promises have been held sufficient to support a judgment of this nature. Coulter v. Howard, 203 Cal. 17, 262 P. 751; Johnson v. Krier, 59 Cal. App. 330, 210 P. 966.

[3] Appellants next urge that the evidence submitted in support of their defense of fraud should have been accepted and adopted by the trial court as true. This evidence was flatly contradicted by the testimony of Corvin, and the court found in accordance therewith. At best, this created merely a conflict in the evidence which was resolved in favor of respondent by the trial court, and furnishes no ground for a reversal of the judgment here.

[4] Appellants next urge that there is no sufficient evidence that the respondents were licensed by the state of California as real estate brokers. Respondent Corvin, while on the witness stand, was asked if respondents were so licensed. After he had answered this question in the affirmative, appellants' counsel objected to the question, which objection was overruled. No motion was made to strike out the answer given. The evidence of their being so licensed was thus before the court prior to an objection, and could have been considered by the trial court. Furthermore, appellants admit that respondents were duly licensed brokers from January 1 to September 1, 1927.

[5, 6] Appellants further urge that respondents were not licensed as real estate brokers at the time the exchange of properties was finally consummated on or about September 23, 1927. The evidence discloses that on or about September 1, 1927, they filed with the real estate commissioner a request to have their broker's license canceled because Archie W. Conrad was withdrawing from the partnership. This request bears upon its face the word "cancelled" stamped thereon by the real estate commissioner. No date of the actual cancellation of the license appears in the record. A new broker's license to Howard Corvin, doing business under the name of Union Realty Company, was issued on October 5, 1927. The trial court found that respondents were licensed real estate brokers during the year 1927, until the consummation of the exchange of properties between Smead Investment Company, Smead, and House. This finding is sufficiently supported by the evidence which shows that respondents were granted a license as real estate brokers for the calendar year of 1927, and fails to show that such license was canceled prior to the consummation of the exchange of properties. "A thing once proved to exist continues as long as is usual with things of that nature." Section 1963, subd. 32, Code Civ. Proc. Furthermore, section 20 of the Real Estate Brokers' Act (Statutes of 1919, pp. 1252, 1259) requires the brokers to be licensed at the time the alleged cause of action arose. The contract of August 23, 1927, signed by appellants, contained a definite promise to pay respondents the commission for the exchange without any provision that the payment be made after the transaction was consummated and the exchange completed. The evidence discloses

that Smead and House took the matter of completing the exchange into their own hands after the signing of the exchange agreement. They went to their own banks, which were created escrow holders by them, and did not call upon respondents to do anything more in connection with the transaction.

Under the circumstances of this case, respondents' obligations were fully completed on August 23, 1927, when the valid contract of exchange was executed by appellants and House followed by an actual exchange completed by themselves. Respondents' commission was earned at the time of the execution of the contract of exchange, and at that time they were admittedly duly licensed real estate brokers.

Judgment affirmed.

We concur: BARNARD, P. J.; GRIFFIN, Justice pro tem.

SMITH v. FRANS NELSON & SONS, Inc.*

Civ. 6587.

District Court of Appeal, Second District, Division 2, California.

June 27, 1931.

Rehearing Denied July 27, 1931. Hearing Granted by Supreme Court Aug. 24, 1931.

1. Escrows ⇨5.

Escrow instructions *held* to contemplate broker was to receive commission, to be held by escrow holder until escrow was closed.

> Escrow instructions of party employing broker provided that escrow holder should pay broker certain commission and deliver to him as balance of commission a deed. Instructions of both parties provided for completion within thirty days from date, and each contained provision that, if conditions had not been complied with at expiration of such time, they should be completed at earliest possible date thereafter, unless written demand had been made for return of money or instruments deposited by either signer.

2. Brokers ⇨49(1).

Under agreement to secure acceptance of proposition for realty exchange, commission is earned when acceptance is obtained, regardless of completion of sale or ability of prospective purchaser.

3. Frauds, statute of ⇨106(1).

"Memorandum" under statute of frauds must contain essential terms of contract so expressed that it may be understood without parol evidence showing intention.

> [Ed. Note.—For other definitions of "Memorandum," see Words and Phrases.]

4. Brokers ⇨43(3).

Escrow instructions directing escrow holder to pay commission when escrow was closed *held* insufficient "memorandum" of contract to procure acceptance of realty exchange (Civ. Code, § 1624, subd. 6).

> Evidence of plaintiff broker disclosed that he was employed by defendant under oral contract "to get an acceptance" of proposition to exchange realty; that escrow instructions to title company, describing properties, were prepared and signed, defendant's escrow instructions including direction to pay plaintiff commission and to deliver to him as balance of commission a deed, instructions of both parties providing for completion within thirty days and extension, unless written demand had been made for return of money or instruments deposited by either signer. After some extensions, exchange was not consummated because of other party's inability to clear title.

5. Brokers ⇨64(2).

Where escrow instructions contained agreement to pay commissions for realty exchange, and party employing broker withdrew upon default of other party, provision respecting commission fell with contract between realty owners.

6. Brokers ⇨54.

If broker suing for commission pleaded employment to secure purchaser for realty, finding purchaser procured was ready, able, and willing to make proposed exchange would be material.

> Such finding would be material as such an agreement would have been completed by producing purchaser ready, able, and willing, in event defendant had not lived up to agreement to exchange realty.

7. Brokers ⇨86(5).

Finding broker procured purchaser able, ready, and willing to make realty exchange *held* unsupported.

CRAIG, J., dissenting.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Charles R. Smith against Frans Nelson & Sons, Inc. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

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*For subsequent opinion see 5 P.2d 427.

Rehearing denied; CRAIG, J., dissenting.

Hughes & Miller and Harold Aubry Miller, all of Los Angeles, for appellant.

Edgar G. Wenzlaff, of Los Angeles, and John H. Miller, of San Francisco, for respondent.

ARCHBALD, Justice pro tem.

[1] Defendant has appealed from a judgment awarding a commission to plaintiff as a realtor. Plaintiff testified that he was a real estate broker on and prior to December 1, 1927, that about said date he was employed by defendant under an oral contract "to get an acceptance" of the latter's proposition to exchange certain real properties for property owned by one Fred W. Siegel, at a stipulated commission or compensation, and that on that date he succeeded in bringing the parties together. Escrow instructions to the title company describing the respective properties were prepared and signed, the parties agreeing to deposit deeds to their properties which could be delivered by the escrow holder when the latter could issue certificates of title showing the properties each was to receive to be vested in him or it "free of incumbrance except 2nd ½ taxes for fiscal year 1927–1928," etc. In defendant's escrow instructions appeared the following: "Pay Charles R. Smith * * * $5,250.00 commission and deliver to him as balance of commission a deed covering Lots 6 and 7 in Block 23 of Tract No. 7264, in the County of Los Angeles * * * with certificate of title. * * *" The instructions of both parties provided for completion within thirty days from date and each contained a provision that, if the conditions thereof had not been complied with at the expiration of such time, they should be completed at the earliest possible date thereafter, unless written demand had been made for the return of the money or instruments deposited by either signer.

In our opinion the only conclusion that can be drawn from such escrow instructions is that plaintiff was to be paid the money and be given the deed to the designated lots by the escrow holder, and that both money and deed were to be held by such escrow holder until the escrow was closed either by performance of the conditions or cancellation for failure so to do.

The conditions of defendant's escrow instructions were changed in various particulars not material here, and extensions were either permitted or expressly granted by it until February 21, 1928. It is admitted that plaintiff understood that defendant would require clear title in the contemplated exchange, and Siegel testified that there were many liens against his property, and that he had not been able to "clear" his property up to February 21, 1928, at which time defendant withdrew from the escrow, although he says he was still "proceeding to arrange to clear it."

[2-5] Appellant contends that there was no sufficient memorandum in writing of respondent's employment within the intent of the statute of frauds, and insists that respondent was not entitled to a commission except upon a consummation of the exchange as evidenced by the escrow instructions. The case was tried on the theory that the agreement set out in the amended complaint is within the statute of frauds, and for the purposes of this appeal we shall assume, without so deciding, that such is the case.

Respondent relies upon the language quoted from the instructions as a sufficient memorandum to satisfy the statute, the agreement in question being verbal, and in support thereof cites the case of Coulter v. Howard, 203 Cal. 17, 262 P. 751, 752, the facts of which he says "are strikingly similar to the facts in the instant case." The defendant in that case was the owner of a piece of real estate which she was willing to sell on certain terms, and "plaintiff, a licensed broker, was interested under a verbal contract with her in finding a purchaser on said terms." Pursuant to this verbal arrangement plaintiff found a prospective purchaser, "which fact was communicated to defendant," and he also obtained a written offer to purchase from said party, which was drafted at a certain bank which was to act as escrow holder for both purchaser and seller. Later the seller appeared at the bank and made a separate written offer to sell, which contained the following direction to the bank: "Pay F. Bradley Coulter a commission of 5% at close of escrow but only out of funds then due and payable to me out of this escrow." The seller later canceled the escrow, the court finding such action to be without right, and it was held that the language quoted constituted a sufficient memorandum of the verbal agreement. As the seller was at fault she was held liable, the purchaser found having been shown to be ready, willing, and able to perform his part of the agreement. It is to be noted, however, that in such case the verbal agreement was not to pay the commission upon securing an acceptance of the proposition of sale, as in the instant case, but upon finding a purchaser—an entirely different contract from the one alleged in the amended complaint here. In the instant case the agreement alleged was to "get an acceptance," in which case the commission is earned when such acceptance is obtained, regardless of the completion of the sale or the ability of the prospective purchaser, while in the Coulter Case the commission was only due when a purchaser ready, willing, and able was produced. Here there is not a word in the alleged "memorandum" to the effect that the commission is to be paid for respondent's services in securing the acceptance of appellant's proposition of exchange, which the record shows was amended several times in order to help Siegel over some of the obstacles he found in his way. "The pre-eminent qualification of a memorandum under the statute of frauds is 'that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.' 5 Browne on Statute of Frauds, § 371." Zellner v. Wassman, 184 Cal. 80, 85, 193 P. 84, 86. In other words, it would seem that the statute was enacted to prevent the very thing respondent was permitted to do here, viz., to recover, not on a contract proved as shown by the memorandum, to wit, a contract "authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" (subdivision 6, § 1624, Civ. Code), but upon one to "receive the acceptance of a proposition of exchange," the only term of which, shown by the alleged memorandum, is the amount of commission (concerning which there is no dispute), the term of employment resting entirely in parol and possibly the subject of conflicting evidence. A memorandum sufficient in the latter case is shown in Jauman v. McCusick, 166 Cal. 517, 137 P. 254.

In the case of Jennings v. Jordan, 31 Cal. App. 335, 160 P. 576, an agreement was entered into for the exchange of properties of the parties thereto which contained the following: "The parties hereto further mutually covenant and agree that they will each pay to Herman Eppinger, Jr., a commission of eighteen hundred and twenty-five dollars." The assignee of Eppinger sued for such commission, although the exchange was never consummated. On page 337 of its opinion (31 Cal. App., 160 P. 576, 577) the court says: "The object of the contract actually entered into was to provide for an exchange of the properties of the parties thereto, each agreeing to convey title free of incumbrances, and the provision therein for the payment of a commission to Eppinger must be construed in its relation to the whole contract. Quite apart from the evidence of Jordan, one of the parties to it, that as to him it was not his intention that any commission should be paid unless the exchange of lands was actually effected, such would be the natural and logical construction of the instrument. Unless and until the exchange was consummated the parties would receive no benefit from Eppinger's efforts; and, as we have seen, there was no obligation existing to pay Eppinger anything except that arising from the written agreement under consideration. The provision relating to such payment is not separable from the remainder of the contract; and certainly as to Jordan, when the other party to it found himself unable to comply with its terms and consented to its cancellation (Jordan already having a right to rescind it) the whole contract fell, the provision relating to Eppinger's compensation with the rest. If the broker should suffer any hardship from such construction it is one inherent in the form of the contract entered into, and which was the only means he chose for his protection. It would certainly be a greater hardship upon the defendant to require him to pay $1,825 for services from which he had received no benefit and which were for the greater part voluntarily rendered." As to the contract between the purchaser and seller here, viz., the escrow instructions, such language is very pertinent; for quite apart from appellant's evidence to the effect that no commission was to be paid under it until the exchange was consummated, "such would be the natural and logical construction of the instrument." When appellant in this case withdrew from the escrow upon the default of Siegel, as it had the right to do, not only the contract between appellant and Siegel fell, but the provision in regard to commission as well. Another and very important distinction, we think, between the case before us and that of Coulter v. Howard, supra. is that in the latter the defendant withdrew before there was a default, leaving the contract, including the commission instruction, a live thing, to be enforced by either the purchaser or the realtor if it were so desired to do. While we agree with the cases cited by respondent, we fail to see where any of them holds that such language is a memorandum of any such agreement as that upon which plaintiff herein stands in his amended complaint.

We must also observe that this is not an action by a broker who has furnished a buyer who enters into a written contract with the seller, who then agrees in writing to pay a commission for the making of the sale, in which case having accepted such purchaser he is liable for the commission and cannot raise the question of readiness, willingness, or ability. Johnson v. Krier, 59 Cal. App. 330, 210 P. 966.

[6, 7] In the instant case the court found that "defendant employed Charles R. Smith * * * to secure an acceptance of its proposition to exchange certain real properties * * * and * * * that subsequently defendant agreed in writing to pay the said Charles R. Smith" the agreed compensation "as a commission for securing" such acceptance. The court then found "that it is true that pursuant to such employment the said Charles R. Smith, the plaintiff herein, did on or about the first day of December, 1927, find a purchaser who accepted its proposition of exchange, to-wit: one Fred W. Siegel, who was ready, able and willing to exchange his said real property, hereinbefore set out, and who was accepted by the said defendant, on terms agreed upon; that it is further true that the said plaintiff brought Fred W. Siegel, the said purchaser by exchange, and defendant together and thereupon said defendant and such purchaser by exchange signed

escrow instructions which together constituted a contract of exchange of said properties, which said contract of exchange contained the memorandum in writing to pay said plaintiff said commission." It would seem that all of such finding regarding the readiness, willingness, and ability of said Siegel is immaterial, in view of the fact that plaintiff must stand or fall on his alleged contract, which was "to get an acceptance" of defendant's proposition; and, as the issues are framed on such allegation, that portion of the finding would seem to be outside of the issues and should not be considered here. But even assuming the complaint had been amended by adding a count similar to that of the original complaint, based on evidence showing an employment of plaintiff to secure a purchaser—in which case such a finding would be material, as such an agreement would have been completed by producing a purchaser ready, willing, and able, in the event defendant had not lived up to its agreement—yet even in such case such a finding would seem to be unsupported by the evidence, as the undisputed testimony of Siegel, the purchaser produced, shows that he had not cleared the record title to his property of incumbrances aggregating approximately $390,000, either at the time the escrow had expired by its terms, December 31, 1927, or on February 11, 1928, to which time it had been extended and at which time a further extension of ten days was granted by appellant, which at the same time authorized the amendment of the escrow instructions so that it was obligated to loan Siegel the sum of $187,000, to be secured by mortgages on the lots being transferred to the latter, and which sum was to be used in said escrow toward clearing said incumbrances in order that Siegel could comply with the requirement of showing clear title to the property he was to convey to appellant. Even with such concession, Siegel had not cleared such property at the time of the expiration of said extension, and appellant withdrew from the escrow on account of the inability of the title company to close the same, the record title, according to the evidence, showing without dispute that it was still in that incumbered condition about a week before the date of trial, November 30, 1928. In view of all that, Siegel's testimony to the effect that at the time of the cancellation of the escrow he was still "proceeding to arrange to clear it," and that, except as to a trust deed for $250,000, notice of intention to sell under which had been recorded, he had cleared all incumbrances and had the releases in his desk, could hardly create a conflict, and in our opinion it would have to be resolved against said finding. Moreover, even though the verbal contract alleged in the amended complaint required no memorandum under the statute of frauds—on which question we express no opinion in view of the fact that the case was tried on the theory that a memorandum was required and in view of the conclusion of the trial court expressed in the following language: "If this were not in there 'Pay Charles R. Smith,' the plaintiff could not prevail at all because there would be no written instrument. In this written contract it takes it out of the statute of frauds"—in our opinion a new trial would be necessary, as such statement changed the effect of the escrow instructions and the order therein relative to the commission into a most damaging conclusion against appellant, when it would seem to be a very persuasive bit of evidence to be weighed by the court with the other evidence in appellant's favor and against the conflicting evidence of plaintiff, before drawing a conclusion in plaintiff's favor.

Judgment reversed.

I concur: WORKS, P. J.

CRAIG, J.

I dissent. The case in its essentials here is parallel with Coulter v. Howard, 203 Cal. 17, 262 P. 751, 752. In each case the parties to the escrow made a memorandum consisting of a stipulated direction to the holder to pay to the broker a commission upon the happening of an event. In Coulter v. Howard, supra, it was provided that they should "pay F. Bradley Coulter a commission of 5% at close of escrow." A finding of the trial court that this was "no written evidence of the employment of the plaintiff" was held reversible error. In the instant case the memorandum directed: "Pay Charles R. Smith * * * $5,250.00 commission and deliver to him as balance of commission a deed," etc. Upon the authority of the Coulter Case this memorandum was sufficient. It rendered admissible proof of the oral contract that the commission was agreed to be paid upon acceptance. Application of Balfour, 14 Cal. App. 261, 111 P. 615. The commission, then, was earned before "written demand had been made for the return of the money or instruments deposited by either signer." The contract for exchange was actually executed by the parties, and the acceptance was complete. In the Coulter Case, and in the instant case, the deal was abandoned by the parties through no fault of the broker. The difference in surrounding facts and circumstances delineated by the majority opinion is of no consequence as against the ultimate finding that upon execution of the exchange the service had been performed and the commission earned (Jauman v. McCusick, 166 Cal. 517, 137 P. 254), in the absence of a substantial legal distinction. In each instance the intent to pay, the amount, and the names of the parties to be bound and to be paid, were expressly stated. The contract of exchange was complete, and the failure to consummate it was not due to any act of the broker.

115 Cal.App. 255

GIAMBRUNO et al. v. CARMICHAEL'S U-DRIVE AUTOS, Inc., et al.

Civ. 7899.

District Court of Appeal, First District, Division 2, California.

June 27, 1931.

1. Appeal and error 🔑901.

On appeal, burden rests on appellants to present record showing any alleged error.

2. Appeal and error 🔑901.

Appellate court need not of its own motion search record for purpose of finding errors within record.

3. Appeal and error 🔑773(4).

Failure of appellants to file brief or to appear on hearing of appeal, although notified thereof, *held* to justify affirmance.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Lawrence Giambruno, by his guardian ad litem, Antone Giambruno, and another, against Carmichael's U-Drive Autos, Inc., and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

B. P. Gibbs, of Los Angeles, and Barry Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant Carmichael's U-Drive Autos.

Heller, Ehrman, White & McAuliffe, of San Francisco, for appellant Sheldon.

John J. McMahon, of Los Angeles, for respondents.

STURTEVANT, J.

In the trial court the plaintiffs obtained a judgment awarding them damages for personal injury. Claiming to represent the defendant corporation, its insurance carrier took an appeal and has brought up typewritten transcripts. They were filed March 16, 1931. Thereafter the hearing of the appeal was regularly placed on the calendar of this court for its June term, 1931. When the hearing was called there were no briefs on file and no one appeared for the defendants, although they had been duly notified by the clerk of this court that the hearing of the appeal was on the calendar; the same being set for 10 a. m. on Wednesday, the 10th day of June, 1931. Counsel appeared for the plaintiffs, and, having called attention to the foregoing facts, made a motion that the judgment be affirmed.

[1-3] In this state it is a statutory rule that the judgment of a superior court duly made and entered is presumed to be regular. Furthermore it is the settled rule of this state that on an appeal the burden rests on the appellant to present a record showing any alleged error and, in due time, to serve and file briefs in which he shows the alleged error, that the error was prejudicial, and the authorities on which he relies. It is no part of the duty of this court of its own motion to search a record for the purpose of finding errors, if any, within that record.

It follows that the judgment should be affirmed (Howell v. Howell, 101 Cal. 115, 35 P. 443), and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

115 Cal.App. 207

BLAKE v. BENNETT et al.

Civ. 7643.

District Court of Appeal, First District, Division 2, California.

June 26, 1931.

1. Evidence 🔑502.

In action for damages to sheep by dog, refusing to permit cross-examination of plaintiff respecting what plaintiff paid for all his sheep and as to selling price *held* not error under circumstances.

> Refusal to permit such cross-examination was not error, because plaintiff owned sheep of various brands which varied in value from $50 to $3,000 per head, and evidence was introduced to show approximate value of various groups of sheep killed by defendant's dog, and though there was evidence that shortly after killing of sheep plaintiff made some sales and some purchases, neither as to purchases nor as to sales was there any evidence that sheep either bought or sold was of same price as animals killed.

2. Evidence 🔑18.

Court notices fact that since January 1, 1918, values of livestock have been very high at times and very low at other times, and that changes have been frequent.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by F. T. Blake against Nellie A. Bennett and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Eugene D. Bennett, of San Francisco, for appellants.

Philip B. Beggs and Harry J. Bias, both of Santa Cruz, for respondent.

STURTEVANT, J.

The plaintiff sued to recover damages for injuries caused to his flock of ewes by a dog alleged to be owned by the defendant and her son. The defendants answered, and a trial was had before the court sitting without a jury. The court made findings in favor of the plaintiff and against the defendant Nellie A. Bennett, but in favor of her son. From a judgment entered on the findings, the defendant has appealed.

[1, 2] The defendant claims that the trial court erred in certain rulings made on the exclusion of certain lines of evidence. While conducting the cross-examination of the plaintiff, the attorney for the defendant asked the plaintiff how much he got for sheep which he subsequently sold. An objection was made to the question, and the objection was sustained. The attorney then asked permission to propound the question as to what the plaintiff paid for all of his sheep, and continuing, the attorney asked a ruling on that question. The plaintiff, assuming the question had actually been propounded to Mr. Blake, who was the witness in the chair, interposed an objection, which was sustained. The defendant points to these rulings and similar rulings, and claims they constituted reversible error. It will not be disputed that in some cases the purchase price and the sales price constitute some evidence of the value of a certain article. Travis Glass Co. v. Ibbetson, 186 Cal. 724, 730, 200 P. 595. But that question is nowhere presented in the record before us. The plaintiff was conducting a farm on which he was raising pure-bred Shropshire sheep. He had many that were pure bred, but as we understand the record, he had others that were not pure bred. The value of the pure-bred stock varies from $50 to $3,000 per head. Of his entire flock, the plaintiff claimed he had purchased some from Baldwin, some from Comb, and some from Meecham. The Baldwins varied in value from $20 to $100 each. Those killed were of a value of $50 to $60, and there were nine of them. The Comb ewes were of a value of $30 to $40 each. Five were killed. The Meecham ewes were of a value of from $15 to $25, and two were killed. At no time did either party attempt to identify any particular sheep and place a value on that particular animal. But the evidence introduced tended to show that, as a strain, the Combs were twice as valuable as the Meechams, and the Baldwins were twice as valuable as the Combs. There was evidence that within a few weeks of the killing by the dog the plaintiff had made some purchases. There was evidence that, a short time after that date the plaintiff made some sales. But neither as to purchases nor as to sales was there any evidence that the stock either bought or sold was of the same type as the animals which were killed. This court will take notice of the fact that since January 1, 1918, the values of livestock have been very high at times and very low at other times, and that the changes have been frequent. But in this record there is no evidence, and no offer to show, that, between the date when the purchases were made and the date when the sales were made, the market did or did not fluctuate and, if it did, whether prices rose or fell and to what extent. The plaintiff testified that his losses included $7 spent for veterinary; 9 Baldwin ewes at $75; 5 Comb ewes at $25; 2 Meecham ewes at $15; general damage to flock $400 or $500; 23 Baldwin lambs at $18; and 15 Comb lambs at $6. Besides these items, several sheep were crippled. His total claim was a grand total of $1,557. The judgment was for $437. It cannot be said that the trial court erred in its rulings, for no foundation was laid for the questions. Moreover, if any error was committed, it cannot be said that the defendant was prejudiced thereby.

As each wounded ewe died, both the plaintiff and his flock master, Mr. Cornthwaite, were present. Each was a witness and gave evidence as to values. Neither was called upon to fix his attention on any particular ewe, identify her, and state her value; yet, as we have shown, the values varied greatly. As to the values of specific animals varying in type, evidence of costs and sales prices in general was wholly irrelevant.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

115 Cal.App. 410

PEOPLE v. FRANKLIN.

Cr. 2075.

District Court of Appeal, Second District, Division 2, California.

July 9, 1931.

1. Criminal law 🔑**742(1).**

Credibility of witnesses is exclusively for jury (Code Civ. Proc. § 1847).

2. Homicide 🔑**250.**

Evidence *held* sufficient to support conviction for manslaughter by shooting deceased.

3. Homicide 🔑300(8).

Evidence in homicide prosecution *held* to justify court in giving instructions on original assailant's right to avail himself of plea of self-defense.

> The court instructed that, where one is making a felonious assault on another, or has created an appearance justifying that other in making a counter attack in self-defense, the original assailant cannot avail himself of the plea of self-defense unless he has first and in good faith declined further combat and fairly notified the other that he has abandoned the contest, and that whenever an assault is brought upon a person by his own procurement or under an appearance of hostility which he himself creates, with a view of having his adversary act on it, and he so acts and is killed, the plea of self-defense is unavailing.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Bolin C. Franklin was convicted of manslaughter, and he appeals.

Affirmed.

W. B. Heinecke and Joseph P. Guerin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was accused by information of the crime of murder, and the jury returned a verdict finding him guilty of manslaughter. From an order denying his motion for a new trial and from the judgment entered on said verdict, he has appealed.

Appellant contends: (1) That the verdict is contrary to the evidence; (2) that there is no competent evidence to support the verdict; (3) that the court erred in refusing to give certain instructions and also in modifying certain others requested by defendant; and (4) that the district attorney was guilty of misconduct in several particulars, which prejudiced the jury and prevented defendant from having a fair and impartial trial.

The evidence shows that on the day in question the decedent, James R. Gentry, who had something over $200 in his possession when he entered defendant's barber shop, was shot by defendant between 2 and 3 o'clock in the afternoon of that day, in a room in the rear of the establishment. The only parties present at the time, and who were witnesses to whatever may have transpired immediately preceding the shooting, were the decedent, the defendant and one Cooper, a barber who worked in defendant's shop. Henry Baker, a witness for the prosecution, testified that he, together with Gentry, Cooper, and another young man, the defendant also being present, engaged in a dice game in the room in which Gentry was shot between the hours of 11 a. m. and 12 m. of the day on which Gentry was killed; that Gentry was winning and expressed a desire to quit, but that defendant said to him: "You will stay here and gamble. I will make you stay. I have something here to make you stay," raising his coat as if showing a gun; that Gentry then said that he had something to protect himself with, displaying a knife, which, however, was closed; that defendant then remarked, "I have got something here to beat that." The witness further testified that he and the "other fellow" then left, leaving Gentry, Cooper, and defendant "standing around." The witness John Davis testified that he was sitting "out on the sidewalk on a cracker box" in front of a poolroom next to the barber shop at about 3 o'clock p. m. of that day, when he heard a pistol fired "two or three times in succession —fast"; that he got up and looked through the window of the barber shop "and I seen him [defendant] run into the front from the back with a pistol in his hand," facing toward the front of the shop; that defendant ran out of the front door and slammed it behind him and "stood there with it [the pistol] in his hand * * * and looked like he was trying to get an aim at someone"; that he saw Gentry "coming walking up to the front, stagger first on one side and to the other from out of the back"; that Gentry fell over and "his head struck the window, breaking the window out"; that "just the minute his head went through the window he [defendant] took the barrel in his hand and hit him and knocked him back" into the shop, "and he fell backwards." The witness Albert McCarthy testified that he was in a bakery shop in the vicinity between 2 and 3 o'clock p. m. of the day in question and heard shots fired in rapid succession; that upon running out into the street he saw defendant backing out of the door of the barber shop, while Gentry was staggering forward toward the door with an open knife in one hand and "a wad of money" in the other. The autopsy surgeon testified that three bullets struck Gentry, one passing through the right lung and another through the tip of both ventricles of the heart and that these caused his death. He also testified that there was a deep scalp wound directly over a depressed skull fracture.

[1, 2] It would seem that if there were no other evidence the jury might well draw the conclusion, which it did, from the little we have mentioned. Appellant urges that the evidence of Baker and Davis is unworthy of belief. The question of the credibility of the witnesses is exclusively for the jury (section 1847, Code Civ. Proc.). "If in any criminal case, there be evidence adduced logically tend-

ing and legally sufficient to prove the guilt of a defendant, this court cannot and will not disturb the jury's determination. * * * The province of the jury in weighing evidence, and determining the degree of credibility to be accorded the testimony of witnesses, is, under the rules of law, exclusive. * * * Thus, upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited, or that their evidence is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence." People v. Durrant, 116 Cal. 179, 200, 48 P. 75, 79. So we must conclude that there is sufficient evidence to support the verdict.

[3] (3) Appellant does not claim the instructions given were erroneous statements of the law, but insists that as to two of them—which were to the effect that, "where one is making a felonious assault upon another," or has "created an appearance justifying that other" in making a counter attack in self-defense, the original assailant cannot avail himself of the plea of self-defense unless "he has first and in good faith declined further combat, and fairly notified him that he has abandoned the contest," and that "whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense is unavailing"—the evidence does not show any circumstances justifying them, as there were only two living eyewitnesses to the combat, defendant and Cooper. The testimony of the witness Baker would seem to justify the giving of such instructions, leaving it to the jury to accept such testimony or reject it in favor of that of defendant and Cooper. In view of the fact that the first story told by both defendant and Cooper was that Gentry came into the shop from the street, while defendant was counting his money previous to banking the same, and held the latter up, and that neither of them had ever seen him before, together with their subsequent stories and evidence that defendant did not have the amount of money found in decedent's hand after the shooting, and that the latter did, and that Gentry was in fact known to both of them, we cannot say that the jury was not justified in believing Baker and in rejecting the evidence of both defendant and Cooper, except in particulars wherein the jurors felt it was corroborated by other testimony.

We see no error in the instructions questioned, nor (4) do we find anything prejudicial in the actions of the district attorney assigned as misconduct. In every case where the prosecutor did go beyond the proper limits, the court at the request of defendant properly told the jury to disregard such action or remark. We have, however, made an examination of the entire record and have read all the evidence, and we fail to see how any such claimed misconduct or misdirection of the jury could have resulted in prejudice to appellant in any way.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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115 Cal.App. 381

FINCH v. EKSTROM.

Civ. 6664.

District Court of Appeal, Second District, Division 1, California.

July 8, 1931.

1. Dismissal and nonsuit ⚷80.

Entry in minutes of order granting nonsuit is final act in entering final judgment, and thereafter another judgment is improper (Code Civ. Proc. § 581).

2. Appeal and error ⚷790(3).

Where reversal of judgment appealed from would be ineffective because of prior judgment of nonsuit, appeal presented only moot questions and was dismissed.

> At conclusion of plaintiff's case, defendant moved for a nonsuit, and trial court ordered that the motion be granted. Court's transcript on appeal disclosed order granting motion for nonsuit. Thereafter extensive findings of fact and conclusions of law were filed, and at same time a judgment was entered dismissing the action. Subsequently, plaintiff appealed from the judgment.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by H. R. Finch against Arthur Ekstrom. From a judgment of nonsuit, plaintiff appeals.

Appeal dismissed.

Jacobs & Jacobs, of Stockton, for appellant.

S. Ernest Roll, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

This appeal is from a judgment of nonsuit entered in an action to recover an attorney's fee for services rendered with relation to an industrial accident award, the amount sought being in addition to that found reasonable by the commission. From the reporter's transcript we note that at the conclusion of plaintiff's case on August 31, 1928, defendant moved for a nonsuit, to which the trial judge responded, after the motion had been argued: "It is the order of the Court that the motion be granted." In the clerk's transcript we find this order, entered in the minutes of August 31, in these words: "Defendant's motion for a non-suit is by the Court granted." Thereafter, September 27, extensive findings of fact and conclusions of law were filed, and at the same time a judgment dismissing the action was made, which was entered the following day. Not quite a month later, October 23, another set of findings was filed, but no judgment appears to have followed.

The appeal before us was taken December 21 from "the judgment made and entered * * * on or about September 27, 1928."

[1, 2] This appeal must be dismissed. It is provided in section 581, Code of Civil Procedure, that the entry in the minutes of an order granting a nonsuit is the final act in entering a final judgment, and there is no place thereafter for another judgment. Henry v. Lingsweiler (1927) 81 Cal. App. 142, 253 P. 357; Bengel v. Traeger (1929) 100 Cal. App. 526, 280 P. 538; Lewis v. Hammond Lumber Co. (Cal. App. 1931) 300 P. 49. As a reversal of the judgment appealed from, if that should be required, would be of no avail because the judgment of nonsuit (August 31) would still be left undisturbed, this appeal presents only moot questions and should be dismissed. Burks v. Bronson (1922) 58 Cal. App. 143, 207 P. 1018.

The appeal is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

115 Cal.App. 429

ROGAFF v. BARTLES.

Civ. 6585.

District Court of Appeal, Second District, Division 1, California.

July 10, 1931.

Fraud ⚷59(2).

Measure of purchaser's damages for vendor's misrepresentations that lot had not been filled *held* difference between actual value of property and value if representation had been true (Civ. Code, § 3300).

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Harry Rogaff against Lillian M. Bartles. Judgment for plaintiff, and defendant appeals.

Reversed.

D. H. Laubersheimer, of Los Angeles (Leland S. Bower, of Los Angeles, of counsel), for appellant.

L. A. Bloom and Robert I. Kronick, both of Los Angeles, for respondent.

HOUSER, J.

On terms and conditions set forth in a contract entered into between plaintiff and defendant, it was agreed that plaintiff would buy from defendant and defendant would sell to plaintiff a certain lot or parcel of land. Among the conditions which were stated in the contract were: "Lot is B Zone. No setback, no fill, and no restrictions against building a 4-story apartment house." In connection with such transaction, following the delivery to plaintiff of a deed of the property and the commencement by him of the construction of a four-story apartment house thereon, in the course of the excavation for the foundation for said building it was discovered that the lot had been filled; which fact induced the outlay by plaintiff of a considerable sum of money in payment of labor and materials for the increased depth of excavations for foundation, brick and cement walls, etc. Thereafter, "relying upon the terms and conditions of the aforesaid agreement," plaintiff brought an action for damages against defendant. Preliminary to the rendition of a judgment in favor of plaintiff, from which defendant appeals to this court, in substance the trial court made its finding of fact that the following allegations of the complaint were true, to wit: "That thereafter, relying upon the terms and conditions of the aforesaid agreement, plaintiff commenced building operations for the erection of a four-story apartment house building; that during the course of the excavation for the foundation for said building it was ascertained that the ground on said lot was filled; that by reason of said filled ground plaintiff has suffered damages in the sum of three thousand seven hundred and fifteen dollars, forty cents ($3,715.40), being the amount expended by him for additional excavating and concrete necessary to build a foundation for aforesaid building, over and above the amount required for the usual and ordinary foundation necessary for the aforesaid building, owing to the fact that plaintiff was forced to make much deeper excavations to reach solid ground and which said deeper excavation and foundation were ordered by the Building Department of the City of Los Angeles."

On the trial of the action, over the objection of defendant, evidence was introduced which showed the amount of money expended by plaintiff in making extra excavations, constructing walls, etc., made necessary in the construction of the building by reason of the greater required depth of such excavations on account of the upper part of the soil on the property in question having been filled. And such evidence furnishes the sole support for the finding by the trial court as to the damages suffered by plaintiff.

One of the reasons urged by appellant for a reversal of the judgment herein is that in attempting to fix the amount of damages which plaintiff was entitled to recover against defendant, the trial court erroneously applied the rule set forth in section 3300 of the Civil Code to the effect that for the breach of an obligation arising from contract, the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." In that connection it is the contention of appellant that in circumstances such as are presented by the facts herein, the true rule for the admeasurement of damages to the injured party is that he is entitled to recover a judgment only for the difference between the actual value of the property and the value which it would have had if the representations regarding the property had been true.

Although in the instant case it is possible that, considering the use to which the property here in question was put, the method adopted by the trial court for the ascertainment of the damage which resulted to the vendee would be a fairer method than that prescribed by the rule for which appellant contends, it is manifest that the safer rule and the one which would oftener result in justice to an aggrieved vendee would be that to which appellant has directed attention. It is clear that the defendant herein was placed on notice that at least one of the anticipated uses to which the property might be put was a site for the construction thereon of a four-story apartment house. However, by the terms of the contract, no provision is made for the type of such contemplated building. For aught that appears, it might have been either a frame, a brick, or a stone building, or even a building composed of steel and cement; and if the construction were of either of the last three mentioned kinds of buildings, it is probable that the depth of the necessary excavation and the thickness of the walls of the building would materially differ from the depth and width of excavation necessary for the construction of a frame building, with a resultant difference in the matter of original cost to the vendee, which in turn would be transferred to the vendor. Nor, even in the construction of a brick building, which apparently was the type selected by the vendee herein, was any restriction placed upon him regarding the thickness of the walls of the foundation to be used. He may have been content to follow the bare requirements prescribed by law, or by city ordinance; but such a wall might have appeared to him to be too frail or unsubstantial, with the result that in constructing his four-story apartment house he might have built a foundation so strong and so secure that if put to the test it would have supported a much taller building. In such circumstances, the question well might be pertinent as to whether the vendor should be held liable for such increased cost. On the other hand, had the vendee constructed a height-limit building of twelve or thirteen stories on the property here under consideration, the question regarding the amount of damage which he had suffered by reason of a false representation as to "no fill" might have been more difficult to solve. As an illustration of consequences which might result from the application of the rule of damages which was adopted by the trial court, let it be supposed that a man purchased a tract of land which was represented to him by the vendor as especially suited to the growth and production of walnuts, and particularly that the natural soil of the land was at least twenty feet deep—"no rock"; and let it be further supposed that immediately after the vendee commenced to set out his walnut trees on the land he discovered bedrock at a uniform depth of six inches below the surface of the soil: Would it be reasonable that the vendee be permitted to blast out the rock to a depth of nineteen and one-half feet, remove same from the land, substitute therefor a soil suitable to the growth and production of walnuts, and that the cost of such operations should be the measure of damages?

In the case of Hines v. Brode, 168 Cal. 507, 511, 143 P. 729, 731, the nature of the cause of action which may be maintained by a person situated as is plaintiff in the instant case is discussed. In part, it is there said: "* * * The consummation of a fraud may arise in a contract executed or executory. But in either case the right of action immediately exists. This is so because even in the case of an executory contract *the action for fraud is not upon the contract, but is collateral to the contract and is on the case.* [Citing authorities.] But while such an action for deceit is not upon the contract, nevertheless it grows out of, and in that sense is founded on, the contractual relations between the parties. * * *" In that case the conclusion reached was that in an action for fraudulent representation as to the character of land conveyed, the measure of damages is the difference between the actual value of the property and its value had the property been as represented.

In Spreckels v. Gorrill, 152 Cal. 383, 390, 92 P. 1011, 1015, it is declared that "the real question in all such cases is whether or not the property, if it had been as represented, would have been of substantially greater value than its actual value in its real condition."

And in Wood v. Niemeyer, 185 Cal. 526, 532, 197 P. 795, 798, the statement is made that in actions for deceit in the sale of real estate, the settled rule of law in this state is that the party defrauded is "entitled to recover the difference between the actual value of the property which he received and the value which it would have had if the * * * representations as to the value thereof had been true." (Citing authorities.) To the same effect, see Wellnitz v. Sacramento Suburban F. L. Co., 97 Cal. App. 51, 274 P. 1016, 276 P. 154.

Reasoning from the principle announced in the authorities to which attention has been directed, it would follow that in the instant action defendant was prejudiced in her substantial rights by the method used by the trial court in estimating the damages to which plaintiff was entitled.

It becomes unnecessary to devote attention to any of the remaining specifications of error presented in the brief of appellant.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

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115 Cal.App. 317

WHITE v. SARFF et al.

Civ. 6798.

District Court of Appeal, Second District, Division 2, California.
July 1, 1931.

1. Appeal and error 🔑110, 113(1).

Appeal from order denying motion for new trial and motion to vacate judgment *held* unauthorized.

2. Brokers 🔑4, 106.

In action by purchaser of leasehold estate against broker and surety, evidence supported findings that plaintiff made purchase and paid purchase price upon knowingly false representations of broker.

3. Brokers 🔑102.

Broker, making positive statements of fact which, if not known to be true, were intended to influence purchaser to buy and were relied upon by purchaser, *held* answerable therefor (St. 1919, p. 1252, § 9a, as amended by St. 1929, p. 228).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by L. White against G. W. Sarff and another. From a judgment for plaintiff, and, from orders denying a motion for a new trial and a motion to vacate the judgment, defendants appeal.

Judgment affirmed, and appeal from intermediate orders dismissed.

Whitson & Sims, of Los Angeles, for appellants.

Leo Freund, of Los Angeles, for respondent.

CRAIG, J.

[1] The appellants, a licensed realtor and his surety, respectively, have appealed from a judgment rendered in favor of a purchaser of a leasehold estate. They also appealed from orders denying a motion for a new trial, and a motion to vacate the judgment. The appeal from said orders being unauthorized by the statutes, it will be dismissed. Chaplin v. Amador, 93 Cal. App. 358, 269 P. 544.

In response to a published advertisement in one of the metropolitan newspapers, White communicated with Sarff, and was assured by the latter that he had for sale a lease on a cafe in the city of Los Angeles; and that the representations in said advertisement that it was a five-year lease, that the lessee had on deposit as security therefor the sum of $400, that the agent would sell the same for a specified price, including such deposit, and that investigation was invited, were true. Subsequent negotiations resulted in a purchase by respondent. Previously to the execution of the transfer, White questioned the responsibility of the owner, and demanded of Sarff, "if you are sure everything is as you represent, you won't hesitate a minute to sign the bill of sale." The conveyance was prepared, reciting that it included the "lease on building No. 5511 Santa Monica Blvd., Hollywood, Calif., and all deposit up on lease. Lease in force now and to continue for 3 or more years at $175 per month." It was executed by the lessee and by Sarff. It developed after the sale, and the owner of the property testified, that he did not know the broker, that no lease of the premises existed, that he had not been asked, nor had he promised, to execute a lease; and that no amount of deposit had been held by him at the time in question.

[2, 3] Appellant contends that the evidence was not sufficient to justify or to support findings by the trial court that respondent made the purchase upon representations of the broker, that because thereof he paid the consideration; and that said representations were false, fraudulent, and untrue, that

they were made to deceive, or that they were known to the broker to have been untrue. There is no merit in this contention. The broker, having made positive statements of facts which, if not known to be true, were intended to influence the purchaser to buy, and were relied upon by the latter, must be held answerable therefor to the same extent as if he had known that they were false. Gaffney v. Graf, 73 Cal. App. 622, 238 P. 1054.

Section 9a of the Real Estate Brokers Act (St. 1919, p. 1252), as amended by St. 1929, p. 228, expressly affords an injured party a right of action for a failure of the broker to perform his duties or to comply with the provisions of said act. Section 2 as amended by St. 1929, p. 223, thereof embraces leasing or sales of leases upon real property, and such an agent is especially enjoined from the making of any false promise of a character likely to influence, persuade, or induce another to act to his detriment. The findings of fact were not unwarranted. Nittler v. Cont. Casualty Co., 94 Cal. App. 498, 271 P. 555, 272 P. 309.

The judgment is affirmed. The appeal from intermediate orders is dismissed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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114 Cal.App. 509

PACIFIC FINANCE CORPORATION v. CITY OF LYNWOOD.

Civ. 6531.

District Court of Appeal, Second District, Division 1, California.

July 1, 1931.

Hearing Denied by Supreme Court July 30, 1931.

1. Appeal and error ⚷832(4).

Rehearing will not be granted to consider evidence called to attention of appellate court for first time after determination of appeal.

2. Municipal corporations ⚷231(2).

Contract employing engineer on various street improvements *held* not invalid as violating prohibition against officer of city being interested in any contract (St. 1883, pp. 279, 886).

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

On application for rehearing.

Petition denied.

For former opinion, see 300 P. 50.

Roscoe R. Hess, City Atty., of Lynwood, for petitioner.

John A. Rush and John L. Rush, both of Los Angeles, for respondent.

PER CURIAM.

A quotation from the early case of Andrews v. Mokelumne Hill Co. (1857) 7 Cal. 330, is apposite: "This case may be said * * * to be a fair illustration of a most pernicious practice which has sprung up among the bar in many instances, of presenting cases without that care and examination of the record which is necessary to a correct understanding of the case, and afterwards trusting to the indulgence of the Court by way of a petition for a rehearing. * * * Such a practice does great injustice to the bar and the Court, and frequently imposes upon us double labor, besides giving to the decisions a seeming contradiction. * * * And we wish to announce that, for the future, we will be less indulgent in such cases."

[1] In the petition for a rehearing, counsel now representing appellant, a substitution having been made, points out that our filed opinion ignores the stipulations with respect to the city ordinance on claims and demands. This is true, but appellant may not complain of it. As pointed out in the opinion, a city ordinance is not a general law, but a special one, which must be proven. Because appellant's counsel, in his opening brief, argued the effect of the ordinance under the topical heading, "The complaint does not state facts sufficient to constitute a cause of action," we suppose he regarded the ordinance as a general law which did not need to be proven. In harmony with this theory we found that neither his opening nor his closing brief contained in the text or in the supplement any copy of, reference to, or hint suggesting that, if we looked in the typewritten record, we would find a stipulation that the ordinance might be introduced in evidence or any evidence that an ordinance had been passed. Nor in support of the criticism, made in appellant's opening brief, that there was no finding respecting the passage of the ordinance, was there even a suggestion that a stipulation had been entered into or any evidence received respecting it. Not until the petition for a rehearing do we hear of this incident of the trial and that the ordinance was proven before the trial court. We know of no reason why an exception should be made in this case and a rehearing be granted to consider the effect of evidence called to our attention for the first time after the appeal has been submitted and determined.

Complaint is also made that there is no finding respecting the defense that, since March 3, 1926, there has been no revenue of the year 1925—26 with which to meet Schwabland's claim. Even the petition for a rehearing fails to reveal the existence of evidence which would support such a finding if it were required, and the briefs serve us no better, even in their generous direction to "see the following pages of the transcript," enumerating some thirty-four. In the absence of evidence, of course, appellant cannot complain if the finding is absent also.

[2] Another thought, suggested for the first time in the petition for a rehearing, is that the contract is invalid because contrary to section 886 of the Municipal Corporation Act, St. 1883, p. 279 (and similar provisions elsewhere), prohibiting any officer of the city from being interested directly or indirectly in any contract with the city. This common-law rule (County of Shasta v. Moody [1928] 90 Cal. App. 519, 265 P. 1032) is predicated on the principle that no man can serve two masters (Stockton P. & S. Co. v. Wheeler [1924] 68 Cal. App. 592, 229 P. 1020; Nielsen v. Richards [1925] 75 Cal. App. 680, 243 P. 697), and that an officer of a city "cannot be permitted to place himself in any position where his personal interest will conflict with the faithful performance of his duty" (Berka v. Woodward [1899] 125 Cal. 119, 128, 57 P. 777, 780, 45 L. R. A. 420, 73 Am. St. Rep. 31). Because we are unable to see how these reasons for the rule are remotely applicable to the situation in this case, we doubt that the contract is in violation of section 886, even should the appointment of Schwabland as an officer be regarded as a permanent one.

We are unable, however, to distinguish this case from Kennedy v. City of Gustine, 199 Cal. 251, 248 P. 910 (cited in our opinion). It is evident that the Supreme Court was not unmindful of section 852 of the Municipal Corporation Act (St. 1883, p. 267, as amended by St. 1919, p. 19, § 1) as well as of section 41 of the Improvement Act of 1911 (St. 1911, p. 751 [amended St. 1929, p. 1652]) from which they quoted. Rather the Supreme Court saw there, as we see here, a plain intent existing from the first not to appoint a civil engineer under section 852 of the Municipal Corporation Act (unless temporarily without pay) nor to fix his compensation and prescribe additional duties by ordinance, as is the method section 881 of the act (St. 1883, p. 278) provides shall be followed for fixing the duties and compensation of city officials. Instead, from the beginning in each case, it was the intention to secure engineering services required for certain improvements for which petitions were on file, such services to be paid for only under improvement acts, the employment to be that authorized by section 41 of the Improvement Act of 1911 (or section 3 of the Acquisition and Improvement Act of 1925 [St. 1925, p. 853, as amended by St. 1927, p. 1383, § 13] in our case). This was the intent, and in accomplishing it, in the case at bar, a contract calling for legal work and other matters not the duty of a civil engineer as an officer was entered into. If, as held in the Kennedy case, the relation of employee and not that of an officer results, it may not be changed by the employee taking an oath of office. Incidentally, provision was made that routine engineering services, which the city did not obligate itself to request from Schwabland nor he agree to do if requested, were, if done, to be paid for on a cost plus nothing basis. Nor is there any ground for the criticism that by the contract Schwabland may claim a life job. The recitals of the contract refer to petitioned improvements, and, these done, there is no theory on which he could claim the contract covers others. His present action is not consistent with any claim for profits denied him on other work.

We see no reason why the agreement on which the plaintiff relies, as assignee, should be held invalid, and we know of no reason why a city, as well as an individual, should not be expected to keep faith with those with whom it contracts, or else respond in damages for its failure.

The petition for a rehearing is denied.

115 Cal.App. 267

SUTTON v. TANGER.

ALMSTEAD v. SAME.

Civ. 7572.

District Court of Appeal, First District,
Division 2, California.

June 29, 1931.

1. Statutes 🔑74(1).

Statute respecting liability of owner of automobile driven by another *held* not to violate constitutional provision requiring all laws to be uniform because inapplicable to owners of horse-drawn vehicles (Civ. Code, § 1714¼; Const. art. 1, § 11).

2. Names 🔑18.

Jury *held* warranted in inferring identity of person driving defendant's automobile from identity of name (Code Civ. Proc. § 1963, subd. 25).

> Evidence disclosed that defendant rented his automobile to person giving his name as L. F. and showing a license in that name, and passenger in automobile, who was dozing at time of accident, testified that about an hour or two after the rental he was introduced to man with that name, and that such man was driving automobile at time of accident.

3. Evidence 🔑67(1).

Jury *held* warranted in inferring that operation of automobile by same person continued from its rental to accident (Code Civ. Proc. § 1963, subd. 32).

4. Automobiles 🔑192(1).

Word "operate" in statute respecting automobile owner's liability means to direct or superintend and is sufficient to hold owner liable for negligence of person to whom his permittee has temporarily intrusted automobile (Civ. Code, § 1714¼).

> Civ. Code, § 1714¼, makes the owner liable for the negligence of any person using or operating his automobile with his implied or express permission; the words "using" and "operating" in the statute not being synonymous terms.
>
> [Ed. Note.—For other definitions of "Operate" and "Use; Used," see Words and Phrases.]

5. Trial 🔑108½.

In automobile collision case, court properly overruled objection to question collectively on voir dire whether any juror had interest in certain casualty company.

6. Automobiles 🔑245(80).

Contributory negligence of motorist struck, when turning into vehicular lane to board ferry, by defendant's automobile traveling rapidly *held* for jury.

Appeals from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Actions by Dorothy Sutton and by F. N. Almstead against C. A. Tanger, doing business under the firm name and style of Owl-U-Drive-or-Fly Auto Rental Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Theodore Hale, Barry J. Colding, and Carroll B. Crawford, all of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

Kilpatrick & Goodman, of Oakland, for respondents.

GRAY, Justice pro tem.

[1] In the above-entitled actions, tried together before a jury, each respondent recovered a judgment for injuries received in a collision between an automobile operated by Dorothy Sutton and in which F. N. Almstead was a passenger, and another automobile, owned by appellant and operated by a renter. Appellant first contends that his demurrers to each complaint should have been sustained, because, while the facts pleaded shows his liability under section 1714¼ of the Civil Code, such section violates the requirement of article 1, section 11, of the state Constitution, that all laws be uniform, by failing to be applicable to owners of horse-drawn vehicles. As broadly stated by him, this criticism is equally applicable to all the regulations of the California Vehicle Act, which have been repeatedly held constitutional in that regard. Matter of Application of Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; In re Schmolke, 199 Cal. 42, 248 P. 244; Old Homestead Bakery, Inc., v. Marsh, 75 Cal. App. 247, 242 P. 749. More narrowly stated, the section does impose upon an automobile owner alone a new liability analogous to the doctrine of respondeat superior, without the existence of the relationship of employment or agency or family and irrespective of negligence in ascertaining the competency of the driver. In Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42, section 24 of the Motor Vehicle Act, which imputes negligence of the minor to the person who signed his application for operator's license, was held not violative of the above constitutional provision. While it is true that an automobile may not itself be a dangerous instrumentality, yet, in the hands of an incompetent person, it may, under modern traffic conditions, become extremely dangerous to life, limb, or property. The greater potential danger in case of a fast-moving automobile as compared to a slow-traveling horse-drawn vehicle warranted the Legislature in placing its owner in a separate class by imposing this new liability upon him, effectively requiring him to ascertain, at his peril, the competence of the borrower. A similar statute of the state of Michigan was held in Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N. W. 520, L. R. A. 1918A, 916, to be a valid exercise of the police power. In Robinson v. Bruce Rent-A-Ford Co., 205 Iowa, 261, 215 N. W. 724, 61 A. L. R. 851, another similar statute was upheld as not violating due process of law. A statute of the state of New York, identically worded as our Code section in its material part, was also sustained as constitutional. Feitelberg v. Matuson, 124 Misc. Rep. 595, 208 N. Y. S. 786, 789; Stapleton v. Hertz Drivurself Stations, 129 Misc. Rep. 772, 222 N. Y. S. 579.

[2-4] The appellant next urges that the evidence is insufficient to support the verdict because it does not show who was driving his car at the time of the accident. Appellant admits that about four hours before the accident he rented his automobile to a person giving his name as Leroy Foster and showing a license in that name. A passenger in this automobile, who was dozing at the time of the accident, testified that about an hour or two after such rental he was introduced to a man with this name, and that such man was driving the automobile at the time of collision. This driver fled the scene of the accident and has never been seen since. The jury was warranted in inferring an identity of person from identity of name (Code Civ. Proc. § 1963, subd. 25); and that the operation of the automobile by the same person continued from its rental to the accident

(Code Civ. Proc. § 1963, subd. 32). But, even if the renter was not the operator, appellant would still be liable. The Code section makes the owner liable for the negligence of any person using or operating his automobile with his implied or express permission. The word "operate," meaning "to direct or superintend," is sufficient to hold the owner liable for the negligence of a person to whom his permittee has temporarily intrusted the automobile. Bosse v. Marye, 80 Cal. App. 109, 250 P. 693. A statute providing that the owner of an automobile shall not be liable for injury occasioned by its negligent operation, unless it was being driven by his express or implied consent or knowledge, does not require that the particular driver must be known, and his driving consented to by the owner; and hence the owner would be liable for negligent injury caused by his automobile loaned to another and being driven by the latter's brother at the time of the accident. Kerns v. Lewis, 246 Mich. 423, 224 N. W. 647. The following excerpt from Feitelberg v. Matuson, supra, is particularly pertinent: "What was the purpose of adding the word 'use' unless it was meant to include the person who had the actual, though not physical, control of the car, and who was constituted by the owner is master ad hoc. If the liability of the owner were limited to the acts of the operator, the statute would become a dead letter in most cases. Its evasion would be an easy matter. The statute must be interpreted in harmony with its verbiage. We cannot hold that 'using' and 'operating' are interchangeable or synonymous words. If the owner chooses to intrust his car to another person, he invests such person, so long as he uses the car, with the same authority in regard to the management of the car which the owner has. That authority includes the right to select the operator. The statute so provides in unmistakable language."

[5] Respondent asked the jurors collectively on their voir dire the following question: "Has any lady or gentleman in the jury box any interest either as a stockholder or bondholder, agent or otherwise in the New Amsterdam Casualty Company?" Appellant merely objected to the question, but requested no admonition by the court. The court properly overruled the objection. Dougherty v. Ellingson, 97 Cal. App. 87, 275 P. 456.

[6] Immediately prior to the accident, respondent Sutton had driven her sedan, at a rate of from 8 to 10 miles per hour, between intersecting streets, across the Embarcadero, having a width of 200 feet, preparatory to boarding the Southern Pacific automobile ferry from San Francisco to Oakland. When her automobile was 8 feet westerly of the curb projected and as she was turning into the vehicular lane, at the direction of the company's traffic officer, the sedan was struck at its right front door by the left front portion of appellant's automobile, traveling on its right side of the street, and slid around a distance of 3 or 4 feet. Although the street was well lighted and nothing obstructed respondent's view to the right, she testified she did not see appellant's car until it was right on top of her. As to this respondent alone, appellant argues that she was guilty of contributory negligence as a matter of law in failing to see the other car prior to the collision. But other additional facts required the submission of this question to the jury. On cross-examination, this respondent testified that she went across the Embarcadero looking both ways; that when in the center of the Embarcadero, and when three-quarters of the way across, she looked but did not see the other automobile until it was right on top of her. The traffic officer testified he first saw the other automobile when it was 60 or 70 feet from the point of impact, and that it was then traveling at between 35 and 40 miles per hour. At this rate of speed it would travel this distance in approximately one second of time. Whether respondent had taken proper precautions of observation under all the attendant circumstances was a question of fact which the court properly left to the jury's decision.

The judgments are affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

In re YOUNG'S ESTATE.*

ALLEN et al. v. YOUNG et al.

Civ. 4388.

District Court of Appeal, Third District, California.

July 6, 1931.

Rehearing Denied Aug. 5, 1931. Hearing Granted by Supreme Court Aug. 31, 1931.

1. Wills ⚷858(1).

Legatees named in clause disposing of balance of estate consisting of property described *held* not entitled to insurance on death of last survivor of permitted class of beneficiaries.

2. Army and navy ⚷51½.

Amendment respecting beneficiaries of war risk insurance *held* retroactive, taking effect as of October 6, 1917 (Act Cong. March 4, 1925, § 14 [38 USCA § 514]).

3. Descent and distribution ⚷6.

Rights of parties to estate must be determined as of date of deceased's death.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 8 P.2d 846.

4. Army and navy 🔑51½.

Naming of beneficiary in war risk policy does not limit insured's right to make change or vest in beneficiary indefeasible interest (World War Veterans' Act 1924, § 303, as amended by Act Cong. March 4, 1925, § 14 [38 USCA § 514]).

5. Army and navy 🔑51½.

Insured could execute will and name person to whom war risk insurance should go (World War Veterans' Act 1924, § 303, as amended by Act Cong. March 4, 1925, § 14 [38 USCA § 514]).

6. Wills 🔑440.

Court must determine testator's intent from words used in will (Civ. Code, § 1318).

7. Army and navy 🔑51½.

War risk insurance paid to insured's estate on death of life beneficiary must be considered as paid as of date of insured's death, and those entitled to receive estate are determined as of that date.

8. Wills 🔑548.

Statute respecting words in will referring to death or survivorship *held* inapplicable to will giving testator's father insurance and in case of his death to another (Civ. Code, § 1336).

9. Wills 🔑612(1).

Will giving father insurance, and in case of his death to another, did not give father only life estate.

10. Wills 🔑540.

Where there is devise to one person in fee and in case of his death to another, contingency referred to is death of first-named devisee during testator's life.

11. Wills 🔑548.

Words in will referring to survivorship simply relate to time of testator's death.

12. Wills 🔑612(1).

Will bequeathing insurance to testator's father, and in case of his death to another, conveyed absolute title to father.

13. Wills 🔑612(3).

Where will bequeathed insurance to testator's father, and in case of his death to another, words regarding use of money to be made by the other person did not limit absoluteness of gift to father.

14. Army and navy 🔑51½.

Where will gave testator's father war risk insurance and father was deceased at date of distribution sought, distribution should be made to testator's father's estate.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

In the matter of the estate of Ralph Clark Young, deceased. Proceeding between Jane B. Allen and others, as claimants and contestants, and Fred Young, administrator, and Henry Ralph Siess, legatee. From a decree distributing the proceeds of a certain life insurance policy, Jane B. Allen and others appeal.

Reversed and remanded.

Jacobs, Blanckenburg & May, of San Francisco, and J. Harold McAlpine, of Santa Rosa, for appellants.

Lewis H. Cromwell, Karl Brooks, and F. A. Meyer, all of Petaluma, for respondents.

PLUMMER, J.

This cause is before us upon an appeal from the decree of the trial court distributing to Henry Ralph Siess the proceeds of a certain life insurance policy.

The deceased, Ralph Clark Young, was an enlisted man in the United States Navy during the World War. While in the service he applied for and obtained an insurance policy in the amount of $10,000, payable as provided in the Act of Congress approved October 6, 1917 (40 Stat. 398). The application designated his estate as beneficiary. Certificates were issued by the government pursuant to the applications made by the deceased, to the effect that the $10,000 insurance would be payable, in case of death or total, permanent disability, in monthly installments in the sum of $57.50 each. The Act of Congress referred to was amended in 1919 (40 Stat. 1160, 41 Stat. 274, 371), revised and re-enacted in 1924 (43 Stat. 607), and on March 4, 1925, section 303 of the act, necessary to be considered herein, was amended (section 14 [38 USCA § 514]) to read as follows: "If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award: Provided, That all awards of yearly renewable term insurance which were in course of payment on the date of the approval of this act, shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this act," etc. The various amendments made by the acts of Congress to which we have referred, enlarged the permitted class of beneficiaries, but have no bearing upon the questions tendered for determination upon this appeal.

On May 17, 1918, Ralph Clark Young made and executed his last will and testament in the following words and figures, to wit:

> "May 17th, 1918.
>
> "I Ralph Clark Young declare this my last will and testamony. To my father George C. Young my ten thousand dollar insurance policy in case of his death this said policy is to go to my Godson Henry Ralph Siess. My idea is that he uses this money to go to college and to help his mother. My interest in the Young, Patterson Co. of Oakland goes to R. H. Patterson my pardner and friend. The house hold furnishings silverware and jewelry I wish my three cousins Alma, Gladys and Dora to have. The balance of my estate consisting of life insurance policy of one thousand dollars stock in Taft & Pennoyer Co. Oakland and real estate in Petaluma and Alameda I wish divided into four equal parts one-fourth going to each of the following: Mrs. Morris Taylor, Miss Gladys Holmes, Miss Dora Holmes, and Mrs. Emma McCoy. I hereby appoint Mr. Wm. H. Holmes administrator to serve without bonds and with power to buy or sell without order from the courts.
>
> "Ralph Clark Young."

[1] On October 18, 1918, Ralph Clark Young died. His father, George C. Young, who survived him, was then paid installments of insurance at the rate of $57.50 per month until his death on April 13, 1921. Thereafter the monthly installments were paid to certain aunts and an uncle, and upon the death of the last survivor of the permitted class of beneficiaries, the present value of the remaining installments was paid to the estate of Ralph Clark Young, deceased, and is now awaiting distribution. The appellants Dora A. Holmes, Gladys E. Holmes, and Alma Holmes Taylor claim that this sum falls into and becomes a part of the residuary portion of the estate of said deceased, and base their contention upon the fourth clause of the will. This contention, however, we think is without merit, as that clause of the will specifically mentions the balance of the estate intended to be devised to the persons therein named, and under that clause they are not entitled to any more.

[2-4] Without following all of the argument of appellants, it suffices here to state that the Act of Congress of March 4, 1925, was retroactive and took effect as of October 6, 1917, and the rights of the parties to the estate of Ralph Clark Young, deceased, must be determined as of the date of his death, and as though all of the provisions of the law relative to the enlargement of the permitted class of beneficiaries and the right to make disposition of any sums coming into the estate of the deceased, existed as of the date of the death of the decedent. Thus, the right of the deceased to dispose of the fund now constituting a part of his estate is the same as though that fund had been paid to him preceding his death. While the administration and distribution are delayed, all other rights are considered as existing as and of that date. The naming of a beneficiary in the insurance policy, as one entitled to receive the monthly installments does not, under the acts of Congress, limit the right of the insured to make a change thereof, or vest in the beneficiary an indefeasible interest therein. The foregoing statements which we have made are supported by the following cases: Palmer v. Mitchell, 117 Ohio St. 87, 158 N. E. 187, 55 A. L. R. 566; In re Pivonka, 202 Iowa, 855, 211 N. W. 246, 55 A. L. R. 570; Williams v. Eason, 148 Miss. 446, 114 So. 338, 55 A. L. R. 574; Woodworth v. Tepper, 152 Md. 332, 136 A. 536, 55 A. L. R. 578; In re Ogilvie's Estate, 291 Pa. 326, 139 A. 826. See, also, extended note in 55 A. L. R., beginning on page 580.

[5] The rights of the deceased to execute a will and name the person to whom his insurance policy should be devised, being thus established, there remains to be considered the legal effect of the first clause of the will, which reads as follows: "To my father George C. Young my ten thousand dollar insurance policy in case of his death this policy is to go to my Godson Henry Ralph Siess. My idea is that he uses this money to go to college and to help his mother."

Upon this appeal two sections of the Civil Code are presented for our consideration: First, section 1318, which reads: "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." And section 1336, which reads: "Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession." The contention of the appellants is that the wording of the clause of the will quoted is unambiguous; that it refers only to a situation, and not a contingency at the date of the death of the testator. On the part of the respondent the theory is put forward that the words of the first clause of the will are ambiguous, and that a contingency is presented, to wit, the death of George C. Young, and the actual possession of the installments. In other words, it is contended by the appellants that George C. Young took an unlimited interest in the insurance policy so far as any interest therein was possessed by the testator Ralph Clark Young. The contention of the respondents is to the effect that George C. Young took, in reality, only a life interest, and that the words of the will constituted the creation of a remainder over, to Henry Ralph Seiss.

[6] The law appears to be well settled that in ascertaining the intent of the testator, we must look only to the terms of the will, and must determine his intent from the words used. This rule is very carefully stated in the Estate of Young, 123 Cal. 337, 55 P. 1011, 1013, where the court, speaking through Justice Henshaw, said: "The inquiry will not go to the secret workings of the mind of the testator. It is not, what did he mean? but it is, what do his words mean? In Bingel v. Volz, 142 Ill. 214, 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64, it is well said: 'The purpose of construction, as applied to wills, is unquestionably to arrive if possible at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will.'" A number of cases are then cited supporting this statement. It is then further stated: "The inquiry of the court in construing a will comes to an end when the intent has been discovered from the language of the will. * * * It is never at liberty to supply omissions, or to wrest language from its plain import, and give it such a meaning as it may be guessed the testatrix would have intended if she had known that her own efforts to create a legal devise had resulted in failure."

[7] While it is clear that the naming of a beneficiary in a war risk policy of insurance gives the beneficiary no title to the policy or interest therein further than the right to receive the specified monthly payments, yet in view of the cases which we have cited that the right to the fund paid to the estate by the government upon the death of the last beneficiary, is to be considered as paid as and of the date of the death of the insured, and that those entitled to receive the estate are to be determined as and of that date, as established by the cases which we have cited, and especially the long list of cases found in the note set forth in 55 A. L. R., page 596, all the asserted ambiguity in the first clause of Ralph Clark Young's will disappears. Likewise, all contention as to postponement of possession. Speaking as and of that date, the right of immediate possession to the proceeds of the insurance policy was immediately and actually vested. Being in law then and there a part of his estate, the legatees named to take possession thereof, and to whom it was given without any limitation as to his right to take and enjoy the whole thereof and consume the principal sum so paid, we find nothing upon which to base a contingency. Considered in the light of the decisions which we have referred to, there is presented entirely a situation as to who would be entitled to take the fund of the insurance policy, and the whole thereof, as of the date of the death of the insured. As said in the case of Marvel v. Wilmington Trust Co., 10 Del. Ch. 163, 87 A. 1014, 1015: "No legatee takes anything until after the death of the testator, and every legatee takes his gift immediately upon the death of the testator, if there is nothing to indicate a suspension of the vesting until a later period."

[8, 9] Read in the light of the foregoing decisions, there is nothing in the will which would limit the right of George C. Young to take the fund represented by the insurance policy, as and of the date of the death of Ralph Clark Young, immediately upon the happening of such occurrence. George C. Young living at that date, there was no change in the situation contemplated by the testator, between the date of making his will and the date of the bequest becoming effective. The cases which we have cited, establishing the law relative to war risk insurance policies, and the date from which they speak, completely answer respondent's argument based upon the law relative to annuities, as the whole fund was payable to the legatee George C. Young as and of the date of the death of Ralph Clark Young. There being nothing in the will indicating postponement of possession, and the law of distribution, speaking as and of the date of the death of the testator, giving immediate possession to the legatee named in the will, there is nothing upon which the provisions of section 1336, Civil Code, can operate. The right to enjoy the subject-matter of the bequest was vested without any limitation; that is, there are no words in the will limiting the bequest to George C. Young or from which it can be construed that the testator intended only to give him a life estate.

[10, 11] The authorities are practically unanimous in support of the following: "It may be regarded as a settled rule of construction that where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first-named devisee during the life-time of the testator." In re Application of N. Y. L. & W. Ry. Co., 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478. In 26 California Jurisprudence 109, the text-writer thus sets forth the rule of construction "a gift in form, to A, and at or after his death to B, passes to A a life estate, and to B, and estate in remainder. But where the devise or bequest is to A, *and in the event of his death, to B*, the gift to B is contingent, the contingency being A's death in the testator's lifetime. That is to say, the limitation over to B is merely a lapse provision, taking effect only in case A predeceases the testator." Citing Estate of Hoytema, 180 Cal. 430, 181 P. 645; Estate of Clancy, 8 Cof.

Prob. Dec. 343. Words in a will referring to survivorship simply relate to the time of the testator's death. Estate of Rounds, 180 Cal. 386, 181 P. 638; Estate of Alexander, 149 Cal. 146, 85 P. 308, 9 Ann. Cas. 1141.

As to whether the language of the will relates to a contingency or a situation, the text found in 26 California Jurisprudence 107 is applicable. Among other things it is there said: "If the gift is one that is effective at the testator's death, the presumption is that the testator considered the contingency as happening during his lifetime, but if the devise or bequest is limited, to take effect during or at the termination of a period subsequent to the testator's death, the inference is that the testator intended the gift to be dependent upon the occurrence of the event during this period, rather than during his lifetime." Here, as we have seen, the gift is effective to George C. Young as and of the date of the death of Ralph Clark Young, and is not postponed to a future date, and is not limited upon the contingency of any after event.

Viewed in the light of the law that the right involved herein has its inception as and of the date of the death of Ralph Clark Young, the decisions relied upon by the respondent establish the error of the ruling of the court involved upon this appeal. See Marvel v. Wilmington Trust Co., supra, and Small v. Marburg, 77 Md. 11, 25 A. 920, 922, where it is said, quoting from Jarman on Wills: "It has become an established rule that, where the bequest is simply to A., and, in case of his death, or if he dies, to B., A., surviving the testator, takes absolutely." The distinction is likewise made in Jarman on Wills, between a case where the possession, or right to possession vests as of the date of the death of the deceased, or is postponed to some future time. Schouler on Wills (6th Ed.) § 1040, thus states the rule: "If a bequest is to one person, and 'in case of his death', to another, the gift over takes effect prima facie only in the event of the prior legatee's death before the period of payment or distribution, agreeable to the rule which favors an early vesting and the prompt settlement of the decedent's estate."

A very well-considered case is that of Fischer v. Fischer, 75 N. J. Eq. 74, 71 A. 488. It is there said: "A bequest to one and in case of his death to another, the expression 'in case of his death' unexplained by the context refers to the event of death happening before the death of the testator." Further: "An absolute bequest to a person, followed by the expression 'in case of his death,' cannot be construed to mean 'at his death' or 'from his death'; the element of contingency being absent in that case, as no proper force could then be given to the expression, 'in case of.'"

Practically the holding of all the cases is summed up and set forth in the opinion found in the case of Carpenter v. Sangamon Loan & Trust Co., 229 Ill. 486, 82 N. E. 418, 419. From this case we quote the following: "The rule which we think controls is clearly stated in that portion of the opinion in the case of Britton v. Thornton, 112 U. S. 526, 5 S. Ct. 291, 28 L. Ed. 816, which reads as follows: 'When, indeed, a devise is made to one person in fee, and "in case of his death" to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. 2 Jarman on Wills, c. 48; Briggs v. Shaw, 9 Allen (Mass.) 516; Lord Cairns in O'Mahoney v. Burdett, L. R. 7 H. L. 388, 395. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator.'"

[12, 13] That the first clause of the will of Ralph Clark Young conveyed to George C. Young an absolute title to the insurance policy, is supported by the decision of this court in the Matter of the Estate of Mattley, also reported as Pinegar v. McGee (Cal. App.) 294 P. 37. In that case, just as in this, the fund represented by the insurance policy was paid to the estate of the testator, and it is held that under the will of the testator the legatee to whom the war risk insurance policy was bequeathed took the proceeds of the policy, and being deceased, distribution should be made to her estate. The words of the will expressing the thought of the testator as to the uses of the money to be made by Henry Ralph Siess, do not in any particular limit the absoluteness of the gift to the father of the deceased, George C. Young.

[14] From what we have said we think it is clear that the clause of the will under consideration presents only a case of substitution, and not of contingency, and under the law, being interpreted, and speaking as and of the date of the death of Ralph Clark Young, it must be held that all of the fund paid over by the government representing, or represented by the insurance policy, vested in and became the absolute property of George C. Young, and he being deceased at the date of distribution sought in this proceeding, distribution should be made to the estate of George C. Young and to those entitled to take under and through him.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

I concur: PRESTON, P. J.

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115 Cal.App. 374

GUILD v. BROWN et al.

Civ. 7394.

District Court of Appeal, First District, Division 1, California.

July 8, 1931.

Rehearing Denied Aug. 7, 1931. Hearing Denied by Supreme Court Aug. 31, 1931.

Automobiles 🔑197(1).

Admiral in United States Navy *held* not liable, under respondeat superior doctrine, for negligence of enlisted man acting as chauffeur in driving government automobile on return to headquarters after delivering admiral to private club.

> Driver of automobile at time of accident was enlisted man in United States Navy, and his detail on shore duty embraced duties of chauffeur, including duty to operate service automobiles as directed. Driver at appointed time, and pursuant to order, drove admiral to private club where he left him, and, on return to headquarters, collision in question occurred. Both enlisted man and admiral served under same employer, though each had different status and different duties to perform. Automobile had been placed at disposal of admiral by governmental authority which permitted its use for whatever purpose the admiral might determine.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Eva R. Guild against W. F. Brown and another. Judgment for the plaintiff, and the defendant Thomas Washington appeals.

Reversed.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for appellant.

Crozier C. Culp and Lynn W. Culp, Sr., both of Oakland, for respondent.

PARKER, Justice pro tem.

The action is to recover damages claimed as a result of personal injuries and injury to personal property incurred as the result of an automobile accident. In the court below judgment went for the plaintiff and against both the defendants. The appeal is prosecuted by the defendant Washington. The question of negligence is not an issue on this appeal, nor does the question of damages enter herein. The facts of the case are undisputed in the main, and the question here presented may be more accurately stated following a general outline of the facts.

The appellant Washington is, and was at the times herein noted, an admiral in the United States Navy and was at the said times assigned as commandant of the Twelfth Naval District of the United States, which said district embraced the territory wherein the happenings to be related occurred. The defendant Brown is and was at all of the said times an enlisted man in the United States Navy. The defendant Brown under orders, of which hereinafter, was acting as chauffeur for the appellant, the admiral, on the day in question. The car which he was operating was the property of the United States government. The admiral and his chauffeur left the navy headquarters at San Francisco en route to the Bohemian Grove, at which latter place was maintained a clubhouse as an adjunct of the Bohemian Club. The admiral was a member of this club, and his attendance at the place was as a member and in no wise connected with the naval department or with any other department of the federal government. After delivering the admiral safely to his destination, the chauffeur proceeded to return to headquarters as originally directed and ordered. It was on his return, while the admiral was not with him, that the car driven by the chauffeur collided with the car of plaintiff, as a result of which this action was brought.

The only question is whether or not there was such a relationship between appellant Washington and the enlisted man Brown on the day and at the time and place in question as would render appellant liable in damages to the plaintiff for the admitted negligence of Brown, the chauffeur. The question is one not free from difficulty for two reasons: First, there is little precedent from the standpoint of factual similitude; secondly, the underlying principles formerly controlling have, through a process of statutory enactment both substantive and procedural, and judicial application, become sufficiently elastic to justify almost any conceivable solution. It seems elementary, however, that no liability can attach to the appellant Washington unless it can be shown that there was some privity of individual relationship between him and the defendant Brown. It may, therefore, be well to establish the individual status of each regardless of the events in question.

Brown was an enlisted man in the navy, with the rating of machinist or machinist's mate, first class. By regular routine he had been assigned to shore duty through the proper authorities. His detail on shore embraced the duties of chauffeur. It was within his duties to operate the service automobiles as directed. Whatever the orders were in this respect, his obedience thereto was enjoined wholly by reason of his status, and not through any personal contract of service with any individual whom he might serve. If he had been ordered to take the car and drive to any store or business establishment to secure articles personal to his superior officer, he would have had no discretion to question the order. Whatever he did in the operation of said car pursuant to his orders, he did in the capacity of an enlisted man.

The automobile with which we are concerned was admittedly the property of the United States and assigned for use to naval headquarters of the Twelfth District. On the day prior to the day of the journey the admiral had notified his aide of his contemplated trip and requested the detail of the car and driver. Accordingly at the appointed time Brown appeared with the government car at division headquarters, with directions to drive the admiral to Bohemian Grove. No order was given by the admiral nor was Brown directed in any way by him as to where he should drive. All of this was embraced in his routine detail. The admiral simply stepped in the car and the journey began. The trip to the grove was completed, the admiral safely delivered at his destination, and the chauffeur started on his return to headquarters. His official detail was to deliver the admiral at Bohemian Grove and return to headquarters.

Coming then to the status of the appellant. He was a member of the same navy as the defendant Brown. Each was bounden to a common authority, and basically there was no difference in the status of either. Their common vocation was with the navy. Though of different rank each served under the same general regulations and to the accomplishment of a common end. While their duties were under a common authority, yet in the performance of these duties one was subordinate to the other, and in the scheme of things the enlisted man was subject to the orders and directions of the superior officer. In its strictest sense, however, the relation of master and servant did not exist.

The proper governmental authority had placed at the disposal of the admiral the automobile in question and a likewise properly functioning agency had permitted its use for whatever purpose the admiral might determine. Respondent concedes that had the accident happened while the government car was on an official trip engaged in business directly pertaining to the administration of the admiral's business then no personal liability on the admiral would have resulted. But, contends respondent, the admiral had withdrawn himself from his office or his rank for the time being and was engaged wholly in his private affairs. Let us concede this for the sake of argument. Then it necessarily follows that we must fix the time of this claimed withdrawal. If for the purposes of this vacation the admiral stepped aside from his rank and official position, the transition occurred at the time he stepped into the car at the commencement of his journey. He was from that time on the guest of the naval department. He was either such guest or else he was the admiral fully functioning as such and in the discharge of his duties. There can be no middle ground. Conceding still the private nature of his journey, it follows that as an individual he had no control or authority over the chauffeur with respect to his employment or discharge or his conduct. If there had been a breach of discipline or any insubordination displayed by the chauffeur on the journey, the power or right to punish or discharge him would have to be traced back to the regulations of the service.

The only claim of respondent to sustain the judgment of the court below is on the theory of respondeat superior. Having discussed the relationship of the parties, we may then apply the rule relied on thereto.

In the case of Moss v. Chronicle Publishing Co., 201 Cal. 610, 258 P. 88, 90, 55 A. L. R. 1258, the court quotes approvingly from other holdings of the same tribunal. We find therein this statement: " 'In other words, the application of the doctrine of respondeat superior in any given case depends upon the power of control which the superior possesses, and which for the protection of third persons he is required to exercise, over the conduct and activities of his subordinates. Consequently the doctrine has application only in cases where the power of control exists, and such power does not exist in a situation where the special employer has no voice in the selection or retention of the negligent subordinate.' "

Again, quoting from 39 Corpus Juris, § 1462, p. 1275: "To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary cooperation where the work furnished is part of a larger operation."

In Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241, 243, speaking on the doctrine under discussion here, the court states: "In such a situation, however, it is obvious that it is necessary to ascertain who was the master at the very time of the negligent act complained of. This is so, for the doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the very time and in respect to the very thing out of which the injury arose."

While the facts before us in the instant case do not parallel a case of hiring or lending, nevertheless in as far as the control of the servant goes, there is more than a passing analogy.

Quoting from Billig v. Southern Pacific Co., supra, we find: "It would appear, therefore, to be the rule in this state that, when a master hires out, under a rental agreement, the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner, and not that of the hirer, of the instrumentality." (Citing cases.)

In the instant case any control or authority that the admiral had over Brown necessarily arose out of the naval regulations bearing on the particular situation. To repeat, if it be conceded that both men were on official duty covering the trip, then it is further conceded that no theory of respondeat superior has application under the facts.

The complicating feature is the fact that as admiral the appellant remained the superior officer of the enlisted man; but this was entirely independent of the transaction under review. But if we accept the theory of the respondent and of the court below that appellant had completely disconnected himself from the service, we cannot accede to the contention that though in fact removed from the service, yet for the purposes of fixing a liability he was still in control of the chauffeur solely by reason of his rank in that service. We can see no difference in the facts of the case than in a case where the admiral had retired from active service and had completely withdrawn himself from the service and after retirement had been a visitor at headquarters and the officer in command had detailed an enlisted man to escort him to his home. Surely, if in such a case the enlisted man upon his return from his trip, homeward bound, had been guilty of a wrongful or negligent act in the handling of the car, there would be no contention that the retired officer was liable under any doctrine.

Summing up the facts as coming within the rules of law stated, we find Brown, an enlisted man, bound to his employer, the government, pursuant to his enlistment and the regulations governing, and assigned to chauffeur duty. He is ordered in the regular course of his employment to drive the car to Bohemian Grove and to carry as a passenger the admiral, the appellant herein. He is neither hired nor loaned to the appellant. He is specifically in the service of his master performing no service for appellant as master, but always within the terms of his own employment and subject only to the control of his own master throughout. We can conceive of no sound principle of law that renders appellant liable for the acts of Brown upon his return trip.

Much is said by respondent of the fact that when the admiral was delivered at the grove he instructed Brown to return and gave him money with which to buy his lunch. The instruction to return home was pursuant to the detail. And if the relationship under the skin between the colonel's lady and her maid still holds, there was perhaps sufficient subcutaneous relation between the admiral and the chauffeur to break down the barrier of rank to the extent at least of permitting this friendly courtesy.

In the case of Dowler v. Johnson, a New York case, found in 225 N. Y. 39, 121 N. E. 487, 3 A. L. R. at page 146, it is said: "We do not doubt the rule invoked by counsel for the defendant, and sustained by superabundant citations, that public officers are not liable for the negligence of their subordinates unless they co-operate in the act complained of, or direct or encourage it."

There remains another feature of the case that must be considered. The appellant was the commandant of the Twelfth Naval District. His duties were to some extent general within his district and it will be unnecessary to enumerate them. He was on duty twenty-four hours a day under the regulations and at any place or point within the district. Bohemian Grove was within the district. Any official business that it was necessary to transact with him by any member of the staff or of the department could have been transacted at Bohemian Grove, and while, perhaps, the cares of his station might have been momentarily forgotten in this retreat, he was still on duty. The record offers no contradiction of this direct evidence and the trial court was without right to ignore it.

He was not on leave of absence, and if he chose by way of respite to depart from the surroundings nominally designated as headquarters, he in no sense assumed the status of a civilian. The various branches of the government, state and federal, are necessarily knit together in close formation, and it hardly seems in comport with the comity existing to attempt to draw too close lines regarding the technical status of those engaged in the public service.

It seems to be taken for granted in these times that the main thing in every case of accident is to find some one able to respond to the claim of damage. And following this out the ancient doctrines of the law have been twisted and distorted in an endeavor to dole out damages to every unfortunate person injured, regardless of the true principles upon which liability rests.

It is our opinion that the judgment should be reversed, and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

115 Cal.App. 400

SCOTT v. SHAW (two cases).

Civ. 6666.

District Court of Appeal, Second District, Division 1, California.

July 9, 1931.

1. Automobiles ⚷245(8).

Evidence that motorist striking four year old boy crossing street, was not watching street or did not have automobile under proper control, *held* for jury.

> There was evidence from which jury might have found that defendant motorist drove eighty-eight to one hundred thirty-two feet, while child could be seen in street, before defendant arrived within forty feet of child; that child and defendant went on, latter swerving to one side, then over to curb on other side of street, striking child; and that, just before child's and defendant's paths crossed, defendant's brakes were heard for first time.

2. Automobiles ⚷150.

It was duty of motorist to watch street.

3. Appeal and error ⚷110.

No appeal is authorized from order denying motion for new trial.

Appeals from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Actions, consolidated pursuant to stipulation, by Andrew Scott, by his guardian ad litem Ruth J. Scott, and by Ruth J. Scott, in her own right, against Louis R. Shaw. From a judgment of nonsuit and an order denying a new trial, plaintiffs appeal.

Judgment of nonsuit reversed. Appeal from order denying motion for new trial dismissed.

Nimmo, Leighton & Heath and Mark A. Hall, all of Los Angeles, for appellants.

Kidd, Schell & Delamer, of Los Angeles (Patrick F. Kirby, of Los Angeles, of counsel), for respondent.

BISHOP, Justice pro tem.

Andrew Scott, aged four years, was struck by an automobile driven by defendant on a public highway in Los Angeles city. By his guardian ad litem, Andrew brought suit to recover for the injuries he sustained, and in a separate action his mother sought reimbursement for the expenses she incurred because of his injuries. Pursuant to stipulation, the actions were consolidated and proceeded to trial. From a judgment of nonsuit and an order denying them new trials, both plaintiffs appeal. Because there is evidence which would warrant the jury in finding that the defendant drove negligently and that his negligence was the proximate cause of the accident, the motion for a nonsuit should not have been granted.

From the evidence the jury may well have seen this picture: Andrew and his nurse with his little sister Jean, who is just out of school for the noon recess, are walking south along the east side of Burlington avenue, between Acacia and Maryland streets. Jean, six years old, runs across Burlington avenue to the opposite side. A few seconds more and Andrew breaks away from his nurse, runs around the end of an automobile parked obliquely to the curb and out into the street. When fifteen feet beyond the automobile he hesitates, then goes on, his course being south of a direct line across the street. Burlington avenue, between Acacia and Maryland streets, drops toward the south at a grade of 7.8 per cent. Down Burlington avenue the defendant is driving a Studebaker sedan, first seen by the nurse when it is just south of Acacia street, regarded again when about forty feet north of the path of the boy and then as it shuts out the boy from her sight. Its speed, the jury could believe, was twenty-eight to thirty miles an hour from the time it was first noticed until forty feet from the boy's path. At the time the car driven by defendant was forty feet away from Andrew, he was at the point fifteen feet beyond the parked car. As it is an exceptional college athlete who can run thirty feet in one second, i. e., a hundred yards in ten seconds, the jury may well have thought that it took Andrew, four years of age and hesitating at the end of the distance, two or three seconds to run the fifteen feet he was in clear sight of any one looking at him from the defendant's direction; and that defendant, consequently, drove eighty-eight to one hundred thirty-two feet while Andrew could be seen in the street before he arrived within forty feet of him. Andrew went on and so did defendant, swerving first to the west, then over to the curb on the east side of the street, striking Andrew, breaking his leg, as their paths crossed. Just before the point of intersection defendant's brakes "squealed" for the first time.

[1-3] From this picture the jury could with reason conclude that defendant either was not watching the street, which it was his duty to do (Rush v. Lagomarsino [1925] 196 Cal. 308, 237 P. 1066), or did not have his car under that control which the law requires of a driver (Reaugh v. Cudahy Packing Co. (1922) 189 Cal. 335, 208 P. 125). If failing in either duty, his failure was negligence proximately causing the accident. It was error to grant a nonsuit, and the judgment so entered is reversed. As an appeal is not authorized from an order denying a motion for a new trial, the appeal from that order is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

115 Cal.App. 447

PEOPLE v. JENNERJOHN.

Cr. 2085.

District Court of Appeal, Second District, Division 2, California.

July 10, 1931.

Larceny ⚷65.

Evidence *held* sufficient to sustain conviction for grand theft of automobile (Pen. Code, § 31).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Harry Jennerjohn was convicted of grand theft, and he appeals.

Affirmed.

Jones, Tatlow & Meloy, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

Appellant was charged with the crime of grand theft, to wit: Stealing an automobile, in count one of the information, and with violation of section 146 of the California Vehicle Act (St. 1923, p. 564), under a second count. The second count was dismissed, but appellant was convicted under the first count by trial without a jury. From this judgment, he appeals, assigning but one ground of appeal, to wit, the insufficiency of the evidence to sustain the judgment.

The evidence showed that on or about the 19th day of January, 1931, the prosecuting witness, Francisco Ledesma, parked his Ford touring car at Ninth and Soto streets, in the city of Los Angeles, at about 9:30 in the morning; he was away from it for about five minutes, and, upon his return, found it was gone; the car was found by police officer Bradley in an open field about 11 a. m. of the same day, with the defendant standing beside the automobile. The police officer testified that the spare tire was on the ground, the battery out of its container, the carburetor removed from the motor and lying on the running board, gasoline was spilled on the running board, a couple of wrenches and a pair of pliers were lying on the running board, and all the nuts were taken off the bolts that held the tires on. He further stated that he found none of the nuts lying about that had been removed from the rims of the tires, but that after he had searched the defendant he found six or seven nuts in his pocket, such as are used on the rims of Ford automobiles, together with a few short bolts, keys, and other miscellaneous objects; that defendant's hands were dirty and greasy, and that "it was fresh and wet grease and oil." He further testified that he told defendant to get into his car and drive over to the boulevard, and that defendant then entered an old Ford touring car that was standing beside the road; that he, the witness, then called another police officer, who came to the field where the Ledesma car was standing; that the second police officer told the boy "it looked pretty bad for him, and Jennerjohn said it didn't look so good," and that "we checked the parts for prints and we looked at the parts of the car lying on the ground, and felt of the radiator and the radiator was hot."

Another witness, a deputy sheriff, testified that on the evening of the same day, in the presence of another deputy sheriff, the defendant made a statement to him in which he related his actions that day from the time the car was stolen until it was found. His statement was as follows: That defendant, together with one Harold Provin, left their home about 9 o'clock in the morning, defendant driving his Cadillac roadster, and Provin driving the old Ford touring car that was standing beside the road at the entrance of the field where the Ledesma car was found; that they drove to 9512 Laurel avenue, where Provin left his Ford touring car, both of them getting into appellant's Cadillac; that they drove north on Alameda street to the vicinity of the Southern Pacific freight sheds on North Alameda, where they "tried to start a Ford touring car they found sitting there," and that "they couldn't get that one because it was locked, the steering wheel was locked, and they had no keys for it." That they both got back in the Cadillac and drove through Boyle Heights to the vicinity of Ninth and Soto, where appellant stopped his Cadillac, Provin getting out and entering the parking lot of

Sears & Roebuck; that appellant then drove south on Soto street to 9512 Laurel avenue; that, while he was driving along Soto street, Provin passed him driving the Ledesma automobile; that when they arrived at the address on Laurel avenue, appellant parked his automobile and got into Provin's old Ford touring car; that they both turned around, going south on Alameda street to Dominguez road, turned to the left and went about a mile across the railroad track to the entrance of the pasture or field where the Ledesma car was found; that appellant then stated he parked Provin's Ford touring car beside the road, Provin driving the other car (the Ledesma car) about seven or eight hundred feet south of Dominguez road beside the Edison Company high line, and "they both started to take the tires off, and they took the battery out of it, the manifold, the carburetor, and loosened the nuts on the radiator, and about that time, he said, Provin saw a fellow watching them and they figured it was an officer, so Provin ran across a pasture and up over a storm drain and across the tracks and was on his way. And he said this man kept watching him and he finally walked away from the car (the Ledesma car) toward where he had his Ford touring car parked, when he was arrested." The witness then stated that later on that evening appellant repeated this statement in the presence of Provin and the two deputy sheriffs, and that Provin denied any connection with it whatsoever.

At the trial of the case, appellant denied having made the statement as related above by the deputy sheriff. He accounted for his actions on the day of the theft by testifying that on the morning of the 19th he was driving his Cadillac down to the place where he was employed; that he met Provin about Ninety-Seventh and Hickory street, and the latter wanted him to stop and fix his car, but that defendant told him he did not have time to do so as he had to see his employer on St. Louis street: that Provin then asked defendant to take him up to North Main street, which defendant did; that Provin went into a place, apparently looking for work, but soon came out again, and that he and Provin then drove to Ninth and Soto, where he left Provin at the entrance of Sears & Roebuck's store; that he, the appellant, then proceeded down Soto, and that Provin passed him in a Ford automobile (the Ledesma car); that when they reached Ninety-Fifth and Laurel avenue Provin told him to "take my Ford touring car and find out what is wrong with it and follow me"; that appellant was then on his way to Virginia City to get an estimate on some cars for his employer; that Provin pulled into a field with the Ford automobile (the Ledesma Ford) and told defendant to meet him on the way back from Virginia City; that when he, appellant, returned he found Provin on the car tracks; that appellant "walked—got within 50 feet of the car, that is" (the Ledesma car) "when Mr. Bradley drove up in his Ford coupe in front of my car. I was there just about a second, walked around the car, looked down underneath the hood, turned around and come back out again. Mr. Bradley encountered me and he asked me what I was doing. I said 'I am looking at the car.' He says, 'Do you know who that car belongs to?' I said, 'I do not.' He says, 'Let's go down and take a look at it, so we walked back and took a look at it and found parts of the car'; that the officer 'asked me whether I had done it, whether I had taken anything off of it, and I told him no, I hadn't, because I had just arrived.'" The appellant further testified that he did not drive the Ledesma car or take any parts away from it; that he was an automobile mechanic, and that his business was appraising automobiles for secondhand places.

The evidence in this case, exclusive of appellant's extrajudicial statements to the deputy sheriffs, points very strongly to appellant's guilt. He testified that Provin's own car had been left earlier in the morning at the address on Laurel avenue, and yet a short time later Provin passed him on Soto street driving another Ford automobile, and that later on he, appellant, drove Provin's own car while Provin drove the Ledesma car to the field at which the Ledesma car was found. This testimony itself tends to support the conclusion that appellant was knowingly assisting in the theft, and, by reason thereof, was guilty of the crime charged. Pen. Code, § 31. Furthermore, appellant was found in the immediate neighborhood of the stolen car shortly after it had been stolen; the car had a number of its parts removed, the radiator was still hot, appellant's hands were dirty, and, according to one witness, it was "fresh and wet grease and oil." In the case of People v. Roldan, 93 Cal. App. 677, 270 P. 253, 254, it is said: "The firmly established rule of law is that, 'when a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.' People v. Cataline, 54 Cal. App. 36, 200 P. 1060."

It cannot be said, after a consideration of all the testimony in this case, that there was not sufficient evidence to sustain the judgment.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

115 Cal.App. 261

FIRST MORTGAGE CORPORATION v. BECK.

Civ. 7693.

District Court of Appeal, First District, Division 1, California.

June 29, 1931.

Appeal and error 🔑761.

Appellate court need not assume burden of applying to facts of case principles of law discussed by appellant.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the First Mortgage Corporation against Albert Beck, in which the defendant filed cross-complaint against the plaintiff and the Guardian Investment Corporation of California. From an adverse judgment, the plaintiff and the cross-defendant Guardian Investment Corporation of California appeal.

Affirmed.

Lewis Cruickshank, of Los Angeles, for appellants.

Joseph Scott and A. G. Ritter, both of Los Angeles, for respondent.

MURPHEY, Justice pro tem.

This is an action based upon a promissory note made, executed and delivered by the defendant to the plaintiff on the 7th day of July, 1926, due on or before thirty days after date. At the same time and place, plaintiff delivered to defendant a receipt in the following words:

"Received of Albert Beck Seventy Five Thousand Dollars. Evidenced by a promissory note of even date due in thirty days. It being understood that we will accept in lieu of said note, contracts on lots or orange groves that are worth one hundred cents on the ~~dollar from a loan standpoint.~~ Provided said contracts are offered for exchange on or before thirty days and draw interest at not less than seven per cent. (Marked out-C. W. Harrison.)

"First Mortgage Corporation
"By (Sgd) C. W. Harrison, Gen'l Mgr."

The promissory note and the property named in the receipt were given and received according to the plaintiff's contention for 600 shares of common and 600 shares of preferred stock of the Guardian Investment Corporation, cross-defendant and appellant in this case. The record shows that no stock was ever delivered to the defendant Beck. The record discloses that the negotiations leading up to the actual business transaction so far as the plaintiff corporation and the Guardian Investment Corporation are concerned were handled by Harrison representing both corporations. In the course of the transaction Beck urged thereto by Harrison had not only delivered to him the promissory note, but also deeds and contracts of the value of $75,000 as claimed by Beck and $40,000 claimed by Harrison. The transaction involving the delivery of the promissory note and the receipt hereinabove referred to was consummated after office hours on the date of their execution. There was an actual passing by way of consideration from plaintiff to the defendant of nothing other than the papers involved in the transaction. It may be said that the circumstances of the entire transaction are enveloped in an atmosphere of dissimulation not at all creditable to the corporations represented in the transaction by Harrison.

The court found, and the true history of the events are reflected in the findings, as follows:

"That it is not true that at the time of the execution and delivery of said promissory note that defendant deposited or pledged with the plaintiff herein as collateral security for the payment thereof, or otherwise, or at all, the following described property, or any part thereof, to wit: Six Hundred (600) shares of preferred stock of Guardian Investment Corporation of California, evidenced by Certificate No. 76; or Six Hundred (600) shares of common stock of Guardian Investment Corporation of California, evidenced by Certificate No. 57; or any stock of said corporation, or any certificate, or any other property of any kind or nature, whatsoever, or at all. * * *

"That said plaintiff gave no consideration of any kind to defendant for said note, and never became the owner of said note; that defendant has never received any consideration of any kind for said note. * * *

"That * * * said note as set forth in said complaint was given to said plaintiff solely for the purpose of said plaintiff holding the same as escrow holder as the agent of said defendant until said defendant should deposit with said plaintiff certain property belonging to defendant in lieu of said promissory note; that it was at all times understood and agreed by and between plaintiff and said defendant that said note was held and to be held by said plaintiff solely for said purpose, and was to be returned to said defendant upon demand in case said escrow was not completed, or in case said defendant did not deliver to said plaintiff said property to be deposited with said plaintiff in lieu of said note; that thereafter said defendant did deposit with said plaintiff all the said personal and real property hereinabove referred to. * * *

"That thereafter, and on or about the 13th day of August, 1926, said cross-complainant deposited with said cross-defendant deeds to said real property, and assignments of said contracts, except said Mazetti contract, but that at said time said cross-complainant at the request of said cross-defendant made and executed a deed to said property covered by said Mazetti contract. * * * That at the request of said cross-defendant, First Mortgage Corporation, said deeds and assignments of contract were executed by the cross-complainant in the name of Guardian Investment Corporation of California. That thereupon said First Mortgage Corporation caused to be recorded said deeds without authority or permission of said cross-complainant and retained said assignment of contract and refused, and has at all times refused to return the same to said cross-complainant. * * *

"That it is true that on or about the 7th day of July, 1926, said cross-defendants First Mortgage Corporation and Guardian Investment Corporation of California, wrongfully, fraudulently and unlawfully represented to said cross-complainant that if cross-complainant would make and execute to said First Mortgage Corporation his promissory note in the sum of $75,000, and would thereafter deposit with said First Mortgage Corporation certain deeds and contracts to real property owned by said cross-complainant, and hereinafter described, that said First Mortgage Corporation thereupon, upon the deposit of said deeds and contracts, would return to said cross-complainant said promissory note, and would retain and keep said deeds and said assignments of contract, and in exchange therefor would give to said cross-complainant Six Hundred (600) shares of common and Six Hundred (600) shares of preferred stock of Guardian Investment Corporation of California, and that upon delivery of said stock to said plaintiff said cross-complainant would become the owner of said stock and said cross-defendant would become the owner of said real estate and said contracts for the sale of said real estate, and that in addition thereto said cross-defendant would cause said cross-complainant to be elected a member of the board of directors of said Guardian Investment Corporation of California; that said real property and said contracts are described as follows, to-wit. * * *" Then follows a description of the contracts not necessary to be included herein.

"That it is true that said cross-complainant never at any time received from said cross-defendants, or either of them, any of said stock in said corporation, and never was made or elected a director of said corporation, or received said Two Hundred and Fifty shares of stock, or anything of value, whatsoever from said cross-defendants or any of them for said promissory note or said property, and that said promissory note and said property were received by said cross-defendants without any consideration of any kind whatsoever, and that said cross-complainant was induced by said cross-defendants to turn over said promissory note and property to said cross-defendants by reason of the false and fraudulent statements of said cross-defendants hereinabove referred to. * * *

"The Court finds that it is not true that said cross-defendant, First Mortgage Corporation, was to receive property and contracts satisfactory and acceptable to said cross-defendant, First Mortgage Corporation, in return for said promissory note, but that it is true that it was agreed between said cross-defendant and said cross-complainant that said cross-defendant should return said promissory note upon receiving said deeds and contracts and assignments of contract hereinbefore described.

"That it is not true that said cross-complainant ever at any time pledged any property with said cross-defendant First Mortgage Corporation, or either of said cross-defendants, to secure the payment of said promissory note.

"That it is not true that cross-complainant at any time instructed the Guardian Investment Corporation of California for or in his behalf, or at all, to record said deeds hereinabove described and referred to, or either of them, or otherwise or at all."

That there should be and are contradictions in the record with respect to the questions of fact involved in this litigation, as reflected in the findings herein set out, goes without saying; nevertheless there is abundant evidence in the record to fully sustain the findings of the trial court. A careful consideration of the entire record has convinced us that there is no substantial merit in the appeal of the plaintiff or cross-defendant.

In so far as the law of the case is concerned, appellant has written an elaborate dissertation on fraud, rescission, alternative demands, modification of contracts, but has not assisted the court by making or attempting to make any application of the principles of law thus discussed, to the facts of the instant case, and we are satisfied after reading the cases cited and from our knowledge of the facts as adduced by the evidence in this case that no application favorable to the contention of the corporations, parties to this litigation, is possible. There is no duty incumbent upon the appellate courts to assume this burden, and this is particularly so under the facts and circumstances developed in this case, as any such effort, as above indicated, must necessarily prove futile and fruitless. As is well said in the case of Neff v. Engler, 205 Cal. 484, 271 P. 744, 747: "There is contained in the record here competent and persuasive evidence in support of the findings and judgment. As might be anticipated in a case of this character, the testimony is in conflict as to whether defendants made the representations charged against them, but there is nevertheless sufficient evidence of a tangible character to uphold the conclusions of the trial court, to meet the requirements as to the degree of proof required to support findings of fraud, and to establish the misrepresentations found by the court to have actually been made."

In this case the rescission was promptly made and the misrepresentations substantial, and the deal was actually consummated through the activities of and with the knowledge of both plaintiff and the cross-defendant.

No error appearing in the record, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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115 Cal.App. 348

In re MITCHELL'S ESTATE.

REED et al. v. McCARTHY.

Civ. 886.

District Court of Appeal, Fourth District, California.

July 6, 1931.

1. Wills 🔑203.

Decree of final distribution *held* not such adjudication of title to property of estate as prevents court from admitting to probate will left by decedent (Code Civ. Proc. § 1666).

2. Wills 🔑431.

Order dismissing proceeding to establish lost or destroyed will, refusing to admit will to probate did not bar subsequent proceedings to admit to probate will later found.

3. Wills 🔑431.

Court's conclusion that will alleged to have been lost had actually been destroyed by decedent before death *held* not conclusive upon will subsequently found.

4. Executors and administrators 🔑33.

Order discharging public administrator *held* not appealable.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Proceeding between Edwin Reed, administrator, and James Mitchell, contestants, and Marie L. McCarthy, proponent, for the probate of the will of W. O. Mitchell, deceased. From an order refusing to admit the will to probate, proponent appeals.

Reversed.

Claude M. Shell and Jesse George, both of San Diego, for appellant.

Hamilton, Lindley & Higgins, of San Diego, for respondents.

BARNARD, P. J.

This is an appeal from an order refusing to admit an alleged will to probate. W. O. Mitchell died on January 24, 1927, and Edwin Reed, public administrator of the county of San Diego, was appointed administrator of his estate on February 11, 1927. On January 13, 1928, Marie L. McCarthy filed in the same proceeding a petition to probate an alleged lost or destroyed will of the said W. O. Mitchell, a copy of said will being set forth as follows:

"August 31, 1925

"Marie L. McCarthy
"Katherine C. McCarthy
"Marie C. McCarthy
"Helen M. McCarthy
"John McCarthy

"I leave everything, property and valuables to Marie L. McCarthy.

"[Signed] W. O. Mitchell."

After a hearing thereon, the court, on September 5, 1928, entered an order dismissing said petition, the court finding, among other things, that the contents of the alleged will had not been proved by two credible witnesses; that the said writing was in the possession of W. O. Mitchell prior to his death and was not found among his effects thereafter; and that the same cannot now be found. As a conclusion of law, the court found that the purported will was destroyed by Mitchell in his lifetime, and that the same was not in existence at the time of his death. An appeal was taken from the order dismissing the petition. On January 11, 1929, Marie L. McCarthy, in a separate proceeding in the superior court of San Diego county, filed a petition for the probate of an alleged will alleging that W. O. Mitchell left a will "which is herewith presented." A copy of the purported will was not set forth in the petition, and the record does not show that any purported will was filed with the clerk of the court. On September 5, 1929, an order was entered abating this proceeding, the court stating that it appeared that the parties and issues in that action were identical with the parties and issues in the previous proceeding. On September 5, 1929, Marie L. McCarthy moved the court to set aside the decree and order of September 5, 1928, upon the ground that since the making of said order the will of W. O. Mitchell had been found. On September 16, 1929, the appeal in the first proceeding was dismissed by the Supreme Court for want of prosecution.

On December 30, 1929, Marie L. McCarthy filed a "notice of motion to reopen the matter of the petition to probate will and permit another petition to be filed," in which it is stated that on a certain date she would move the court to reopen the administration of said estate and permit her to file a petition for the probate of the last will of W. O. Mitchell, deceased, "discovered and produced since the appointment of the public administrator, and since the findings and judgment herein dismissing the petition of the same said petitioner for probate of a lost will." Attached thereto appears an order signed by the trial judge granting her permission to present this motion. Also attached thereto is a "Petition for Probate of Will discovered after letters issued herein and for revocation of said letters and appointment of Petitioner as Administrator with Will annexed." This petition sets forth a copy of the purported will, as follows:

"August 31st, 1925

"Marie L. McCarthy
"Katherine McCarthy
"Marie M. McCarthy
"John McCarthy

"I leave everything, property and valuables to Marie L. McCarthy.

"[Signed] W. O. Mitchell.

"Witness: D. J. Hocking
"Witness: Dorothy K. Wollgast."

Among other things, this petition alleges the following: "That the said will was lost and was not discovered until long after the Public Administrator was appointed herein, nor until on or about the 10th day of January, 1929, and has not been presented herein prior to this time because your petitioner through mistake caused it to be presented in an independent proceeding, No. 16194."

The public administrator filed a motion to strike from the files "that certain petition for leave to probate an alleged will of W. O. Mitchell, deceased," on the ground that this petition or motion had been denied on September 6, 1929, and on the further ground that the matter was res adjudicata. Prior to the hearing on these two motions, an order was entered settling the final account of the administrator, and ordering final distribution of the estate. After a hearing on the motions, the court entered an order refusing permission to probate the alleged will. The trial judge certified that these motions were made, heard, and decided upon the papers, records, and files in this proceeding and upon the papers, records, and files in the other proceeding started by Marie L. McCarthy on January 11, 1929, without oral or other evidence being received. From this last order refusing to admit to probate the alleged will of W. O. Mitchell, deceased, Marie L. McCarthy has appealed.

The respondent Mitchell has made no appearance in this court, but the respondent public administrator has filed a brief. The only point raised is that admission to probate of the will now offered by the appellant has been previously refused, and that the matter is res adjudicata. In this connection, it is urged that the decree of distribution, having become final, is, under section 1666 of the Code of Civil Procedure, conclusive. It is further urged that, since the appeal from the previous order of the court, refusing to admit to probate the alleged lost or destroyed will, was later dismissed, such dismissal amounts to an affirmation of the order of the trial court.

[1] That a decree of final distribution is not such an adjudication of the title to the property of an estate as prevents the court from admitting to probate a will left by the decedent was decided in Re Estate of Walker, 160 Cal. 547, 117 P. 510, 511, 36 L. R. A. (N. S.) 89, a case in which the essential facts are quite similar to the case at bar. In that case, the court said: "The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself, and not to those who under it may have derived an unconscionable advantage through fraud, accident, or mistake. Such questions the probate court does not possess the requisite machinery to try. They belong in a court of equity. Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, 63 Cal. 473; Wickersham v. Comerford, 96 Cal. 433, 31 P. 358. Nor are we here called on to anticipate the decision of any such question which may in future arise. It is sufficient on this appeal to say that it was proper for the probate court to establish the last will of the deceased to the end that those entitled to take under that will might be in a position to prosecute their rights in equity."

[2, 3] Nor do we think that the prior proceedings herein constituted an adjudication of the issues here presented. The former order refusing to admit a will to probate, which later became final, was made in connection with an effort to establish a lost or destroyed will. That order was based upon a failure to establish the existence and contents of such a will, and the conclusion was drawn by the court that the will had been destroyed by the deceased prior to his death. If the will was actually in existence and was later found, there is no reason why the same cannot be established and admitted to probate. The conclusion of the trial court that the will alleged to have been lost had actually been destroyed by the decedent prior to his death was based upon the evidence then before the court, and is not conclusive upon a will subsequently found. It also appears that the will subsequently offered and which it is alleged was subsequently found, is somewhat different from the will previously offered as the lost or destroyed will, the difference consisting in the names first set forth in the instrument, and in the fact that the will now offered in court purports to have been signed before two witnesses. It is entirely possible that the will set out in the first petition was destroyed by its maker, as inferred by the court, and that another will was made on the same day, in the presence of two attesting witnesses. The issue presented to the court in the first instance

was as to the existence, contents, and validity of what was claimed to be a lost or destroyed will. The issue finally presented was as to the validity of an instrument offered in court and claimed to be the last will of the deceased. No evidence was taken upon this question, and the same has never been decided by the trial court. This issue, not having been presented in the prior proceedings, was not settled by any of the prior orders. When the motion was made on September 5, 1929, to set aside the order of September 5, 1928, an appeal from that order was still pending.

[4] It appears that two days after the entry of the order refusing to admit to probate the will now offered, the court entered a decree discharging the administrator. The notice of appeal purports also to appeal from this order. Not only is that order not an appealable one, but the matter calls for no consideration, since the public administrator has no further interest in the proceedings. In re Estate of Walker, supra.

For the reasons given, the order appealed from is reversed.

We concur: MARKS, J.; GRIFFEN, Justice pro tem.

CITY OF LOS ANGELES v. ABBOTT et al.*

Civ. 7293.

District Court of Appeal, Second District, Division 2, California.

June 23, 1931.

Rehearing Granted July 23, 1931.

1. Eminent domain 🔑**246(3).**

City's compliance with injunction against prosecution of condemnation action and commencement of new action *held* abandonment of original action.

> After commencement of action in eminent domain by city, another action was brought against the city wherein a judgment was rendered enjoining the city from paying out any costs or expenses incurred in connection with improvement, because the ordinance of intention and the required notice were fatally defective and the proceedings null and void. Thereafter, city did not further prosecute action, but commenced a new action based on new proceedings.

2. Eminent domain 🔑**265(5).**

City's abandonment of condemnation action by commencement of new proceedings after original proceedings were declared invalid *held* to entitle property owner to costs and attorney's fees (Code Civ. Proc. § 1255a; Deering's Gen. Laws 1923, Act 8198, § 14).

> **Code Civ. Proc. § 1255a, in substance, authorizes plaintiff to abandon condemnation proceeding by serving on defendant and filing written notice of such abandonment, and provides for awarding to the defendant his costs and disbursements, including all necessary expenses incurred in preparing for trial and reasonable attorney's fees. Street Opening Act of 1903, § 14 (Deering's Gen. Laws, Act 8198) provides, in substance, that city council may at any time prior to payment of compensation abandon condemnation proceedings by ordinance and cause action to be dismissed without prejudice.**

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action in eminent domain by the City of Los Angeles against Sadie D. Griffith Abbott and others. From a judgment dismissing the action and awarding to the defendant Alice Virginia Hatfield her costs and reasonable attorney's fees, the plaintiff appeals.

Judgment affirmed.

Rehearing granted; THOMPSON, J. dissenting.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for appellant.

E. C. Pyle, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This is an appeal from a judgment of dismissal in a proceeding in eminent domain. Pursuant to ordinance of intention No. 45,501 (new series) a complaint in the usual form was filed November 24, 1923, seeking to condemn certain property, including that owned by the respondent for the purpose of opening, widening, and extending Mines avenue in the city of Los Angeles. On January 8, 1930, the defendant Alice Virginia Hatfield gave notice that on January 21 she would make a motion in the trial court for an order dismissing the proceeding on the ground that the same had been abandoned by the city. The motion was supported by the affidavit of one of her attorneys to the effect that the action had been abandoned and the plaintiff had brought another action in connection with the proceeding, and that the second suit was then pending. In opposition there was filed an affidavit by one of the deputy city attorneys in which it was set forth that on September 11, 1924, and before the cause had gone to judgment the O. T. Johnson Corporation had filed a complaint against the city of Los Angeles seeking to enjoin the city from prosecuting the action; and that subsequently a judg-

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*For subsequent opinion see 19 P.2d 47.

ment was rendered by the superior court by which the city was enjoined from paying out any "costs or expenses incurred in connection with the improvement provided for by ordinance No. 45,501 (new series)," and that thereafter an appeal was taken to the Supreme Court wherein the judgment of the trial court was affirmed, the decision being reported in volume 198 Cal., at page 308, 245 P. 164. The lower court made and rendered its judgment of dismissal based upon its finding that the plaintiff had abandoned the action and awarded the defendant her costs and reasonable attorney fees. The amount of attorney fees allowed does not appear from the transcript, and it does not appear that a motion to tax costs was made by the appellant.

It is now insisted by the appellant as follows:

1. There was no abandonment of the action by the city of Los Angeles because of lack of intent, and because the requirements for abandonment imposed by statute had not been complied with.

2. Granting an abandonment in fact, nevertheless it is not of such a character as to entitle the respondent to her attorney's fees.

3. The trial court erred in allowing attorney's fees because the appellant had previously been enjoined from paying them.

The last argument is concluded by the decision rendered by us in the case of City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Julia Fanta et al., respondents, 299 P. 807.

[1] Reducing the contentions which we have numbered 1 and 2 to their elementals, we may well consider whether there was in fact an abandonment, and, if so, whether under the law the abandonment is such that the respondent is entitled to recover attorneys' fees. The superior court determined that the ordinance of intention and the notice of public work were fatally defective and the proceedings were null and void. This judgment was affirmed by the Supreme Court. Johnson v. City of Los Angeles, 198 Cal. 308, 245 P. 164. Let us suppose that the city attorney had discovered the fatal error in the proceedings and of his own free will and accord had determined that it was his duty not to prosecute the action further, but to have new proceedings initiated. Could there exist any doubt concerning an actual abandonment of the action in the assumed situation? The question then remains whether, when compelled to desist by order of court on account of the invalidity of the proceedings, there is an abandonment. It is argued that since the proceedings were invalid there was nothing to abandon. But this can scarcely be true; there was prior to the judgment of dismissal an action pending, an attempt had been made to take the property of the defendant for public purposes and an end had to be put to the attempt—to the action. Abandon is not necessarily used in the sense of voluntarily relinquishing the effort, for we sometimes speak of abandoning the attack after discovery of an impregnable defense, or of abandoning the idea after learning of insurmountable difficulties in our path. No, the word no more suggests the thought of voluntarily letting go than it does of forsaking the effort by compulsion of circumstances. In the instant situation the commencement of a new action was evidence almost irrefutable of an actual abandonment.

[2] We next turn to inquire whether it was of such a character as to entitle the respondent to attorney's fees. We had occasion to comment upon the reason behind the enactment of section 1255a of the Code of Civil Procedure in City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Julia Fanta et al., respondents, supra, and reference may be had to that case and the authorities therein cited for a more detailed statement of the proposition that it is because in no sense of the word is the party defendant in a condemnation case responsible for the litigation and may be entirely unwilling to sell his property. Thus our natural sense of justice would seem to dictate the statement that, where he has been compelled to defend himself against an action for which he is in no wise answerable, the loss occasioned thereby in case of a discontinuance thereof should fall not upon his individual shoulders but upon the corporate plaintiff or upon the entire political subdivision. And it can make no difference to the conclusion that the relinquishment of the action has come about by reason of a change of heart on the part of the plaintiff or a mistake in the proceedings, for which (it may be repeated) the defendant is in no wise to blame. These thoughts should be borne in mind in any effort to construe the law enacted for the protection of the owner of property and with them in mind we read section 14 of the Street Opening Act of 1903 (Deering's Gen. Laws, 1923, p. 3317) as follows: "The city council may, at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings, by ordinance, and cause the said action to be dismissed, without prejudice; and if any of the assessments levied to pay the expense of the improvements, as hereinafter provided, shall have been actually paid in money at the time of such abandonment, the same shall be refunded to the persons by whom they were paid. If the proceedings be abandoned or the action dismissed no attorneys' fees shall be awarded the defendants or either or any of them."

The respondent argues that an abandonment brought about by the passage of an ordinance is the sole and only kind of abandonment which will entitle the defendant to attorney's fees when the proceeding is instituted under that act. In effect it is contended that the city council may grant or withhold the right to such fees by either passing or refusing to pass the ordinance. It is to be observed, however, that the concluding sentence of the section to the effect that no attorney's fees shall be paid in case of abandonment or dismissal was declared unconstitutional in the case of City of Los Angeles v. Cline, 40 Cal. App. 487, 181 P. 78, and in effect it was there determined that section 1255a, Code of Civil Procedure, was controlling in relation to the allowance of such fees. That section of the Code of Civil Procedure reads as follows: "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action."

With the concluding sentence of section 14 of the 1903 act eliminated, we find nothing inconsistent in the two provisions. The one authorizes the city council to abandon the proceedings and cause the dismissal of the action. The other fixes the conditions upon which attorney's fees will be allowed. It now becomes important to determine the meaning and purpose of the provision of section 1255a that the "plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment. * * *" Does this mean that an actual abandonment of the action in any other manner shall not entitle the defendant to his attorney's fees, or does it mean that the plaintiff may conclusively evidence an abandonment by such written notice? If it means the former, it is immediately apparent that it is without substantial significance, for the reason that an abandonment in fact such as the trial court found to exist in the instant cause might be, as it was here, followed by a failure or refusal to serve and file the written notice and the defendant cut off from his right to be made whole for fees by the neglect or determination of the plaintiff. In Silver Lake Power & Irrigation Co. v. City of Los Angeles, 32 Cal. App. 123, 162 P. 432, 433, we find expressions of the court, however, which throw light upon the language under consideration. In that case the plaintiff sought to dismiss the action under section 581 of the Code of Civil Procedure followed by a notice of its action served upon defendant and filed. The court said: "Viewing section 1255a as a valid enactment, then it appears that the only effect of a request to the clerk for a dismissal of the action and notice of such request to the opposite party would be to apprise the defendant in such a suit of the determination on the part of the plaintiff to abandon the action. Thereupon the defendant would be permitted to proceed as is provided by section 1255a and ask the court by a motion for a judgment of dismissal and for his costs. The procedure followed by the defendants, after they had been apprised that plaintiff had abandoned its action, was strictly in accordance with that outlined in the section under consideration." The trial court impliedly found, and we see no reason to view the matter differently, that the commencement of a new action was just as effective to apprise the defendant of an actual abandonment as would have been the notice mentioned in the section quoted. It must be remembered that we are not here dealing with the implied abandonment therein defined, but an actual desertion of the action.

It is insisted by appellant that the case of City of Los Angeles v. Hannon, 79 Cal. App. 669, 251 P. 247, is in point to the effect that there has not been such an abandonment as entitles respondent to her costs. An inspection of that case, however, will convince the reader that two main points were therein determined: First, that the trial court was not divested of jurisdiction to file its decision and enter its judgment by a delay of four years and seven months after trial and an order for judgment; second, that inasmuch as the statute provided only that failure to comply with section 1251 of the Code of Civil Procedure should constitute an implied abandonment we could not say as a matter of law that an abandonment should be implied from the delay.

Reliance is also placed by appellant upon City of Long Beach v. O'Donnell, 91 Cal. App. 760, 267 P. 585, but that case simply announces the rule that, since section 1255a was enacted to reimburse a defendant for attorney's fees which he has laid out, it did not apply to one who had employed an attorney on a contingent basis and had not in fact paid out or obligated himself for any fee.

We have examined the authorities cited from other jurisdictions, but we find them neither persuasive nor helpful, and for that reason decline to comment further upon them.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Benevolent Realty Holding Company, Defendant and Respondent. *

Civ. 7539, 7540.

District Court of Appeal, Second District, Division 2, California.

June 23, 1931.

Rehearing Granted July 23, 1931.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain and from an order denying motion to tax costs. Affirmed.

Rehearing granted; THOMPSON, J. dissenting.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom and C. N. Perkins, Deputy City Attys., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

A condemnation proceeding was pending in the lower court, which was terminated by a judgment of dismissal and an allowance of costs, including attorney's fees to the defendant Benevolent Realty Holding Company. There are two appeals involved herein, the one (7540) from the judgment of dismissal made and entered upon the motion of the defendant and respondent, and the other (7539) from the order denying the plaintiff's motion to tax the costs of the defendant and respondent. The records by which these appeals are presented to us establish that the motion for judgment of dismissal and the opposition thereto were based upon the same grounds and facts as in the case of City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Alice Virginia Hatfield, defendant and respondent (Cal. App.) 1 P.(2d) 538, this day decided. While there was no motion to tax costs in that case as there was in this, nevertheless there is no claim that the attorney's fees, allowed as a part thereof, were or are excessive, the appellant here resting upon the same arguments as were put forward in the case just mentioned, to wit, that there was no abandonment of the action, and that, assuming an abandonment in fact, it was not of such a character under the law as to entitle the respondent to attorney's fees.

So far, therefore, as the appeal from the order denying the motion to tax costs is concerned, it is governed and controlled by another one of those already disposed of in this series of appeals, that of City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Julia Fanta, etc., et al., respondent (Cal. App.) 299 P. 807.

And even if that appeal were not thereby determined, it, as well as the appeal from the judgment of dismissal, would be governed by City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Alice Virginia Hatfield, respondent, mentioned above.

Judgment of dismissal affirmed. Order denying motion to tax costs affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; The Lankershim Estate, a Corporation, Defendant and Respondent. †

Civ. 7541, 7542.

District Court of Appeal, Second District, Division Two, California.

June 23, 1931.

Rehearing Granted July 23, 1931.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain and from an order denying motion to tax costs. Affirmed.

Rehearing granted; THOMPSON, J. dissenting.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

There are two appeals herein, the one (7541) from an order denying plaintiff's motion to tax costs, and the other (7542) from a judgment of dismissal. All of the material facts and propositions of law are identical with

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*For subsequent opinion see 18 P.2d 796 and 19 P.2d 47.

† For subsequent opinion see 18 P.2d 796 and 19 P.2d 48.

those in the case of City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Benevolent Realty Holding Company, defendant and respondent (Cal. App.) 1 P.(2d) 538, this day decided, and these appeals are governed thereby.

Judgment of dismissal affirmed. Order denying motion to tax costs affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Richard R. Freeman, Defendant and Respondent.*

Civ. 7543, 7544.

District Court of Appeal, Second District, Division 2, California.

June 23, 1931.

Rehearing Granted July 23, 1931.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain and from an order denying motion to tax costs. Affirmed.

Rehearing granted; THOMPSON, J. dissenting.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

There are two appeals herein, the one (7543) from an order denying plaintiff's motion to tax costs, and the other (7544) from a judgment of dismissal. All of the material facts and propositions of law are identical with those in the case of City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Benevolent Realty Holding Company, defendant and respondent (Cal. App.) 1 P.(2d) 538, this day decided, and these appeals are governed thereby.

Judgment of dismissal affirmed. Order denying motion to tax costs affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

CITY OF LOS ANGELES, a Municipal Corporation, Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Dora Haynes, Defendant and Respondent.*

Civ. 7545, 7546.

District Court of Appeal, Second District, Division 2, California.

June 23, 1931.

Rehearing Granted July 23, 1931.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain and from an order denying motion to tax costs. Affirmed.

Rehearing granted; THOMPSON, J. dissenting.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

There are two appeals herein, the one (7545) from an order denying plaintiff's motion to tax costs, and the other (7546) from a judgment of dismissal. All of the material facts and propositions of law are identical with those in the case of City of Los Angeles v. Sadie D. Griffith Abbott et al., defendants; Benevolent Realty Holding Company, defendant and respondent (Cal. App.) 1 P.(2d) 538, this day decided, and these appeals are governed thereby.

Judgment of dismissal affirmed. Order denying motion to tax costs affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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*For subsequent opinion see 18 P.2d 797 and 19 P.2d 48.

115 Cal.App. 277

FAUST v. CITY OF SAN DIEGO.

Civ. 447.

District Court of Appeal, Fourth District, California.

June 29, 1931.

1. Trial 🔑**388(4).**

Where case was submitted upon agreed statement of facts, findings of fact *held* unnecessary.

2. Appeal and error 🔑**1071(5).**

Where case was submitted upon agreed statement of facts, findings of fact made by court may be disregarded.

3. Waters and water courses 🔑**231.**

Where assessment, sale, and conveyance of city's pueblo lands to plaintiff's grantor by irrigation district were valid, city was not entitled to judgment in suit to quiet title.

4. Quieting title 🔑**52.**

In suit to quiet title, judgment that plaintiff take nothing except that plaintiff have judgment for $60.71, but which fixed no time to make payment, must be reversed.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Frank F. Faust against the City of San Diego. From a judgment for defendant, plaintiff appeals.

Reversed.

Herbert C. Kelly, of San Diego, for appellant.

M. W. Conkling and H. C. Hopkins, both of San Diego, for respondent.

MARKS, J.

This is an action to quiet title to 80 acres of pueblo lands formerly belonging to the city of San Diego. The complaint is in the usual short form alleging ownership, possession, and the right to possession of the property in the plaintiff, and the wrongful claim of an interest therein by the defendant. The answer is equally brief. It denies the ownership, possession, and right to possession of the plaintiff, and asserts title in the defendant. Judgment was rendered in favor of the defendant, and the plaintiff has appealed.

The case was submitted to the trial court upon two stipulations which constituted an agreed statement of facts. They are brought to this court in the form of a bill of exceptions.

[1, 2] The trial court unnecessarily made findings of fact. In Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 253 P. 726, 733, it was said: "As the case was submitted upon an agreed statement of facts without any other evidence whatever, findings of fact were unnecessary. 24 Cal. Jur. 953. The only question, therefore, before the court, was as to what was the law applicable to those facts. Gregory v. Gregory, 102 Cal. 50, 36 P. 364; McMenomy v. White, 115 Cal. 339, 47 P. 109. Any findings of facts made by the court under these circumstances may be disregarded."

The sole question to be considered by us is whether the judgment is supported by the facts set forth in the stipulations. The pertinent parts of the judgment are as follows:

"By reason of the law and the findings aforesaid, it is hereby ordered, adjudged and decreed as follows, to-wit:

"That the plaintiff take nothing by reason of his action herein, except that the plaintiff have judgment against the defendant for the sum of sixty dollars and fifty-one cents ($60.51), together with interest thereon at the rate of seven (7%) per cent per annum from August 28, 1911, until paid.

"That the certificate of purchase and deed to the property described in plaintiff's complaint be, and they are hereby cancelled and decreed to be null and void.

"That the defendant have judgment for its costs herein expended.".

From the stipulations before us it appears:

That the 80 acres involved in this action is the east half of pueblo lot No. 1179 in the city of San Diego. That during the year 1891, the Linda Vista irrigation district was lawfully organized and included within its boundaries the property in question here, as well as over $2,000 acres of other pueblo lands of the city of San Diego. That during the year 1911, the land in question here, together with other lands, was assessed for taxation by the irrigation district and a tax of $112.87 was levied upon the 80 acres involved here. That this land was assessed to O. J. Stough. That none of the assessments on the pueblo lands were paid prior to February 28, 1912, on which date the property in question and the other pueblo lands of the city of San Diego were sold to Charles B. Gould, who paid the delinquent assessment and interest, penalties, and costs on the 80 acres involved herein in the total sum of $121.01. That Gould assigned his certificate of purchase to Frank F. Faust, and that the Linda Vista irrigation district by its officers deeded the property to him. That the Linda Vista irrigation district has issued and sold bonds to pay for certain improvements within its boundaries, and that the assessment was levied to pay all or part of this indebtedness. That the Live Oak Corporation claimed to be the owner of this indebtedness prior to February 29, 1911. That on

March 1, 1912, Ed Fletcher wrote and delivered the following letter:

"San Diego, California, Mar. 1, 1912.
"Honorable City Council, San Diego, Calif.

"Gentlemen: This is to inform you that all delinquent property in the Linda Vista District was sold on Wednesday, Feb. 28th. The pueblo lands owned by the city were included in this sale. Nearly 90% of the land owners have already paid their assessments.

"Mr. Charles B. Gould bought in the property of the city, and providing a settlement is made within a reasonable time, (say thirty days from date) along the lines of our original proposition, I am in a position to say that same will be accepted.

"The Live Oak Corporation have been more than fair with the city in extending time of payment, nearly six months from the date of September 12, 1911, when it became delinquent, and Mr. Gould does not feel that we should be called upon to make any further extension, except as above stated."

That thereafter on or about April 2, 1912, the city of San Diego paid the Volcan Land & Water Company and the Live Oak Corporation "the sum of $6,810, in full payment, discharge, satisfaction, settlement and compromise of the claim of the Linda Vista Irrigation District and of the claim of the Live Oak Corporation, claiming to be the beneficiary of said assessment, and of all successors in interest of said Live Oak Corporation; and the said Linda Vista Irrigation District and the said Live Oak Corporation and its successors and assigns hereby release and discharge the City of San Diego and the pueblo lands of the City of San Diego heretofore assessed or claimed to be assessed for the payment of any tax, lien or assessment whatever of said district, or of any claim against said lands, which are described as follows." That pueblo lot No. 1179 was not described or mentioned in this receipt. That on April 4, 1912, the Linda Vista irrigation district issued its receipt, in part as follows: "Received of the City of San Diego, Six Thousand Eight Hundred and Ten ($6,810) Dollars in payment of the assessment of said District levied in the year 1911 to pay the judgments against said District upon the following described property: Description — Lot — Acres — Pueblo Lands." That pueblo lot No. 1179 was not mentioned in this receipt nor was any part of the assessment thereon included in any payment ever made by the city of San Diego. That all of the proceedings employed by the Linda Vista irrigation district in levying the assessment, making the sale, and in deeding the 80 acres to Charles B. Gould were legal and valid and in accordance with law as was the assignment from Gould to Faust. That "the plaintiff in this action has never been in the actual possession of the property involved in this action nor has he ever paid taxes thereon. The land involved in this action is, and at all times has been, wholly unimproved and no actual occupancy thereof has been had by any person. Plaintiff purchased the certificate of sale involved in this action for value and at no time prior to the issuance of the Linda Vista Irrigation District deed to plaintiff did plaintiff have actual notice or knowledge of the defendant's claim of title to said property nor of any settlement and/or negotiation for settlement of the claims of the Linda Vista Irrigation District, Live Oak Corporation, Volcan Land & Water Company, a corporation, and/or Charles B. Gould against this property or against any Pueblo Lands of the City of San Diego."

[3] In the case of San Diego v. Linda Vista Irrigation District, 108 Cal. 189, 41 P. 291, 35 L. R. A. 33, an action to quiet title to pueblo lands, it was held that an assessment by the defendant irrigation district upon pueblo lands of the city of San Diego which were unoccupied and uncultivated and which had not been put to use under the governmental functions of the city and which were susceptible of cultivation through irrigation, were subject to assessments levied by the irrigation district and to sale by it for unpaid assessments. Under authority of this case, the stipulated facts do not support the judgment, as the defendant has admitted that the assessment, sale, and conveyance of the property were all legal and valid proceedings taken under authority of and in accordance with the laws governing them.

[4] Under authority of Warden v. Nahas (Cal. Sup.) 300 P. 815 the judgment must be reversed regardless of the fact of the insufficiency of the stipulations to support it. The Warden Case was an action to quiet title against an invalid tax deed. The Supreme Court held as follows: "The judgment as to the portion thereof assailed upon this appeal read as follows: 'It is ordered, adjudged and decreed that the defendants are the owners of the following described property (description) and that upon the payment to the plaintiff of the sum of $55.99, with interest thereon from the third day of July, 1928, at the rate of seven per cent per annum, that the title to said property and every part thereof be forever quieted in said defendants, and the plaintiff, her agents and servants shall be and they are hereby enjoined and estopped from asserting title thereto, or to any part thereof, after the payment by defendants to the plaintiff of the sum of $55.99 with interest thereon as aforesaid.' The plaintiff appealed from said judgment on the judgment roll and urged upon the appeal, as the only ground thereof, 'that the conclusions of law and the decree do not set any time in which the respondents are to make the payment set out in said decree, and is not the judgment required by the decisions of the supreme court of this state.' In support of her appeal the appellant directs attention to the case of Bloom v. Bloom, 207 Cal. 70, 276 P. 568, 569, in which,

in an action substantially similar to this and in which the plaintiff appellant urged that 'the judgment is uncertain and incomplete in that no time was fixed within which the defendant was required to pay the amount found to be due the plaintiff as a condition upon which the defendant would be entitled to a reconveyance,' this court held that the judgment in that case was subject to the above infirmity, and that the trial court should have entered an appropriate judgment requiring the defendant to pay the amount found due the plaintiff within a specified reasonable time; that upon such payment within the time specified the defendant would be entitled to a reconveyance; and that in default of payment within such time the plaintiff would be entitled to a decree quieting his title. The court reversed the judgment in that case because of said infirmity. We are satisfied that a similar course must be pursued in the instant case."

The defendant has urged at considerable length that the judgment should be affirmed because of equitable reasons which need not be detailed here. None of them are within the stipulated facts, and some are contrary to inferences which these facts justify. Some are not within the issues made by the present pleadings. If the defendant desires to urge the grounds of defense suggested, it should take such steps as it may be advised to enable it to present any special defense it may be able to urge at another trial.

Judgment reversed.

We concur: BARNARD, P. J.; GRIFFIN, Justice pro tem.

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115 Cal.App. 330

CLOUGH v. ALLEN et al.

Civ. 7681.

District Court of Appeal, First District, Division 1. Californa.

July 6, 1931.

1. Master and servant ⚷302(1).

Respondeat superior doctrine cannot be invoked, unless at time of negligent act causing injury servant was performing service for master.

2. Automobiles ⚷197(7).

That agent was returning to his home at time of automobile accident after business visit to officer of employer, would not render employer liable for agent's negligence.

Such fact would not render the employer liable, because insufficient to establish that the agent was engaged in performing a service for the employer.

3. Appeal and error ⚷891.

Appellate court cannot take evidence discovered after denial of new trial, and, if facts are found to be true, reverse and direct judgment.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Mrs. Maude E. Clough against E. S. Allen and the National Automobile Insurance Company. From judgment for the last named defendant, the plaintiff appeals.

Affirmed.

M. O. Graves, of Los Angeles, for appellant.

John C. Miles, of Los Angeles, for respondents.

TYLER, P. J.

Action to recover damages. Plaintiff was injured by an automobile driven by defendant Allen. The National Automobile Insurance Company was joined as a defendant in the action as the employer of Allen. Both parties were served, and Allen defaulted. Upon the close of plaintiff's case, a nonsuit was granted as to the insurance company. Motion for a new trial was made and denied, from both of which orders plaintiff appeals.

From the evidence, it appears that Allen was employed as a "special agent" of defendant insurance company to solicit insurance from automobile dealers and finance companies. His hours of employment were from 8 o'clock in the morning until 5 o'clock in the afternoon. His duties required him at times to visit outlying cities and he was not required to report at the office of the company before entering upon or completing his daily work. On the day of the accident complained of, Allen drove to the home of the president of his company and discussed with him a particular form of policy desired by a prospective client. The visit was made to the officer of defendant insurance company for the reason that such officer was confined to his home by sickness, and a personal interview was desired by the agent. The business was completed shortly after 6 o'clock in the evening, and Allen then drove his car several miles across the city of Los Angeles to Rowan street and Whittier boulevard, arriving there about 7 o'clock in the evening. It was at this time and place that the accident complained of occurred. Under these circumstances, appellant claims that defendant insurance company was liable for the tortious acts of defendant Allen at the time of the accident, and that the or-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

der granting a nonsuit as to his employer was erroneous and should be reversed.

[1, 2] There is no merit in the claim. There is absolutely no evidence in the record to show that the automobile was being used for the insurance company's purposes at the time of the accident, nor is there any evidence from which a presumption to this effect could be drawn. It nowhere appeared that the car driven by Allen belonged to the company. A master is not responsible for the negligence of his servant while such servant is pursuing his own ends. The doctrine of respondeat superior cannot be invoked in an action for personal injuries unless at the time of the negligent act causing the injury complained of the servant was engaged in performing a service for the master or some act incidental thereto. Kish v. State Automobile Ass'n, 190 Cal. 246, 212 P. 27; Hall v. Puente Oil Co., 47 Cal. App. 611, 191 P. 39; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358. Even if it be assumed that Allen was returning to his home after his visit to the officer of the company, such fact would not alter or change the situation. Mauchle v. Panama-Pacific Int. Exp. Co., 37 Cal. App. 715, 174 P. 400. Under such circumstances, the servant is not engaged in performing a service for the master.

[3] In a supplemental brief filed by appellant, it is claimed that subsequent to the denial of the motion for a new trial appellant has discovered that the car driven by Allen was owned by defendant insurance company, and we are asked to take evidence upon this subject, and, if we determine such fact to be true, to reverse the judgment and fix the amount of damage to which plaintiff should be entitled, and direct the lower court to enter such judgment. We have no such power. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. Plaintiff had full opportunity to properly present her case at the trial. There must be an end to litigation.

The judgment and order are affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

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115 Cal.App. 403

In re EHLER'S ESTATE.

EHLER et al. v. EHLER.

Civ. 7771.

District Court of Appeal, Second District, Division 1, California.

July 9, 1931.

1. Executors and administrators 🔑188.

Where it had not been determined, in widow's divorce action pending at husband's death, whether widow left husband voluntarily or for good cause, widow *held* not to have lost her statutory rights as widow.

2. Executors and administrators 🔑182.

Widow could have exempt furniture constituting portion of decedent's home set aside to her, although decedent had bequeathed furniture to others.

3. Executors and administrators 🔑181.

Widow could have proceeds from insurance policy set aside to her, notwithstanding executors had used it to pay claims.

4. Executors and administrators 🔑178.

Where decedent's estate was worth over $200,000, order awarding widow $750 per month during administration *held* not excessive.

5. Executors and administrators 🔑178.

Where decedent's estate was worth over $200,000, allowance of $6,500 to widow for eight months' period and $750 monthly thereafter *held* not abuse of discretion.

6. Executors and administrators 🔑176.

Allowance to widow should not be limited to one year after issuance of letters testamentary, unless estate is insolvent.

7. Executors and administrators 🔑176.

Estate, assets of which were sufficient to pay debts and administration expenditures, *held* not "insolvent" within statutory definition (Code Civ. Proc. § 1466).

[Ed. Note.—For other definitions of "Insolvency; Insolvent," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Proceedings for the probate of the estate of Gerd Ehler, deceased, in which Cora E. Ehler filed a petition for family allowance and for order setting apart exempt personal property and for order setting apart a homestead. From orders for petitioner, Otto Ehler and others, contestants, appeal.

Affirmed.

L. J. Faust, of Los Angeles, for appellants.

Julius V. Patrosso, of Los Angeles, for respondent.

YORK, J.

This is an appeal by the executors from an order for family allowance, and from an order setting apart exempt personal property, and from an order setting apart a homestead, all in favor of the respondent, who is the widow of decedent. Said decedent died testate leaving an estate consisting entirely of separate property, which he devised to his children by a former marriage. By his will he specifically disinherited respondent, giving as his reason for such action the fact that she had left him and commenced an action for divorce against him. The inventory showed the value of the estate to be $346,000, against which amount there were liabilities in the form of mortgages and two disputed claims amounting to $75,000 and $3,700 respectively, making in all $171,000 of outstanding claims, but less than $100,000 of admitted indebtedness.

Appellants maintain that respondent is not entitled to a family allowance, to the exempt personal property, or to the homestead out of her deceased husband's estate, for the reason that she was not a member of his family at the time of his death.

It is admitted that respondent commenced an action for divorce against deceased, which was pending at the time of his death, and that decedent had been paying to her the sum of $20 per week alimony pendente lite. In the Estate of Parkinson, 193 Cal. 354 at page 358, 224 P. 453, 455, it was contended that the use of the word "family" in section 1466, Code of Civil Procedure, gave rise to the implication that the allowances under that section were to be confined to cases where an actual family status existed at the date of the decedent's death, and the court in passing upon that question said: "We can see no reason for giving any such restricted significance to the use of that phrase in that section, nor, in fact, in making any distinction between the application of section 1464 and section 1466 of said Code in that regard. Both of these sections are dealing with the support of the widow and minor children, if any, of the decedent, the one before and the other after the return of the inventory. In the case of an application made under section 1464, Code of Civil Procedure, this court held, in the Matter of Estate of Gould, 181 Cal. 11, 183 P. 146, that the right of a widow to a reasonable provision for her support under section 1464 of the Code of Civil Procedure, was not conditioned upon her having lived in a family relation with the deceased at the time of his death. In so holding this court reviewed the earlier cases in this state involving this very question, and wherein it was held that, in the absence of a showing that the wife had either by her conduct lost, or by her agreements waived, her statutory rights as a widow, she was entitled to a family allowance upon her husband's death, even though she was not living in the family relation with him at the time of his death. We can perceive no reason why this principle should not be given a like application to the provisions of section 1466 of the Code of Civil Procedure and to applications for family allowances made thereunder."

[1] Appellants contend that the widow voluntarily abandoned decedent, and that she thereby waived her right to claim any allowance from his estate. As a matter of fact, the record shows that she left him and instituted an action for divorce against him, which was pending at the date of his death. It was therefore never determined whether or not respondent left voluntarily or for good cause. In view of this we are of the opinion that there was a total absence of any showing that respondent by her conduct lost her statutory rights as the widow of decedent.

In the Estate of Henningsen, 199 Cal. 103, 247 P. 1082, 1083 (in which an appeal was taken from an order setting apart a homestead to the surviving husband of a deceased wife, and an appeal from an order setting apart the exempt property of said estate to the surviving spouse, and in which the appellant contended that the family relation had been dissolved prior to death, and that therefore the husband was not entitled to benefit from the estate of the deceased wife), the court said: "Even if it were to be conceded, which it is not, that the appellant herein had established upon such hearing by practically undisputed evidence that the family status of the parties had been destroyed, it would not follow that the husband of the decedent must for that reason have been denied the rights he sought to assert under section 1465 of the Code of Civil Procedure. On the contrary, this court has held in Estate of Gould, 181 Cal. 11, 183 P. 146, and also in Estate of Parkinson, 193 Cal. 354, 224 P. 453, that the rights of the surviving spouse created under the provisions of sections 1464, 1465, and 1466 of the Code of Civil Procedure were not conditioned upon the existence of the family status at the date of the decedent's death."

[2, 3] The court, in its order setting aside the exempt personal property for the use of the widow, included therein several pieces of furniture from the home place, which had been bequeathed by decedent to his heirs. The appellants claim that the court's action was inequitable and contrary to the law, inasmuch as the particular articles were unnecessary for the use of respondent, and that she could very well have done without them. These pieces of furniture—admittedly exempt from execution—constituted a portion of decedent's home, and upon application of the widow, duly made and noticed, the requirement to set them aside to her is mandatory, and the court is without jurisdiction to make an order denying it. Mahoney v. National Surety Co., 89 Cal. App. 148, at page 152, 264 P. 304, citing Estate of Ballentine, 45 Cal. 696; County of Los Angeles v. State, 64 Cal. App. 290, at page 296 et seq., 222 P. 153. This is also true of the proceeds from the in-

surance policy. The respondent had the prior right to have this money set aside to her, despite the fact that the executors had used it to pay claims filed against the estate.

[4-7] Appellants also claim that the court grossly abused its discretion in awarding respondent the sum of $6,500 for the month ending December 20, 1927 (which was more than eight months after letters testamentary had been granted), and also awarding the further sum of $750 per month from that date for the period of administration of the estate or until further order of the court; and in addition claim that these amounts are far in excess of the amounts reasonably necessary for respondent's maintenance according to her circumstances and manner of living, and are not justified by the amount and condition of the estate, which they maintain is insolvent. So far as the record shows, respondent received from the estate of her deceased husband the homestead, together with its furnishings and $4,000 insurance money. There is nothing to show that she had independent means of her own with which to sustain herself. Further, the estate is a large one—over $200,000—and, while much of the property is non-income bearing, we do not find that the order awarding the widow $750 per month during the period of administration is excessive or an abuse of discretion by the trial court. The allowance of $6,500 "for the month ending December 20, 1927," probably was made by the court in the light of the fact that there had been a delay of seven months in the filing of the inventory, and a corresponding delay in the matter of family allowance. Neither do we believe that the allowance should be limited to one year after issuance of letters testamentary, unless the court should subsequently find the estate to be insolvent. In the ordinary estate offered for probate, there is rarely either sufficient cash on hand or income with which to pay off outstanding indebtedness, and an executor ordinarily is forced to sell off part of the estate in order to secure the funds necessary to pay claims and demands outstanding. In the instant case the assets of the estate were amply sufficient to pay all debts and all expenditures incident to administration. That is sufficient to make the estate not insolvent, within the definition of an insolvent estate under the provisions of section 1466 of the Code of Civil Procedure. Where the assets of an estate were appraised at $58,000, and the debts allowed, exclusive of subsequently accrued interest, amounted to $31,000, but the property could not at that time be sold at the appraised value, it was held, nevertheless, that the estate was then solvent. Estate of Boyes, 151 Cal. 143, 152, 90 P. 454.

The orders are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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115 Cal.App. 383

REYNOSA v. PICKWICK STAGES SYSTEM et al.

Civ. 6819.

District Court of Appeal, Second District, Division 2, California.

July 8, 1931.

1. Negligence 🔑62(1).

"Intervening efficient cause" is independent force which breaks causal connection between original wrong and injury.

> "Intervening efficient cause" is a new and independent force which breaks the causal connection between the original wrong and the injury, and but for which the injury would not have occurred.
>
> [Ed. Note.—For other definitions of "Intervening Cause," see Words and Phrases.]

2. Negligence 🔑62(3).

To fix liability for accident, law will not look back from injurious consequences beyond last efficient cause, where responsible person has intervened.

> This is so if the chain of events is so broken that they become independent and the result cannot be said to have probably and naturally accrued from the primary cause, or to have been anticipated.

3. Automobiles 🔑245(65).

In action against stage company for injuries in collision with automobile after automobile in which plaintiff was riding was struck by stage, whether presence of other automobile involved in collision was independent intervening cause *held* for jury.

4. Damages 🔑131(1).

$5,500 for fractures of shoulder blade and ribs and other injuries, *held* not excessive.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Frank Reynosa against the Pickwick Stages System and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

B. P. Gibbs, of Los Angeles, and Thomas S. Gould, for appellants.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for respondent.

CRAIG, J.

The respondent was injured in a collision between his automobile and another machine in the county of Ventura. After trial by a jury, a verdict and judgment were rendered in his favor, and the defendants appealed from said judgment.

It was testified by the plaintiff that while riding on a curve in the public highway, in a northerly direction, he suddenly noticed the lights of a machine within a few feet before him, upon his side of the thoroughfare, there was a crash, and the next that he knew he was taken to a hospital at Fillmore, in Ventura county. His son, who was driving at the time, swore that his Ford car was traveling near the right bank of the roadway, that the wheels on the right side were off of the pavement; that he first saw the approaching stage on the curve between thirty and forty feet distant, that it was traveling at the rate of about fifty miles per hour, that he quickly turned against the bank, but was unable to avoid a collision. He was unable to testify as to subsequent occurrences. A witness by the name of Williams testified that he was driving in a sedan in a southerly direction, but some distance northerly from the scene of the first impact, when the stage passed him at a speed of fifty or fifty-five miles an hour; that "as it rolled up the boulevard a few feet more, on the left-hand side of the road we heard a flash, and out from behind the bank came the Ford, and it rolled along next the bank and angled right on the road and ran into us." The testimony of Mrs. Williams tended to corroborate the two former witnesses. The witness Shean averred that he was driving in a southerly direction along the same highway, at about forty miles per hour, to the rear of the Williams car; that the stage passed him at a speed of "fifty miles, probably fifty-five, maybe sixty, because they passed us very fast." This witness further testified, and was corroborated by various witnesses, that "as it passed Williams it swerved to the left and they were completely on the left side of the road as they hit the curve; * * * we heard the bump and then we heard the smash, and then the Ford —Mr. Reynosa's car—smashed into Williams in front of us. * * * I asked the stage driver why he was driving so fast and he said he was late and trying to make up time." It was stipulated that the driver was an employee of the appellant company, and that he was at the time of the accident operating the stage in the course of his employment. Evidence offered on behalf of the defendants consisted of testimony to the effect that the stage was at all times on the right-hand side of the boulevard, that its impact with the Ford was very slight, and that the stage received only a small indentation on the left rear fender.

[1-3] It is first contended that there was a total failure of proof of any negligence upon the part of either defendant proximately resulting in the injuries alleged to have been sustained. It is insisted that respondent's machine and occupants received their injuries, if at all, from the fact that the "sedan, which had been following at a distance of approximately 150 feet behind the stage, crashed into the Ford." The rule invoked by appellants requires that the plaintiff must show that the negligence, if any "was an efficient cause from which the injury followed in a natural and continuous sequence, unbroken by any efficient intervening cause." Marovich v. Central California T. Co., 191 Cal. 295, 216 P. 595, 599. But in the cited case the issue arose rather as to whether a street car passenger suffered injury from its failure to stop or from walking off the car while it was in motion, than as to whether the injury resulted from a direct impact or from the resulting contact. We are cited to no authority, nor is logical argument advanced in the instant case, that contact with the ground may be held an efficient intervening cause of injury to one who has been struck by an automobile, illegally driven, at a dangerous place upon a much-traveled public thoroughfare. Appellants' contention falls for want of evidence that Williams' car collided with the Ford at all, other than that the Ford was cast over the roadway into the sedan, as herein stated from the testimony of various witnesses. An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and but for which the injury would not have occurred. The law will not look back from th injurious consequences beyond the last efficient cause, where a responsible and intelligent person has intervened, if the chain of events is so broken that they become independent and the result cannot be said to have probably and naturally accrued from the primary cause, or to have been anticipated. Schwartz v. California Gas, etc., Corp., 163 Cal. 398, 125 P. 1044; Merrill v. Los Angeles Gas, etc., Corp., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. It does not appear that the mere coincidental lawful presence of Williams at some distance from the collision intervened or was a more efficient cause of the result than was the embankment which prevented respondent's escape from a violent irresistible primary force. There was evidence that he applied his brakes immediately upon hearing the crash; that he was driving at a legal rate of speed, and that the Ford was traveling but fifteen or twenty miles per hour, when it was struck. The jury might well have concluded that the opportune appearance of Williams was not an independent intervention but for which the injuries would not have occurred. That he was not guilty of negligence has heretofore been decided. Williams v. Pickwick Stages System (Cal. App.) 297 P. 98.

[4] Finally, it is strenuously insisted by appellants that the verdict allowing damages

in the sum of $5,500 for injuries to the spinal area and thorax of respondent's body was so excessive as to indicate that the jury were influenced by the evidence adduced. It was testified that the respondent suffered fractures of the shoulder blade and ribs, and other injuries, from which he was still incapacitated and endured pain eight months after the accident. We cannot say as a matter of law that the facts and circumstances before the jury were not such as to justify their action, nor do the appellants cite any particular wherein the record tends to warrant a charge of unfairness or of passion or prejudice upon the part of the jury.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

115 Cal.App. 314

PEOPLE v. HICKS.

Cr. 2070.

District Court of Appeal, Second District, Division 1, California.

July 1, 1931.

Rehearing Denied July 11, 1931. Hearing Denied by Supreme Court July 30, 1931.

1. **Criminal law** 🔑1134(6).

Notwithstanding trial judge gives erroneous or insufficient reason for rendering judgment, if on review it appears that upon any theory judgment rendered was in accordance with law, it will be sustained.

2. **Homicide** 🔑250.

In homicide prosecution, evidence *held* to support conviction of manslaughter.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Harry Hicks was convicted of manslaughter, and from the judgment rendered, and from an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Joel Terrell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, J.

From a judgment of conviction of the crime of manslaughter, and from an order by which his motion for a new trial was denied, appellant has appealed to this court.

The action was tried before the court without a jury, and the only specifications of error presented by appellant are that "the court erred in applying the law to the facts," and that "the verdict of the court is contrary to and against the evidence produced at the trial, and the law."

From the briefs of respective counsel it appears that the point at issue is whether the evidence adduced at the trial of the action was sufficient to support the judgment.

[1] It is argued by appellant that, because in rendering judgment the judge of the trial court made the statement, in substance, that if the case should stand entirely upon the testimony given by defendant "an actual case of manslaughter was shown," in determining whether the judgment should be reversed, no consideration should be given by this court to the other evidence in the case. But manifestly such is not the law. The authorities are numerous to the effect that, notwithstanding the fact that in rendering judgment an erroneous or an insufficient reason therefor may have been assigned by the trial court, if on review it appear that upon any theory the judgment rendered was in accordance with the law as applied to the facts in the case, it will be sustained. 2 Cal. Jur. 809; 24 Cal. Jur. 924, and authorities respectively there cited.

[2] Although, in some particulars contradicted by testimony given by defendant, evidence was presented on the trial of the instant action which, in substance, showed that immediately prior to the commission of the offense "this man that was killed (Washington) came out and run down here onto the ground and Mr. Hicks (defendant) came out on the porch there and they were talking, but I don't know what they said. Mr. Hicks went back into this open door and left the door open and this man that was killed went up onto the step to the porch and Mr. Hicks came back and struck him three blows and I saw the man fall and that's all I know." No blows were exchanged between defendant and Washington when they first came out of the house and walked down to the side of the steps; defendant talked as though he were angry when he went back into the house. Washington walked up onto the porch. What then occurred is illustrated by the following testimony:

"Q. Did he (Washington) put his hand on the door? A. I don't think so.

"Q. As far as you know, he was standing on the steps? A. Yes.

"Q. Did you hear any words then? A. No.

"Q. Then you saw Mr. Hicks come out? A. I did.

"Q. Then did you see any blows exchanged? A. I seen him strike him three times. * * *

"Q. Could you hear the blows? A. Yes, I heard the blows.

"Q. As well as see them? A. I saw them and heard them.

"Q. Was this man struck down? A. He fell; that's all I know.

"Q. Do you know whether or not he fell at the first blow or was it after the three blows? A. I couldn't tell you nothing about it.

"Q. When (then) what did you see Mr. Hicks do? A. He went back in the house and closed the door."

Furthermore, testimony was given by witnesses to the effect that, immediately after the occurrence which resulted in the death of Washington, defendant stated that "he threw everything on him that he could get; * * * and he had told him to get out of the house and he didn't go and he jumped on him." In addition thereto the testimony given by defendant was much weakened, if not altogether discredited, by reason of the fact that when questioned by officers defendant told them that he "didn't know anything about how Washington was killed"; that he did not kill him; that he did not hit him. It was not until defendant took the witness stand in his own behalf that he made a statement to the effect that Washington had tried to hit him with a beer bottle, and that then in self-defense defendant had hit Washington with a pick handle.

Considering the application herein of the rule that the trial court is the judge of the credibility of the testimony given by the several witnesses, it becomes apparent that, notwithstanding the discrepancies, if any, which appeared in the testimony given by the several witnesses called by the prosecution, in the aggregate it was sufficient to justify the trial court in reaching the conclusion that defendant was guilty of the commission of the crime of manslaughter.

The judgment and the order are affirmed.

We concur: CONREY, P. J.; YORK, J.

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115 Cal.App. 442

FROST et al. v. MAJESTIC FURNITURE CO. et al.

Civ. 6635.

District Court of Appeal, Second District, Division 1, California.

July 10, 1931.

Rehearing Denied July 30, 1931. Hearing Denied by Supreme Court Aug. 31, 1931.

Appeal and error ⇨1011(1).

Where testimony is conflicting, issue of fact is for court in trial without jury, and court's decision cannot be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Elmer E. Frost and another, doing business under the fictitious firm name of Elmer E. Frost & Company, against the Majestic Furniture Company and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Paul Friedman, Mose Katzev, and Louis Lamy, all of Los Angeles, for appellants.

John E. Dalton, of Los Angeles, for respondents.

HOUSER, J.

The sole question presented by this appeal from the judgment is whether the evidence adduced on the trial of the action was sufficient to sustain the finding of fact to the effect that plaintiff sold to the defendant, and the defendant purchased from plaintiff, certain furniture.

On examination of the record herein it appears that, although plaintiff and other witnesses produced in his behalf testified to a state of facts from which the conclusion might have been reached by the trial court that the furniture in question was consigned by plaintiff to the defendant, on the other hand, the defendant by its witnesses was equally positive that no consignment was made, but, to the contrary, that the parties to the transaction agreed upon an out-and-out sale of the furniture one to the other, and that a sale was the ultimate result of their negotiations. In such circumstances, the authorities are universal that the power of deciding the submitted issue of fact rests with the trial court and that its decision thereon cannot be disturbed by this tribunal.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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115 Cal.App. 319

In re JENKINSON'S ESTATE.

Civ. 7904.

District Court of Appeal, Second District, Division 2, California.

July 1, 1931.

Rehearing Denied July 29, 1931. Hearing Denied by Supreme Court Aug. 27, 1931.

1. Wills ⇨230.

Unsuccessful opposition to probate *held* not to constitute bar to contest of invalid will after probate (Code Civ. Proc. § 1327).

2. Wills ⇨111(1).

Instrument not signed by testatrix *held* invalid as testamentary disposition of estate.

Following the last provision of purported will in handwriting of some person, a cross appeared as indicating the place for signature, but signature was absent, and at bottom of page was written the word "over," and then followed on opposite page a form of attestation clause beneath which was written the name of testatrix and blank spaces for names of witnesses. Name of testatrix was written upon first line of these spaces, and a line was drawn through her name, and in margin opposite appeared a notation that it was copy of one person named had.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceeding by Catherine Jenkinson, contestant, against Florence P. Caton, proponent, to contest the will of Eliza Jane Jenkinson, which was admitted to probate. From an order revoking the order admitting the will to probate, proponent appeals.

Affirmed.

Thos. C. Ridgway and John M. Thomas, Jr., both of Los Angeles, for appellant.

Randall & Bartlett and Manley C. Davidson, all of Los Angeles, for respondent.

CRAIG, J.

A document probated as the last will and testament of Eliza Jane Jenkinson, deceased, was thereafter contested by the respondent, and was adjudged null and void, and the order admitting the same to probate was revoked. The proponent appealed from said judgment.

Upon the original petition for probate the instrument in controversy was alleged to have been the olographic will of the decedent, entirely written, dated, and signed by the hand of the testatrix. It consisted of twelve consecutively numbered paragraphs or provisions, and an attestation clause, immediately following which appeared the name of the deceased, all in the handwriting of some person. Opposite the tenth paragraph, which directed that cash remaining after payment of legacies be equally divided, appeared in the margin the notation, "with my four children." The eleventh paragraph was entirely obliterated, apparently with pencil. Following the last provision was written: "In witness I hereby set my hand this 3rd day of December, 1927." A cross then appears, as indicating the place for signature, but the signature is absent. At the bottom of the page was written the word "over," and then follows upon the opposite side a form of attestation clause, beneath which is written the name Eliza Jane Jenkinson, and blank spaces for the names and addresses of two witnesses. The name of the decedent was written upon the first line of these spaces, a line was drawn through the same, and in the margin opposite them appears the notation: "Copy of the one Mr. Madden has." No witness signed the purported will.

The trial court found that the instrument previously admitted to probate "is not the will of said decedent and that it is not executed in the manner and form required by law; that said purported will purports to be entirely written, dated and signed by the said Eliza Jane Jenkinson as her olographic will, but that the said purported will was never at any time signed by the said Eliza Jane Jenkinson; * * * that said instrument is not an instrument which would operate to transfer the property of Eliza Jane Jenkinson on the occurrence of her death."

[1] One of the heirs of said deceased contested the probate of the instrument upon substantially similar grounds to those interposed by respondent in attacking its validity after probate. Appellant's contention is that "the judgment upon the contest prior to probate is final and conclusive upon the petitioner for revocation of the probate." In other words, it is contended that an unsuccessful opposition to probate constitutes a bar to the contest of an invalid will after probate. In support of her defense of the document appellant urges a further ground that, since the petition for revocation is based upon its invalidity, questions as to its legal dating, signature, and handwriting may not be considered because they are merely matters of proof. It is obvious that if this were true the proof and admission to probate of any purported last will and testament would preclude a contest as well in the absence of opposition to its probate, and result in nullification of positive legislative enactment to the contrary. A careful perusal of appellant's briefs and cited authorities does not permit of such anomalous conclusions. Section 1327 of the Code of Civil Procedure unconditionally authorized respondent's contest, as follows: "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked."

An insufficiency of the proof of the date, writing, or signature upon the admission to probate of an olographic will which under the tests authorized by said section may render it invalid, presupposes the right to establish such insufficiency upon a subsequent contest by the will itself and other competent evidence. In Estate of Dorn, 190 Cal. 343, 212 P. 206, 207, our Supreme Court distinguished other authorities cited by appellant, and in a similar proceeding said: "The right to contest a will after its admission to probate is thus expressly reserved to all the heirs. To uphold the soundness of respondent's position would be to hold that the provisions above quoted and all the remaining provisions of that article of the Code are wholly inoperative, because the probate of a will is as binding in the absence of a contest as it is when a contest has been filed and tried. It may well be that an heir who has actually contested the will before probate is thereby estopped to contest it again after probate, but that is not the situation here involved. Certain it is that one who has not done so is accorded that right for the period of one year after probate."

[2] Since the trial court was clothed with power to so hold, it cannot be said upon appeal in the instant case that the subject of inquiry was not invalid as a testamentary disposition of the estate. In re Estate of Manchester, 174 Cal. 417, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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115 Cal.App. 167

FUGELSANG et al. v. STEINER et al.

Civ. 368.

District Court of Appeal, Fourth District, California.

June 24, 1931.

1. Negligence 🔑136(9).

Contributory negligence is question of law only when reasonable men can draw but one inference from facts, and that pointing unerringly to plaintiff's negligence contributing to injury.

2. Appeal and error 🔑1002.

Jury's finding on conflicting evidence is controlling unless appellate court can discover, from evidence and inferences reasonably deducible therefrom, that determination was manifestly incorrect.

3. Trial 🔑139(1), 140(1).

Weight of evidence and credibility of witnesses is for jury.

4. Automobiles 🔑245(80).

Contributory negligence of driver, on issue of right of way at intersection, *held* for jury (St. 1923, p. 560, § 131(a), as amended by St. 1929, p. 541, § 55).

> California Vehicle Act (St. 1923, p. 560), § 131(a), as amended by St. 1929, p. 541, § 55, provides that driver of vehicle approaching intersection shall yield right of way to vehicle which has entered intersection, and that when two vehicles enter intersection at same time, driver of vehicle on left shall yield to driver on right.

5. Automobiles 🔑208.

That driver, after seeing defendant's automobile approaching intersection from right, did not again look until too late to avoid collision, *held* not to defeat recovery by occupants of his automobile (St. 1923, p. 560, § 131(a), as amended by St. 1929, p. 541, § 55).

> Recovery by occupants of automobile having right of way was not defeated by their driver's failure to look again after first seeing defendant's automobile, because driver was entitled to assume that defendant's automobile was traveling at lawful and prudent rate of speed and under such control that it could be slowed down or if necessary stopped to enable automobile having right of way to proceed through intersection with safety, in view of driver's testimony that when he first looked defendant's automobile was 140 feet from intersection.

6. Automobiles 🔑226(2).

That automobile occupant was reading book at time of intersection collision *held* not to defeat recovery, without showing that her dereliction proximately caused collision.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Martin Fugelsang and another, minors, by their guardian ad litem, Caren Fugelsang, against H. J. Steiner and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

F. W. Docker, Claude Minard, and R. E. Norton, all of Fresno, for appellants.

M. F. McCormick and L. N. Barber, both of Fresno, for respondents.

JENNINGS, J.

The present action was instituted to recover damages for personal injuries sustained in a collision between an automobile operated by plaintiff Martin Fugelsang and another automobile operated by defendant H. J. Steiner. Plaintiffs were minors and have prosecuted the action through their guardian ad litem. At the conclusion of the trial the case was submitted to the jury under appropriate instructions by the court. The jury returned a verdict in favor of each plaintiff. Thereupon judgment was rendered in favor of plaintiffs. From this judgment defendants have appealed.

The record herein presents the following state of facts: On October 17, 1929, respondent Martin Fugelsang was operating a Ford roadster automobile on Braley avenue in Fresno county. Braley avenue runs north and south and the Ford roadster was proceeding in a northerly direction. Braley avenue intersects Kearney avenue, which runs east and west. Appellant Steiner, an employee of appellant California Northern Petroleum Company, was operating a Studebaker sedan in a westerly direction on Kearney avenue. At the intersection of the two streets Kearney avenue is approximately 140 feet wide. There is upon it a central driveway which is graded to a width of 39 feet and oiled in the center to a width of 20 feet. On each side of this central roadway there is a road running parallel to the central driveway. Between the central driveway and each of the parallel roads there is a row of palm, oleander, and eucalyptus trees. Braley avenue is graded to a width of 26 feet south of its intersection with Kearney avenue and has an oiled surface of approximately 13 to 15 feet wide in the center. South of the southerly roadway along Kearney avenue there is an irrigation ditch, and at the southwest corner of the intersection of Kearney avenue and Braley avenue there was a vineyard whose vines on the day of the collision had attained a height of from 4½ to 5 feet. The point of collision of the two automobiles was near the center of the intersection of the central driveway of Kearney avenue with Braley avenue. The evidence presented at the trial indicates that the right front part of appellants' Studebaker sedan collided with the right rear side of the Ford roadster owned and operated by respondent Martin Fugelsang. As a result of the collision the right rear wheel and fender of the Ford roadster were crushed and the rear bumper torn off. The windshield was shattered and the standards were broken. The steering wheel and the top of the radiator were bent down and the right front wheel broken. The front bumper of the Studebaker sedan was torn off and the right front fender was crushed. The right headlight was broken and the right front spring horn was bent. The speed of the automobiles was variously estimated at from 15 to 35 miles per hour for the Ford roadster and from 35 to 55 miles per hour for the Studebaker sedan as the vehicles approached the intersection. Following the collision the Ford roadster came to a stop at about the northeast corner of the intersection, a distance of approximately 30 feet from the point of collision. The Studebaker sedan came to a stop at a point on the southerly side of the central driveway of Kearney avenue and west of the intersection with Braley avenue at a distance variously estimated from 50 feet to 250 feet from the point of collision. While most of the evidence introduced at the trial by appellants indicated that the two automobiles came into the intersection at approximately the same moment, it is to be noted that appellant Steiner testified that when he first saw the Ford automobile it was entering the intersection, at which moment the Studebaker sedan which he was operating was approximately 20 feet east of said intersection. The testimony of respondents' witnesses indicates that the Ford roadster had proceeded into the intersection before appellants' automobile had come into it. On the point as to whether the Ford automobile which approached the intersection on the left of the Studebaker sedan had entered the intersection prior to the entrance into it of the Studebaker automobile, the evidence is therefore, at most, conflicting.

[1] Appellants first contend that the evidence showed that the respondent Martin Fugelsang was guilty of contributory negligence as a matter of law and that therefore the verdict rendered in his favor lacks evidentiary support and that the judgment based on the verdict is contrary to law and that the court erred in denying appellants' motion for a new trial. Counsel for appellants correctly state the rule relative to contributory negligence as a matter of law. It has been so often and clearly enunciated by California courts that its scope and limitations are determined. "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125, 128. The above language was quoted with approval in Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369. It is admitted that the evidence as to the cause of the accident was sharply conflicting. Under such circumstances there is slight possibility of applying the doctrine of contributory negligence as a matter of law. The evidence upon which appellants rely to sustain their contention that the respondent Martin Fugelsang was guilty of contributory negligence as a matter of law is the testimony of Martin Fugelsang himself wherein he stated that he looked to his right as he entered the intersection, saw appellants' automobile about 140 feet to his right approaching the intersection at a speed which he could not estimate, that he then looked to his left and did not again look to the right until appellants' automobile was within 3 or 4 feet of his automobile, when he glanced over his right shoulder and saw appellants' car in close proximity to his own. The case of Kinney v. King, 47 Cal. App. 390, 190 P. 834, on which appellants place so much reliance, was one wherein the court had before it the construction of a municipal ordinance

providing that the drivers of all vehicles must look out for and give the right of way to automobiles approaching from the right at the street intersections. In its decision the court adverted to the fact that plaintiffs' own evidence showed that when plaintiff F. E. Kinney was approaching the intersection in which the collision occurred he saw the defendant's automobile traveling at such speed and at such a point in the street as would bring it into collision with his own car, and the court said that this being true both parties must be held to have been approaching the intersection simultaneously within the meaning of the ordinance and that the duty therefore rested upon plaintiff to yield the right of way to defendant who was at plaintiffs' right. The conclusion arrived at by the appellate court that the evidence of the plaintiffs showed that as plaintiff F. E. Kinney approached the intersection he saw defendant's automobile traveling at such speed and at such a point that if each driver continued to proceed along his respective line of approach a collision would inevitably occur indicates the existence of an important element of fact in view of the language of the ordinance before the court. The evidence in the instant case does not warrant this court in arriving at the conclusion announced in the case cited. Furthermore, we are not here concerned with the interpretation of an ordinance phrased as was the ordinance in Kinney v. King, supra. The statutory law here applicable is to be found in subdivision (a) of section 131 of the California Vehicle Act (St. 1923, p. 560), as amended by St. 1929, p. 541, § 55, which reads as follows: "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at the same time the driver of the vehicle on the left shall yield to the driver on the right."

[2-4] This was the state law applicable to the situation presented in the instant case which was in effect at the time of the collision. Under it the right of way at street intersections is given to the vehicle which first enters the intersection. It is only in those cases in which the two vehicles actually enter the intersection at the same time that the rule that a driver on the left shall yield to a driver on the right applies. An important and vital feature therefore of the present action, and so recognized throughout the trial, is a determination of whether the Ford automobile operated by respondent Martin Fugelsang entered the intersection prior to the entrance into it of the Studebaker sedan operated by appellant Steiner. Since the evidence respecting this feature was in conflict, the jury's determination of the fact is controlling unless this court can discover from the evidence presented and inferences reasonably deducible therefrom, that the jury's determination was manifestly incorrect. It is argued that, accepting as correct the testimony of respondents and their witnesses as to the speed of the two automobiles and the distance of appellants' automobile from the point of collision when it was first observed by respondent Martin Fugelsang, the inherent improbability of Martin Fugelsang's testimony is apparent and it is said that this tends to substantiate appellants' testimony that each car entered the intersection at the same time, traveling at approximately the same rate of speed. To arrive at this conclusion there is involved a mathematical calculation wherein certain factors are assumed as definitely fixed. We must, for instance, assume that appellants' automobile was 140 feet from the point where respondents' automobile was when Martin Fugelsang first observed it and this latter point must be taken as definitely fixed. Furthermore, we must be able to assume a definite rate of speed at which each automobile was traveling. But the testimony relating to these different factors is in conflict. Appellants' witnesses fix the speed of appellants' automobile at from 30 to 35 miles per hour as it approached the intersection and the speed of respondents' automobile at approximately the same rate. Respondents' witnesses place the speed of the Ford automobile at 15 miles per hour approaching the intersection and a decrease in this speed in the intersection and estimate the speed of appellants' automobile at from 35 to 55 miles per hour. The estimate of respondent Martin Fugelsang that appellants' car was 140 feet distant from his own when he first observed it is an estimate and nothing more. It is therefore obvious that too many facts are in dispute to arrive at a determination of the problem by mathematical calculation. These disputed facts were necessarily resolved in respondents' favor by the jury who heard the testimony of the witnesses who testified during the trial. Upon the jury rested the duty of determining the weight to be given to the evidence, its sufficiency, and the credibility of the witnesses.

[5] It is, however, urged that, although it be conceded that respondent Martin Fugelsang had the right of way, he was not entitled to recover, because his own undisputed testimony shows that, having first looked to the right as he entered the intersection and having seen appellants' automobile approaching the intersection, he then looked away and to his left and did not again look to the right until it was too late to avoid the collision that ensued. This failure to look longer to the right is said to constitute negligence which contributed to the collision and bars him from recovery. But as we are now proceeding on the hypothesis that the testimony of Martin Fugelsang is correct, we must assume that it

was correct in its entirety and therefore assume not only that Martin Fugelsang looked once to his right, but also that his estimate that appellants' automobile was 140 feet away was correct. If his estimate of the distance was correct, respondent Martin Fugelsang was then entitled to assume that appellants' automobile was traveling at a lawful and prudent rate of speed and under such control that it could be slowed down or if necessary brought to a stop, to enable respondent to proceed through the intersection with safety. Robinson v. Clemons, 46 Cal. App. 661, 664, 190 P. 203; Carbaugh v. White Bus Line, 51 Cal. App. 1, 195 P. 1066; Whitelaw v. McGilliard, 179 Cal. 349, 176 P. 679. Under such circumstances, respondent was under no duty to give further heed to appellants' automobile.

[6] Finally, it is contended that respondent Ellen Fugelsang is not entitled to recover because, according to her own testimony, she was reading a book as the automobile in which she was riding as a guest proceeded into and across the intersection. This failure on her part to look and to warn her brother Martin Fugelsang is said to constitute negligence which contributed to the collision and to the injuries for which she claims compensation. If, as counsel for respondents point out, it be conceded that Ellen Fugelsang was negligent in failing to look, this alone does not bar her from recovery, for it was incumbent upon appellants to show that her dereliction in this regard contributed proximately to the collision. Carroll v. Central Counties Gas Co., 96 Cal. App. 161, 273 P. 875, 274 P. 594; Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236; Bolles v. Boone, 66 Cal. App. 238, 225 P. 775. We may speculate and conjecture that if respondent Ellen Fugelsang had looked up from the book which she was reading she would have seen appellants' automobile approaching and that if she had continued to look she might have been able to foresee that appellants' automobile would collide with the Ford automobile in which she was riding in sufficient time to enable her to warn the driver seated by her side so that he might have avoided the collision. But we here enter upon a field of clear speculation and conjecture not justified in view of appellants' failure to sustain the burden of showing not only that she was negligent but that her negligence proximately contributed to the happening of the collision in which she suffered the injuries for which the jury awarded her damages. Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376; Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 111 P. 530, Ann. Cas. 1912A, 642.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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118 Cal.App.(Supp.) 761

PEOPLE v. ARMENTROUT et al.

Cr. A. 632.

Appellate Department, Superior Court, Los Angeles County, California.

July 3, 1931.

1. Conspiracy 🔑23.

Workmen engaged in industrial dispute have right to appeal to others in sympathy with cause by spreading news of dispute, whether by arranging meeting in hall or printing paper, and employer, though damaged as result, cannot complain.

2. Constitutional law 🔑90.

Freedom of speech and press includes liberty of circulating and publishing; to "publish" ordinarily meaning to disclose, reveal, proclaim, circulate, or make public (Const. art. 1, § 9).

[Ed. Note.—For other definitions of "Publish," see Words and Phrases.]

3. Constitutional law 🔑90.

Constitutional guaranty of free press means immunity from restraint previous to publication (Const. art. 1, § 9).

4. Constitutional law 🔑90.

Constitutional guaranty of free press not only inhibits prior, but subsequent, curtailment of right of expression, subject to wartime restrictions or restrictions properly imposed upon expressions advocating violence (Const. art. 1, § 9).

5. Constitutional law 🔑90.
Injunction 🔑98(1).

No injunction lies against publication of what would be libel or contempt (Const. art. 1, § 9).

6. Municipal corporations 🔑596.

"Anti-picketing" ordinance, so far as prohibiting use of banners, signs and the like, *held* aimed at banners, signs, or circulars exhibited or offered free.

7. Municipal corporations 🔑596.

"Anti-picketing" ordinance *held* directed at direct persuasion not to patronize or work, not indirect persuasion coming from adhering to cause.

8. Municipal corporations 🔑631(1).

Sale or display of newspaper advising people not to patronize theater *held* not to violate "anti-picketing" ordinance.

9. Municipal corporations 🔑631(1).

Crying out, as part of appeal to buy newspaper, headline advocating withdrawal of theater patronage, would not violate "anti-picketing" ordinance, in view of Constitution and other ordinance (Const. art. 1, § 9).

If defendants confined themselves to announcing, "Extra. Read the * * * All about the * * * Theatre being unfair," or words to similar effect, there would be no violation of "anti-picketing" ordinance, making it unlawful to make any loud or unusual noise for purpose of inducing or influencing any person to refrain from entering any works or factory or place of business or employment, not only in view of general constitutional considerations, but in view of street advertising ordinance excepting news venders from the provisions of the latter.

10. Municipal corporations 🔑631(1).

Crying out, in front of theater and without referring to newspaper, headline advising withdrawal of theater patronage, *held* violation of "anti-picketing" ordinance, not cured by exhibiting newspaper.

11. Municipal corporations 🔑640.

Evidence sustained conviction of violating "anti-picketing" ordinance.

12. Criminal law 🔑62.

Excepting offenses against laws or ordinances under police power, creating crime regardless of intent, principal cannot be criminally responsible for agent's act unless he aids, commands, or assents thereto.

13. Criminal law 🔑21.

In statutory offense, created under police power, unless wrongful intent or guilty knowledge, commonly designated by words "willfully" or "maliciously," is made essential element of prohibited act, intent to disobey law is immaterial.

[Ed. Note.—For other definitions of "Maliciously" and "Willfully," see Words and Phrases.]

14. Criminal law 🔑20.

"Willfulness," if made vital ingredient of crime, implies knowledge and purpose to do wrong.

[Ed. Note.—For other definitions of "Willfulness," see Words and Phrases.]

15. Criminal law 🔑62.

Criminal act requiring specific intent cannot be ratified.

16. Municipal corporations 🔑631(1).

"Anti-picketing" ordinance *held* intended to punish only acts done with specific intent of inducing persons to refrain from entering business place, or trading therein, or workmen from working or offering to work therein.

17. Criminal law 🔑20.

Where specific intent must exist, defendant, to be guilty, must specifically contemplate ultimate act.

18. Criminal law 🔑62.

Specific intent to commit crime cannot be imputed to person through agent without principal's direct participation.

To be guilty of this intent, there must be command, direction, or consent by principal to doing of very act.

19. Criminal law 🔑80.

Participation in crime may be inferred from presence at scene.

20. Criminal law 🔑62.

There must be something more than mere presence or surmise to show concert of action between principal and agent.

21. Criminal law 🔑62.

To hold principal criminally responsible for agent's act, purpose of act must be shown to have been authorized or contemplated by principal.

22. Criminal law 🔑62.

To convict principal of agent's crime, involving specific intent, there must be something warranting inference that principal formed intent and purpose to do act denounced.

23. Municipal corporations 🔑640.

Evidence warranted conviction of trade union officer for violation of "anti-picketing" ordinance by others, in view of statute respecting aiding and abetting or, not being present, advising and encouraging, commission of offense (Pen. Code, § 31).

24. Municipal corporations 🔑630.

That union officer's part in crime to deter public from patronizing theater did not require him personally to violate "anti-picketing" ordinance would not, of itself, prevent conviction (Pen. Code, § 31).

25. Municipal corporations 🔑630.

Object of plan to deter public from patronizing theater being lawful, mere fact that union officer joined in execution would not subject him to criminal responsibility for unlawful act other member of combination might do (Pen. Code, § 31).

26. Municipal corporations 🔑630.

To hold union officer criminally responsible for violation of "anti-picketing" ordinance by others, it must appear he agreed to commission of unlawful act as means of carrying out common purpose (Pen. Code, § 31).

> If he did so agree, he thereby became member of conspiracy to do such unlawful act and assumed criminal liability for act when it was done by other members of conspiracy, and such conspiracy might be proved on his trial for offense in order to show his responsibility therefor.

27. Criminal law 🔑1159(2).

Appellate court could not reverse jury's finding supported by evidence.

YANKWICH, Judge pro tem., dissenting in part.

Appeal from Municipal Court of Los Angeles; Benjamin Scheinman, Judge.

Thomas W. Armentrout and others were convicted of violation of section 1 of the Los Angeles city anti-picketing ordinance (Ordinance No. 20586 N. S.), and they appeal.

Affirmed.

Thomas P. White, of Los Angeles, for appellants.

Charles P. Johnson, City Pros., and Joe Matherly and John L. Bland, Deputies City Pros., all of Los Angeles, for respondent.

YANKWICH, Judge pro tem.

In three complaints the five defendants were charged with the violation of two sections of what is known as the Los Angeles city "anti-picketing" ordinance. Ordinance No. 20586 N. S. The first count of each of these complaints charged violation of section 1 through the making of loud and unusual noises for the purpose of inducing, influencing, and attempting to induce and influence, persons to refrain from entering the Rialto Theatre at 812 South Broadway, in the city of Los Angeles. Defendants Thomas W. Armentrout, Joseph P. Dufrane, and James Doyle are charged with the commission of the offense on December 3, 1930. No. 19535. In another complaint, Ernest Apac and Joe Hough are charged with the commission of the offense of December 4, 1930. No. 19537. In a third complaint, Joe Hough and James Doyle are charged with the commission of the offense on December 11, 1930. No. 19735. As to the second count, which charged loitering and picketing, the trial court granted a new trial. The defendants were found guilty by a jury, and judgment was pronounced by the court on March 24, 1931. The defendant Armentrout was fined $250, Dufrane was fined $50, the others were fined $25, upon count I of the complaint. As to count II the trial court granted a new trial.

The determination of the sufficiency of the evidence to sustain the conviction requires a discussion of the section 1 of the anti-picketing ordinance under which the prosecution was had. Before doing so, however, it is well to state briefly that the defendant Armentrout was the assistant business manager of the Projectionists' Union, consisting of motion picture machine operators. The union was engaged in a controversy with the proprietor of the Rialto Theatre, who had locked out the members of the union, whom he had previously employed. For several weeks prior to the dates covered by the complaints, newsboys had been stationed by Dufrane, acting as circulation manager, upon the street, at the north and south property line of the theater, to sell copies of the Los Angeles Citizen, a newspaper of general circulation, published by the labor movement in Los Angeles, and to cry the headlines of the newspaper. On November 28, 1930, the editor of the newspaper issued, at the request of T. H. Eckerson, business manager of the union, a special edition of 500 copies, which contained all the material published in the regular edition, except that the front page had been changed by printing thereon in large type headlines: "Trade Unionists and their families and friends will need no further information to have them decide that they do not patronize the Rialto Theatre because it is on the unfair list of Organized Labor. By T. H. Eckerson, Business Representative of the Moving Picture Projectionists Union No. 150." The front page also carried a banner line in large type: "Rialto, Broadway are yet on the unfair list." On page 3 of this edition was the article relating to the controversy, which appeared also in the regular edition.

For crying out loud certain words claimed to be the headlines of this special edition, the prosecution was instituted. And it is the contention of the defendants that they were merely selling newspapers, and that, assuming they were making loud and unusual noises in so doing, these were not unusual, but such as are made by newsboys everywhere, and are clearly recognized and legalized by the exception to what it known as the "ballyhoo" or street advertising ordinance of the city of Los Angeles. Ordinance No. 6859 N. S.

In passing upon this contention, it is well to consider the anti-picketing ordinance, in the light of certain rights of laboring men which are recognized by law, and the right of every citizen to speak freely in peace time, without being subjected to legislative or administrative restrictions, not covered by the law of libel, contempt, and/or regulatory measures passed pursuant to the police power. Section 1 of the ordinance reads: "It shall be unlawful for any person, in or upon any public street, alley or public place in the City of Los Angeles, to make any loud or unusual noise, or to speak in a loud or unusual tone or to cry out or proclaim, for the purposes of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any works or factory or any place of business or employment, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from purchasing or using any goods, wares, merchandize or other article or articles, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from doing or performing any service or labor in any works, factory, place of business or employment, or for the purpose of intimidating, threatening or coercing any person who is performing, seeking or obtaining service or labor in any works, factory, place of business or employment."

The ordinance has been declared a valid exercise of the police power. Matter of Williams, 158 Cal. 550, 111 P. 1035. Similar ordinances have been upheld elsewhere. Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A. L. R. 1194; Ex parte Stout, 82 Tex. Cr. R. 183, 198 S. W. 967, L. R. A. 1918C, 277; Watters v. Indianapolis, 191 Ind. 671, 134 N. E. 482. See note, "The boycott as a weapon in industrial dispute," 16 A. L. R. 230, 27 A. L. R. 651, 6 A. L. R. 909.

[1] In interpreting the ordinance, it is well to bear in mind that courts have recognized the right of workmen engaged in industrial disputes to appeal to others in sympathy with their cause by spreading the news of this dispute. Whatever be the loss the employer may suffer from the social pressure resulting from this appeal, he cannot complain. 16 R. C. L. 457. To make this appeal effective, the working man may, as it has been pithily put in one case, "hire a hall or print a paper." Some expressions of these principles are here given:

"After striking, the employees may engage in a boycott, as that word is here employed. As here employed it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means of fair publication, and fair oral or written persuasion, to induce others interested in or sympathetic with their cause, to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuse so to do. This last proposition necessarily involves the bringing into a labor dispute between A and B, C, who has no difference with either. It contemplates that C, upon the request of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his patronage from A, with whom he has no controversy. * * * In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer and to induce by fair means any and all other persons to do the same, and in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal." Pierce v. Stablemen's Union, 156 Cal. 70, 76, 77, 103 P. 324.

"Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious." American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360; Sayre's Cases on Labor Law, 213, 219, 220.

"So, also, the laborers have the right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly, or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars in a peaceable way, and with no attempt at coercion. If the effect in such case is ruin to the employer, it is damnum absque injuria, for they have only exercised their legal rights." Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 415, 74 Am. St. Rep. 421.

"Those who labor for wages have certain rights equally unquestioned. They may contract for employment on whatever terms they see fit, and, unless restrained by a binding contract, may cease employment when they please. They have a right to form unions for the purpose of improving their economic and social conditions, or to refrain from joining such unions if they choose. They have a right to strike in concert when the object of the strike is for their collective benefit. They have a right to acquaint the public with the fact of its existence and the causes thereof, and appeal for sympathetic aid by a request to withhold patronage. * * *

"It is clear that any resort to the primary boycott, if in any degree successful, will result in damage to the business of the person boycotted; but, where it is lawfully conducted, this is one of the inconveniences for which the law does not afford a remedy." Robison v. Hotel & Restaurant Employees Local No. 782, 35 Idaho, 418, 207 P. 132, 27 A. L. R. 642.

[2] The right of free speech and of a free press is guaranteed by the Constitution of California, article 1, § 9.

"Liberty of circulation is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, 879.

"The word 'publish' ordinarily means to disclose, reveal, proclaim, circulate or make public." In re Monrovia Evening Post, 199 Cal. 263, 266, 248 P. 1017.

[3-7] The constitutional guaranty against the abridgment of the freedom of the press means immunity from restraint previous to publication. No such restraint previous to publication has been exercised in the English speaking world since the Licensing of Printing Act of the Long Parliament against which John Milton's Areopagitica was directed. The inhibition is also a positive injunction against the curtailment of the right of expression, after it is made, subject, of course, to war-time restrictions, or to such restrictions as may be imposed upon expressions in advocacy of violence. Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470; People v. Steelik, 187 Cal. 361, 203 P. 78. In California, injunctive relief against the publication of what, upon publication, might be libel or contempt is denied. Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; In re Wood, 194 Cal. 49, 227 P. 908; Dailey v. Superior Court, 112 Cal. 94, 44 P. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160.

The portion of the ordinance under which the defendants stand convicted was aimed more at boycotting than at picketing. It was aimed at oral means of inducing persons not to enter the premises or trade or work upon them. The use of printed means is covered by section 2. The Supreme Court has expressed doubts about the constitutionality of that section, particularly as it applies to "loitering." Matter of Williams, supra. We take it that even that section, in so far as it prohibits the use of banners, signs, and other similar physical means of persuasion, was aimed at banners or signs or circulars which are exhibited or offered free and not those which are, like a newspaper, offered for sale. The persuasion at which the section is directed is the direct persuasion not to patronize or work, and not the indirect persuasion which comes from adhering to a cause by being convinced of its justness. Were it otherwise, if a labor union should induce a newspaper of general circulation to publish an article in advocacy of its cause, in the course of a labor difficulty, the circulation of the newspaper in the vicinity of another's place of business might be entirely prohibited upon the ground that the reader might by reading it be convinced of the rightness of the union's cause and be induced to refuse to patronize or work. At the oral argument counsel for the people contended for such power. But we know of no decision which would recognize such right. The statement in Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, to the effect that the display of a newspaper is "equivalent to carrying a banner or wearing a sash with objectionable reference" and that such display might be prohibited, was not made in an action under a statute or ordinance prohibiting the doing of the act. It arose in a proceeding in equity. The same court, in interpreting an anti-picketing ordinance has held that such an ordinance cannot be sustained if it denies the lawful doing of a lawful act, such as the right to strike. Hall v. Johnson, 87 Or. 21, 169 P. 515, Ann. Cas. 1918E, 49. And while courts have upheld laws aimed at the suppression of particular issues of indecent publications we doubt if any constitutional authority or principle could be found which would sustain an ordinance which sought to suppress the circulation of a newspaper in the vicinity of a place of business, merely because its purchase by prospective patrons might result in the withdrawal of patronage or work. Freedom of the press would become illusory if it hung on so slight a thread. What precedes relates more to section 2 of the ordinance. It may seem beyond the issues here involved, because the trial court granted a new trial as to the counts based upon it. It is referred to because a good portion of the argument of counsel for the people is directed to the point that the acts of the defendants amounted to picketing. "Picketing" proper is denounced by section 2 of the ordinance. The first part of section 1, under which count I of the three complaints was drawn, is directed at boycotting. The purpose alleged in the complaint is "for the purpose of inducing, influencing and attempting to induce and influence persons to refrain from entering a certain place of business; and for the purpose of inducing, influencing and attempting to induce and influence persons to refrain from purchasing tickets from a certain place of business, to-wit: Rialto Theatre, located at 812 South Broadway in the City of Los Angeles."

[8, 9] We conclude that neither the sale of the newspaper, nor its display would constitute a violation of the ordinance. Nor would it be a violation of the ordinance to cry out the headlines, as a part of an appeal to buy the newspaper, whatever form that appeal might take. If the evidence in the record indicated that the defendants confined themselves to announcing, "Extra. Read the Citizen. All about the Rialto Theatre being unfair," or words to similar effect, the judgment could not be upheld. For, aside from the general constitutional considerations heretofore adverted to, the news vendors would come clearly within the exception of Ordinance No. 6859 N. S., the more so, as the evidence shows, that the manner of calling did not differ from that used by newsboys in ordinary cases.

[10, 11] However, there is evidence in the record which shows clearly that the newsboys in calling out did not always use the phrase "Rialto Theatre unfair to labor" in conjunction with an appeal to read or buy "The Los Angeles Citizen." There is evidence in the record that the reference to the newspaper was omitted altogether. The words "Rialto Theatre unfair to labor" thus became words intended to achieve the result denounced in the ordinance, and charged in count I of the complaints. And the mere fact that, at the same time, the newspaper may have been exhibited, does not change the character of the words. A careful examination of the record shows that this occurred upon all the dates charged in the complaints, December 3, 4, and 11. See Tr. pp. 35, 50, 62, 67, 87-89, 90, 104-105, 111, 134, 139, 140, 142, 143. The charge as to December 17 against the defendant Dufrane is not supported by the evidence. This is conceded by the people. There was no calling out on that day. Tr. p. 59. But while evidence was directed to this date we find no count in the complaints based upon this date. As to other days, the evidence is clear that he placed the newsboys (Doyle, Hough, and Apac) upon the north and south property line of the theater, told them what to say, and, when he did not himself participate in calling out, he directed their actions in such a manner as to be held responsible for the words used, even though he may have testified that his instructions to them were to mention the newspaper in conjunction with what they called out. People v. Wilson, 93 Cal. App. 632, 636, 269 P. 951. The judgment as to him and Apac, Doyle, and Hough is sustained by the evidence. However, the judgment cannot be sustained as to the defendant Armentrout. Certain general considerations should precede the examination of the testimony as to the connection of the defendant Armentrout with the acts of December 3, 1930, charged in complaint No. 19539. What are the circumstances under which a person may be charged with criminal responsibility for the acts of his agent?

"A principal, in order to be held criminally liable, must be shown to have knowingly and intentionally aided, advised, or encouraged the criminal act committed by the agent." People v. Doble, 203 Cal. 510, 511, 265 P. 184.

"Before one can be convicted of a crime by reason of the acts of his agent a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law." People v. Green, 22 Cal. App. 45, 50, 133 P. 334.

Such is also the law elsewhere. 2 Corpus Juris, p. 855; 8 R. C. L., pp. 65, 66, et seq.; Rex v. Huggins, 2 Ld. Raymond 1574, 92 English Reports, 518, a leading case on the subject.

[12-14] Excepting offenses like libel, or violations of revenue or liquor law, or pure food laws, or laws against public nuisances, or ordinances under police power, which make the doing of an act a crime irrespective of criminal intent, there can be no criminal responsibility of the principal for the act of the agent. Only when the principal aids, abets, commands, or assents to the criminal act can he be held responsible for a crime of which intent is an essential ingredient which is not supplied by law or implied from the doing of the act. People v. Moore, 82 Cal. App. 739, 747, 748, 256 P. 266.

"If, at common law, crime when committed by the individual consists of acts done with an evil intent, in statutory offenses created in the exercise of police power, unless a wrongful intent or guilty knowledge, commonly designated by the use of the words 'wilfully' or 'maliciously', is made an essential element of the prohibited act, the violator may be convicted and punished, even if he has no design to disobey the law." Commonwealth v. N. Y. C. & H. R. R. Co., 202 Mass. 394, 88 N. E. 764, 23 L. R. A. (N. S.) 350, 351, 132 Am. St. Rep. 507, 16 Ann. Cas. 587.

The liquor selling cases, and the police power regulation cases draw the same distinction. People v. O'Brien, 96 Cal. 171, 175–179, 31 P. 45; People v. McClennegen, 195 Cal. 445–469, 234 P. 91; People v. Dillon, 199 Cal. 1, 7–9, 248 P. 230; People v. Le Baron, 92 Cal. App. 550, 568, 268 P. 651, 269 P. 476. For the law elsewhere, see Commonwealth v. Warren, 160 Mass. 533, 36 N. E. 308; Commonwealth v. Sacks, 214 Mass. 72, 100 N. E. 1019, 43 L. R. A. (N. S.) 1, Ann. Cas. 1914B, 1076, and note thereto at 43 L. R. A. (N. S.) 2 et seq.; Spokane v. Patterson, 46 Wash. 93, 89 P. 402, 8 L. R. A. (N. S.) 1104, 123 Am. St. Rep. 921, 13 Ann. Cas. 706. Where "willful"-ness is made a vital ingredient of a crime, it implies "knowledge and purpose to do wrong." People v. Swiggy, 69 Cal. App. 574, 581, 232 P. 174.

[15] Strictly speaking, there can be no ratification of a criminal act in which a specific intent is necessary.

"He, (the principal) must be liable, if at all, at the time the act is done." Clark & Marshall on Crimes (3d Ed.) § 194, p. 255.

"He only is criminally punishable, who immediately does the act, or permits it to be done." Rex v. Huggins, supra, at page 1580 of 2 Ld. Raymond.

[16] It must be evident that, by the enactment of section 1 of the ordinance against picketing, the council of the city of Los Angeles intended to punish not the mere doing of certain acts, but the doing thereof, with the specific purpose (i. e., intent) there denounced, namely, to induce or influence persons to refrain from entering a place of business, or from trading therein, or workmen from working or offering to work therein. The words "intent" and "purpose" express the same thought and idea. See Estate of Olmsted, 122 Cal. 224, 232–233, 54 P. 745; 6 Words and Phrases, Third Series, page 460.

[17, 18] There was thus created an offense like many others we have, in which the criminal intent, or purpose, implied from the doing of the act is not sufficient—offenses in which a specific intent must exist. People v. Weston, 32 Cal. App. 571, 163 P. 691 (assault with intent to commit murder); People v. Lee Kong, 95 Cal. 666, 30 P. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165 (ditto); People v. Fleming, 94 Cal. 308, 29 P. 647 (assault with intent to commit rape); People v. Stewart, 97 Cal. 238, 32 P. 8 (ditto). In such cases, the defendant to be guilty must "specifically contemplate" the ultimate act. Otherwise he is not guilty. Without this specific intent, there can be no such crime. People v. Mooney, 127 Cal. 339, 59 P. 761.

Intent of this character cannot be imputed to a person through an agent, without the principal's direct participation.

To be guilty of this intent there must be command, direction, or consent by the principal to the doing of the very act. There is no such consent shown here as to the defendant Armentrout.

[19-22] The record shows that Armentrout's duty was to check the number of patrons going into the theater. He did not call out any words, or urge any one to buy a newspaper. He was seen the Friday before the occurrence to hand the newspapers to some of the newsboys. None of the officers saw him exhibit any of the newspapers. There is testimony to the effect that about November 14, 1931, Armentrout told one of the officers that he was hiring the boys and that he told the officer who protested that the newsboys were crying too loud that he could not keep them from so doing. This is too remote to infer a hiring on December 3, 4, and 11. This conversation was denied by him. He also denied that he ever gave the newsboys any money, as one of the officers testified. What the money was for was not stated. Armentrout admitted that he may have given them a dollar or two while they were waiting for the man who paid them. While he was about the premises, he exercised no direction or control over them. No one ever saw him give them any directions. We cannot infer direction even from hiring, assuming the evidence shows hiring. It may be true that intent may be inferred from the circumstances surrounding the doing of an act. People v. Franklin, 46 Cal. App. 1, 5, 188 P. 607; People v. Bowman, 24 Cal. App. 781, 142 P. 495; People v. Moore, supra, page 748 of 82 Cal. App., 256 P. 266. It is also true that participation may be inferred from presence at place of crime. People v. Wilson, 93 Cal. App. 632, 269 P. 951. But there must be something more than mere presence or mere surmise in order that concert of action be shown to exist. And the purpose of the act must be shown to have been authorized or within the contemplation of the principal. People v. Green, supra; People v. Doble, supra. There must be something from which the court or jury can infer that the principal had formed "the intent and purpose" to do the act denounced by the statute. See People v. Smith, 96 Cal. App. 373, 378–380, 274 P. 451; People v. Baba, 101 Cal. App. 723, 282 P. 403. There is nothing in the record here from which such inference can be drawn—nothing from which to infer that Armentrout was there for the purpose of aiding in the violation of the ordinance by the other defendants. His act in checking the theater patronage was a legal act, done in a legal manner. He cannot be held criminally liable for the acts of

the newsboys merely because he also was engaged in some work for the cause which the newsboys had also been hired to serve. See Union Labor Hospital v. Vance Lumber Co., 158 Cal. 551, 556, 557, 112 P. 886, 33 L. R. A. (N. S.) 1034.

The judgment as to Armentrout should be reversed. As to the other defendants, the judgments are affirmed.

McLUCAS, P. J., and SHAW, J.

[23-27] We concur in the foregoing opinion except as to the conclusion therein reached regarding the defendant Armentrout. We think the evidence is sufficient to warrant the jury in holding him criminally responsible for the acts of the other defendants under the provision of section 31 of the Penal Code that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission, * * * are principals in any crime so committed." Here the evidence shows that the acts done by the defendants other than Armentrout were not isolated transactions, but part of a concerted plan or scheme, the object of which was to deter the public from patronizing the Rialto Theatre. Armentrout was engaged in the execution of this same plan or scheme. The fact that his part in it did not require him personally to commit any act in violation of the ordinance would not of itself prevent his conviction of such violation. On the other hand, since the object of the plan, as above stated, was lawful, the mere fact that Armentrout had joined in its execution would not subject him to criminal responsibility for an unlawful act which some other member of the combination might do. To bring about that result, it must also appear that Armentrout agreed to the commission of such unlawful act as a means of carrying out the common purpose. If he did so agree, he thereby became a member of a conspiracy to do such unlawful act and assumed a criminal liability for the act when it was done by other members of the conspiracy, and such conspiracy may be proved on his trial for the offense in order to show his responsibility therefor. People v. Ford, 25 Cal. App. 388, 397, 143 P. 1075; People v. Wilson, 76 Cal. App. 688, 694, 245 P. 781; People v. Holmes, 118 Cal. 444, 456, 50 P. 675; People v. Creeks, 170 Cal. 368, 374, 149 P. 821.

The evidence shows that the defendants other than Armentrout had been standing in front of the Rialto Theatre and crying out daily the words which are held sufficient to warrant their conviction, for a period of four weeks or more, and during that same time Armentrout had been there almost every day, counting the patrons of the theater. According to his own testimony he had occasionally brought to the theater and delivered to Dufrane the money which was used by Dufrane to pay the other defendants for their work in selling papers, and according to police officers they saw the defendant himself on some occasions pay the others. Defendant also testified that he usually brought to the scene of action the newspapers which the other defendants attempted to use as a cloak for their violations of the ordinance. He was frequently present when they were doing the unlawful acts, and therefore knew of them, and sometimes told the others what hours to work. About a month before the date of the earliest offense charged in the complaints a police officer talked to Armentrout about the other defendants, saying, "Well, can't you keep them from hollering so loud?" to which Armentrout replied, "They can holler just as loud as they want to." Armentrout also admitted to a police officer that he employed and paid the other defendants and brought them the papers. These circumstances tend to show a continuous course of conduct involving a violation of the ordinance, and Armentrout's assent to such violation, and, the jury having accepted the evidence and drawn an inference of his guilt from it, we cannot reverse their finding.

The judgments against all of the appellants are affirmed.

213 Cal. 160

DAHL v. STATE BAR OF CALIFORNIA.

L. A. 12996.

Supreme Court of California.

July 21, 1931.

Attorney and client ⚷58.

Evidence *held* to justify suspension of attorney from practice for six months for sharing with unlicensed person compensation for professional employment.

In Bank.

Proceeding by John F. Dahl to review an order of the Board of Governors of the State Bar of California, recommending that petitioner be suspended from the practice of law for a period of six months.

Petitioner suspended from practice of law for period of six months.

John F. Dahl, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Proceeding to review an order of the board of governors of the state bar of California recommending that petitioner be suspended from the practice of law in this state for a period of six months.

The local administrative committee for the county of Los Angeles, after a hearing upon charges duly preferred against petitioner, found him guilty of violation of rule 3 of the rules of professional conduct of the state bar of California, which provides, among other things, that a member "shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; nor shall he directly or indirectly share with an unlicensed person compensation arising out of or incidental to professional employment." Said committee recommended that petitioner be suspended from practice for such period as the board of governors should deem meet and proper in the premises. Petitioner failed to appear before said board, and, after a consideration of his case, they recommended a six months' period of suspension. Petitioner thereupon instituted this proceeding to review such action.

The evidence is without conflict. It shows unquestionably a violation of said rule by petitioner, and supports the findings in every respect. Petitioner, who is about 62 years of age, practiced law in Minnesota for many years, but was admitted to practice in this state only three years prior to this investigation. He represented some sixty cases filed in the Los Angeles county superior court in which he did not know the plaintiffs until they were brought to him by so-called adjusters, and he accepted said cases on a contingent fee basis, usually 20 per cent. to him and 20 per cent. to the adjuster, or one-third to each of them.

Citing his excellent record and reputation, petitioner pleads that he accepted said employment in good faith in the belief that he had made personal contracts with the various plaintiffs, and he seeks to distinguish his conduct from that of other members of the bar disciplined for similar infractions [Townsend v. State Bar (Cal. Sup.) 291 P. 837; Shaw v. State Bar (Cal. Sup.) 297 P. 532; Smallberg v. State Bar (Cal. Sup.) 297 P. 916; Howe v. State Bar (Cal. Sup.) 298 P. 25; Irving v. State Bar (Cal. Sup.) 1 P.(2d) 2], in that in said cases it appears either that the real client of the attorney was the adjuster, or there was no direct employment or contract between the injured party and the attorney. Petitioner testifies that in each instance he made a distinct contract with the claimant, and made it clear to both adjusters and claimants that their claims and any ensuing litigation would be entirely in his charge and under his control, he being personally directly responsible to the claimant, and not to the adjuster. Petitioner confessed complete ignorance of recent efforts to cure "ambulance chasing," which he had long recognized as wrong, and offered, as an excuse for taking the business, his feeling that the cases were bound to go somewhere, and he believed he could give good and competent service in accepting only such cases as he believed to be meritorious.

Confirming the position of the board of governors, that all these circumstances in mitigation of petitioner's offense were considered before their recommendation was made, is the fact that in not one of the cited cases was so brief a period of suspension as six months imposed. Those cases reveal the severity of this evil biting at the heels of honest practice, and the seriousness of the offenses springing from it. We are therefore satisfied with the recommendation made in this instance by the state bar.

It is ordered that the petitioner herein, John F. Dahl, be, and he is hereby, suspended from the practice of law in this state for the period of six months, beginning on the tenth day from and after the filing of this order.

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213 Cal. 148

BLACKMORE INV. CO. v. JOHNSON et al.

S. F. 13486.

Supreme Court of California.

July 17, 1931.

1. Costs 🔑263.

Respondents *held* entitled to $500 damages for frivolous appeal taken for purpose of delay, and to cloud title to valuable property.

2. Corporations 🔑415.

Corporation's minutes *held* to authorize secretary and general manager to execute deed of trust to secure note given for price of land purchased by corporation.

> Corporation's minutes recited resolution making secretary general manager of corporation with full power to contract for purchase of property.

3. Corporations 🔑426(10).

Corporation retaining benefits of land contract, knowing that trust deed securing note given for purchase price was executed by its president and secretary, was estopped from asserting officers lacked authority to execute instrument.

4. Injunction 🔑22.

Injunction cannot be granted to stay act already committed.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Blackmore Investment Company against Axel A. Johnson and others. From the judgment, plaintiff appeals.

Affirmed.

Blackmore Investment Company, in pro. per.

Bianchi & Hyman and Milton Marks, all of San Francisco, for respondents.

Stoney, Rouleau, Stoney & Palmer, of San Francisco, for Title Insurance & Guaranty Co. amici curiæ.

PRESTON, J.

[1] The judgment is affirmed, and, inasmuch as it clearly appears that the appeal was taken for the purpose of delay and for the purpose of clouding the title to a piece of valuable property, it is further ordered that respondents receive from the appellant the sum of $500 as damages for the prosecution of a frivolous appeal.

On November 26, 1926, appellant, a Nevada corporation, purchased from respondents Johnson and wife a piece of real property situated at the corner of Van Ness avenue and Washington street in San Francisco, and on said day received a deed thereto and entered into possession thereof. The agreed purchase price was $127,000, $15,000 of which was paid in cash, and the balance assumed the form of a promissory note executed by the president and secretary of appellant, and secured by a deed of trust upon the property, likewise executed by the president and secretary of said corporation, in which the Johnsons were beneficiaries and respondent title company was trustee.

Appellant defaulted on the payments due under the instrument and the trustee noticed the property for sale, fixing the date of January 16, 1928. On January 13, 1928, appellant began this action, setting up the claim that the president and secretary of the corporation had not been duly authorized to execute the deed of trust in question, and for that reason prayed for an injunction against the consummation of said sale. No preliminary injunction was obtained. The sale was regularly conducted on the day fixed, and, more than one year after said sale, this cause came on for trial.

The trial resulted in findings of fact and conclusions of law against the contentions of appellant, and judgment was entered denying the injunction. On the trial, the secretary, Frederick B. Mozingo, was the sole witness for appellant. He testified that no previous meeting of the board of directors of said corporation occurred authorizing the execution of said note and deed of trust, nor, indeed, the purchase of said property. There was no claim that the corporation did not pay the said sum of $15,000, nor that it did not receive the deed to said property and enter into possession thereunder, as well as receive all benefits derived from the use and occupation thereof. Indeed, the evidence shows that in the month of August next prior to execution of the deed of trust the minutes recited that a resolution was adopted making F. B. Mozingo general manager of the corporation "with full power and authority to enter into contracts and leases for the purchase, sale and operation of property." The deed of trust likewise had attached to it, under the seal of the corporation, a resolution purporting to authorize its execution.

[2-4] Appellant, pretending to act in propria persona through the said F. B. Mozingo, has prosecuted this appeal upon the sole ground of alleged absence of authority on the part of himself and the president of appellant to execute said deed of trust. In the first place, the minutes confer ample authority upon Mr. Mozingo, as secretary and general manager of the corporation, to execute the

instrument. Secondly, it requires no citation of authority to show that the corporation received all the benefits from the contract, and retained for its use the fruits thereof with full knowledge of the trust deed, and the corporation is thereby estopped from asserting such a defense. Moreover, it is elementary that an injunction cannot be granted to stay an act already committed; hence, the order above made.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

213 Cal. 156

MacDONALD et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14245.

Supreme Court of California.
July 17, 1931.

Master and servant ⚷417(7).

Evidence as to whether employee's death resulted from industrial injury *held* so conflicting as to require affirmance of commission's award denying compensation.

In Bank.

Application by Annie MacDonald and others for certiorari to annul an award of the Industrial Accident Commission denying compensation for the death of Archie C. MacDonald, employee.

Award affirmed.

Joseph E. Isaacs and William Sea, Jr., both of San Francisco, for petitioners.

A. I. Townsend and Edward O. Allen, both of San Francisco, for respondents.

PRESTON, J.

Petitioners seek annulment of an award made by the Industrial Accident Commission denying them a death benefit upon the ground of insufficient evidence to establish that the death of Archie C. MacDonald on June 13, 1930, resulted from an industrial injury suffered by him on April 29th of said year.

We have examined the record at length in the light of petitioners' contention and, under evidence which could hardly be more conflicting, find that we have no recourse other than to affirm the action of the commission.

On said April 29th the deceased employee, while at work, fell from a scaffold into a hopper, injuring his arm and side. For this he received disability indemnity. His family testify that he also complained of injury to his head and offer new evidence to the effect that a fellow workman will testify that he saw the employee strike his head in falling. Said employee, however, continued all day at his work, and also worked from May 5th to 10th, after which date the condition of his arm kept him from his employment. On June 13th he collapsed on the street, striking the pavement, and was removed to the hospital His skull was found to be newly fractured, and he passed away in the evening from shock and hemorrhage. Petitioners testify that from the day of the accident to the day of his death he suffered from dizzy spells, whereas he had theretofore been an unusually healthy and uncomplaining man. They claim that obviously one of these dizzy spells, resulting from the accident, caused the fall on the pavement and further head injury and death. But they offered no expert evidence to this effect.

There is unquestionably sufficient evidence in the record which would have supported an award based upon findings in accord with petitioners' contentions, but there is also ample and sufficient evidence to support the award and findings to the contrary. The attending physician found no indication of injury to decedent's head, and he made no complaint of any during the period he was having treatment for his arm. Said physician stated that when decedent's wife reported that her husband had been taken to the hospital following a severe heart attack, which she believed was precipitated by the injury, he told her that he was of the opinion that it had no relation to the injury. He later confirmed this opinion and was corroborated in it by the post mortem findings of the pathological laboratory, by the report of the examining physician at the hospital, and by the report of the autopsy surgeon.

The report of the examining physician gives, in effect, the substance of the medical evidence, as follows: "I feel that this patient had a well-advanced arteriosclerosis, a high blood pressure, and it is quite possible that he suffered a stroke that afternoon and fell on this account, the stroke having occurred spontaneously, and that in the fall he injured the side of his head and fractured the skull. In view of the long period of time that had elapsed between his fall in April and the fall and death on June 13th, I can see no industrial connection and think that this man's death was not due to industrial causes."

The award is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

213 Cal. 183

MARTINELLI v. LUIS.

S. F. 13454.

Supreme Court of California.

July 23, 1931.

1. Easements 🔑18(1).

Right of way by necessity over another's lands arises in grant and is limited in duration to continuance of necessity.

2. Easements 🔑10(1).

User of right of way by necessity over another's lands cannot ripen into prescriptive easement while necessity continues.

3. Appeal and error 🔑1071(3).

Unsupported findings become immaterial or nonessential and may be disregarded.

4. Appeal and error 🔑934(2).

Since every intendment favors judgment, court will assume that judgment was based on findings supported by evidence, rather than on unsupported findings.

5. Pleading 🔑369(1).

Plaintiff seeking in one cause of action to establish right of way by necessity, and also, as second cause of action, by prescription, need not be compelled to elect between them at trial.

> It was not necessary that plaintiff be forced to elect at trial as to which cause of action she would stand upon, since she had a claim based on necessity arising from grant to her and to her predecessors, and also a claim based on a continuous user for nearly forty years, and if she should fail in her proof of a right of way by necessity, her proof of a right by prescription would be established.

6. Easements 🔑61(2).

Injunction restraining interference with right of way by necessity, although made perpetual in form, should terminate when necessity ceases, and its operation should be limited by applicable law.

In Bank.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by Genevieve C. Martinelli against Candido M. Luis, with a cross-complaint by defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

E. J. Dole and Carl Barnard, both of Santa Rosa, for appellant.

Wallace L. Ware, of Santa Rosa, and Jordan L. Martinelli, of San Rafael, for respondent.

SHENK, J.

This is an appeal from a judgment in favor of the plaintiff in an action to establish a right of way across the lands of the defendant.

The complaint alleges two causes of action. The first alleges a right of way by necessity as appurtenant to the grant by which the plaintiff and her predecessors in interest acquired the property. The second alleges a right of way by prescription. The defendant answered denying the existence of the right of way on either ground, and filed a cross-complaint to have his rights quieted as against the asserted easement. The court found in favor of the plaintiff as to both causes of action, and issued a permanent injunction restraining the defendant from interfering with the plaintiff's established right.

The appeal is grounded on the proposition that the findings supporting both causes of action are inconsistent; that it cannot be determined upon which theory the court predicated its judgment and injunctive order, and that the findings as to the prescriptive right are not supported by the evidence.

[1, 2] If a permanent injunction could be based on both causes of action, the alleged inconsistency would seem to be immaterial, for, in any event, the plaintiff would be entitled to the establishment of a perpetual right. But the right by necessity arises in grant and is limited in duration to the continuance of the necessity. Washburn on Easements (4th Ed.) p. 260. And the rules seem to be well settled that no length of user by way of necessity can ripen into an easement by prescription, at least while the necessity continues, for the reason that the right of way having arisen by necessity, the possession and use thereof is referable to the right appurtenant to the grant and cannot be made the foundation for the prescriptive right so long as the right by necessity continues. 9 R. C. L., p. 778. It would seem to follow that the time when the prescriptive right would commence to run would be not earlier than the cessation of the right by necessity.

[3, 4] The evidence is sufficient to support the findings on the first cause of action, and the necessity has not ceased. Since this is true, the adverse user has never commenced, and the findings on the second cause of action are not supported by the evidence. Such unsupported findings therefore become immaterial or nonessential and may be disregarded. American National Bank v. Donnellan, 170 Cal. 9, 148 P. 188, Ann. Cas. 1917C, 744. Every intendment being in favor of the judgment, it will be assumed that the judgment

was ordered pursuant to the findings, which are supported by the evidence, rather than upon the unsupported findings. Therefore the claimed inconsistency in the findings, as a controlling question, disappears from the case.

[5] It was not necessary that the plaintiff be forced to elect at the trial as to which cause of action she would stand upon. She had a claim based upon necessity arising from grant to her and to her predecessors. She also had a claim based on a continuous user for nearly forty years. If she should fail in her proof of a right of way by necessity, her proof of a right by prescription would be established. It is the fact and not the claim of necessity that would prevent the prescriptive time from commencing to run.

[6] Something should be said with reference to the operation of the injunction. It is perpetual in form. Since it is based on a right by necessity, it is perpetual in the sense that it continues so long as the necessity exists. When the necessity ceases, the injunction should terminate and its operation should be limited by the law which thus surrounds it. With this observation, it is deemed unnecessary to modify it.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

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213 Cal. 163

HORNBUCKLE et al. v. JENNINGS.

L. A. 11217.

Supreme Court of California.

July 21, 1931.

Appeal and error ⟹1011(1).

In action to cancel land contract, where testimony was conflicting and evidence supported trial court's findings, judgment for defendant was affirmed.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles F. Cook, Judge.

Action by Harry Hornbuckle and another against Curtis Jennings. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Curtis C. Taylor, of Los Angeles, for appellants.

Charles Schusterman, of Los Angeles, for respondent.

PER CURIAM.

This appeal from a judgment of the lower court in favor of the defendant, in an action to cancel an alleged contract of sale of realty and to restrain any change in the status of the property pending trial of the action, comes on after issuance by the court of an order to show cause why the judgment should not be reversed or such order made as might be appropriate in the premises.

The plaintiffs (appellants) alleged a fiduciary relation between themselves and the defendant (respondent), because of which they were defrauded by him out of two lots in Manhattan Beach. The trial court, sitting without a jury, decided in favor of the defendant on all points, finding that he purchased the property from plaintiffs for "a good and sufficient consideration," and that the "sale so made was regular in form and in all other respects and that the deed therefor given by the plaintiffs to the defendant was a free and voluntary act on the plaintiffs' part and not tainted with any fraud on the part of the defendant whatsoever."

The testimony of the witnesses is conflicting, and there is sufficient evidence to support the findings and conclusions of the trial court.

The judgment is affirmed.

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213 Cal. 58

PACIFIC STATES CORPORATION v. PAN-AMERICAN BANK.

L. A. 12433.

Supreme Court of California.

July 30, 1931.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

On petition for rehearing. For former opinion, see 1 P.(2d) 4.

Robert Brennan, of Los Angeles, and Russell & Heid, of Tulare, for appellant.

Alf. L. Armstrong, Louis W. Myers, and O'Melveny, Tuller & Myers, all of Los Angeles, Elbert W. Davis, J. H. Hoffman, and Albert A. Rosenshine, all of San Francisco, and Chandler, Wright & Ward, of Los Angeles, for respondents.

WASTE, C. J.

The petition for a rehearing herein is denied.

In denying this petition, it should not be understood that the court has expressed an opinion as to the validity of the lien provisions in the lease, or that the court has determined what effect section 21a of the Bank Act has on such purported lien, for the reason that the court is of the opinion that the complaint sufficiently alleges a controversy in reference to other clauses of the lease to entitle plaintiff to a determination of its rights thereunder.

213 Cal. 117

ALBERTSON v. BROOKS.

S. F. 13459.

Supreme Court of California.
July 13, 1931.

Rehearing Denied Aug. 10, 1931.

Mechanics' liens 🔑281(1).

In action to recover on lien for labor and materials furnished, judgment for defendant on theory of full payment *held* supported.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Charles Albertson against Belle Brooks. Judgment for defendant, and plaintiff appeals.

Affirmed.

F. W. Sawyer, of San Francisco, for appellant.

Emilio Lastreto, of San Francisco, for respondent.

PRESTON, J.

Action to recover upon two liens for labor and material furnished in the construction of a building for defendant. The complaint set forth two causes of action, the first of which was settled and paid and need not be discussed. The second cause of action alleged that there remained due from defendant to plaintiff's assignor, hereinafter referred to as plaintiff and appellant, the original contractor, a balance of $2,500 representing the unpaid portion of the contract price of $7,500 plus the reasonable value of extras furnished by plaintiff. Defendant filed an answer and also a counterclaim and cross-complaint, alleging damages in various amounts for the failure of plaintiff to complete the building within the agreed time and to settle claims for labor, etc.

Findings were waived by the parties, and the trial court gave judgment decreeing, among other things, that plaintiff take nothing on his said second cause of action, and that defendant take nothing by her counterclaim and cross-complaint. From that portion of the judgment so decreeing plaintiff has appealed upon various specifications of insufficiency of the evidence.

We find his contention to be without merit; hence a brief statement will suffice to dispose of the case. The record shows that the parties entered into an unrecorded contract whereby appellant agreed to erect the building for $7,500. However, various problems of construction necessitated departures from the specifications. Some of the changes made no material difference in cost and were properly included in the contract price; others were paid for by respondent. According to appellant's résumé of the alleged accounting between the parties, the contract price was $7,500; reasonable value of extras $5,215.48, total $12,715.48—paid by respondent direct to contractor $6,117.86 and to others for extras $1,669.63—total $7,787.49. Appellant therefore claims a balance due him of $4,927.99; yet his recorded lien, the basis of his second cause of action, made claim for $2,500 only.

Respondent does not deny that the changes were made, but claims that she has paid the full amount due. Her testimony, with that of the other witnesses, affords ample and sufficient support for the action of the trial court. The reasons for the various changes, some due to alleged errors of construction on the part of appellant, and the differences in cost which they entailed, are given in detail. The evidence shows further that the building was not finished until 154 days had elapsed after the 120 days allowed by the contract for its completion, no good excuse appearing for the delay. The realtor who represented appellant at the time the contract and specifications were drawn up, and who watched the progress of the work continually, corroborated in many particulars the testimony of respondent. Respondent testified that appellant's slowness and failure to pay bills all but compelled her to dismiss him.

There was received in evidence a receipt in full to respondent, signed by appellant, covering all labor, material, and other expenses incurred in the erection of said building. Appellant claimed that respondent visited him one night and asked him to sign his name to a blank piece of paper so she could see how he did it, above which signature was later inserted the wording of the receipt. The court, however, was thoroughly justified in believing the testimony of respondent and her witnesses to the effect that she herself typed the receipt a couple of days before signature, submitted it to said realtor for approval, and that at the time of signature appellant approved the paper and stated that all bills had been paid.

There is no merit in the contention that the settlement of the first cause of action by payment of $360 upon the alleged labor lien of R. Albertson conclusively established the fact that all bills had not been paid by respondent; hence the receipt in full was false, and the correctness of appellant's contentions is thereby proven. After being told by appellant that all bills and labor were paid, respondent took said receipt in full from him, and, if he knew that there was an unpaid labor claim, he should have then so advised her and refused to sign. The settlement of the first cause of action, viewed in the light of the evidence and the further provisions of the judgment, establishes no more than this, and shows no inconsistency in the action of the court below. As above stated, there is to our mind no doubt whatsoever of the sufficiency of the evidence to uphold the decree.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

213 Cal. 122

In re CARPENTER.

Cr. 3460.

Supreme Court of California.

July 13, 1931.

In Bank.

Charles A. Beardsley, of Oakland (Philbrick McCoy, of Los Angeles, of counsel), for petitioner.

A. H. Carpenter, in pro. per., of Stockton, for respondent.

WASTE, C. J.

The application made in open court by A. H. Carpenter on Friday, July 10, 1931, for stay of execution under judgment of contempt herein is denied.

The respondent Carpenter not having paid the fine imposed by this court on July 10, 1931, and the hour having passed at which the commitment herein was directed to issue in the event of such nonpayment, let commitment issue and be transmitted to the sheriff of San Joaquin county, Cal., with directions to serve and execute the same forthwith.

Dated July 13, 1931.

The judgment and commitment read as follows:

In the Supreme Court of the state of California. Crim. No. 3460. In the matter of A. H. Carpenter, an attorney at law. Judgment and commitment.

O. B. Harvey having heretofore filed an affidavit in the above-entitled proceeding, charging the respondent A. H. Carpenter, an attorney at law, with having disobeyed the lawful judgments and orders of this court, made on October 23, 1930, in case No. S. F. 13854, entitled "A. H. Carpenter v. The State Bar of California" (292 P. 450), and on January 12. 1931, in case No. S. F. 14029, entitled "A. H. Carpenter v. The State Bar of California" (295 P. 23), in that in the particulars set forth in said affidavit, the respondent practiced as an attorney and counselor at law in the state of California and held himself out to the public as an attorney and counselor at law in the state of California, while he was suspended by said orders of this court from the right so to do, and the court, upon reading and filing said affidavit, together with the documents filed in support thereof, having, at the suggestion of the State Bar of California, issued its order, directed to the respondent, requiring him to show cause on July 7, 1931, before this court in bank, at its courtroom in San Francisco, Cal., why he should not be adjudged to be in contempt of this court and punished accordingly for his disobedience of said orders so suspending him, in that he continued willfully after the dates thereof to engage in the practice of law in the county of San Joaquin, state of California, and in the superior court of said county, and in that he thereafter contumaciously held himself out as a licensed counselor and attorney at law, authorized and privileged to engage in the practice of law at and during the time said orders of suspension were in full force and effect, as more specifically appears in said affidavit of O. B. Harvey; the respondent, A. H. Carpenter, personally appeared in response to said order, in accordance with the instructions of this court, and the matter came regularly on for hearing at said time and place.

The respondent thereupon made a motion to quash service of the order to show cause served upon him, which motion the court denied. The respondent then interposed a demurrer to the affidavit upon which the order to show cause was based, a copy of which affidavit he admitted having received, together with the order to show cause. The court overruled the demurrer and directed the respondent to answer forthwith, or at a convenient fixed time.

The respondent declined and refused to make a verified or any sufficient answer to the accusation contained in the affidavit, and the matter having been duly submitted for decision and the court having considered the same, the court now finds that the respondent at the times and places, and in the manner, respectively, as stated in said affidavit, did practice as an attorney or counselor at law and did hold himself out to the public as an attorney and counselor at law entitled to practice in this state, at and during the times when said orders of suspension were in full force and effect, and that all of the allegations of said affidavit are true, and no good or any cause being shown why said A. H. Carpenter should not be found in contempt and punished.

Now, therefore, it is hereby ordered, adjudged and decreed that said acts of the respondent A. H. Carpenter in respect to this court constitute a contempt of this court, and the respondent is hereby adjudged and declared to be in and guilty of contempt of this court on account of the acts, as set forth in said affidavit, and that as punishment therefor the said A. H. Carpenter pay a fine of $300, and that in default of such payment he be committed to the sheriff of the county of San Joaquin, state of California, and, until such fine is paid, be imprisoned in the county jail of such county, at the rate of one day's imprisonment for every $2 of such fine.

Witness the Honorable William H. Waste, Chief Justice, and the associate justices of the Supreme Court of the state of California.

Attest my hand and the seal of this court this 13th day of July, A. D. 1931. [Seal] [Signed] B. Grant Taylor, Clerk of the Supreme Court of the State of California.

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213 Cal. 125

Ex parte JOHANNES.

Cr. 3442.

Supreme Court of California.

July 14, 1931.

1. Criminal law 🔑1083.

Appeal from superior court's judgment or order denying motion for new trial removes subject-matter thereof from jurisdiction of superior court.

2. Criminal law 🔑1083.

Pending appeal from superior court's judgment, superior court has no jurisdiction to vacate judgment or make any order affecting it.

3. Criminal law 🔑1017.

Court's jurisdiction on appeal is not determined by presence or absence therein of record on appeal.

4. Criminal law 🔑1083.

Appeal may be subject to dismissal, but until disposed of, jurisdiction of subject-matter of judgment is vested in appellate tribunal.

5. Criminal law 🔑1104(½).

Transcript can be prepared after notice of appeal is filed.

6. Criminal law 🔑1110(2).

Trial court has power, notwithstanding appeal from its judgment is pending, to correct clerical errors, omissions, and mistakes of fact in order that record speak truth.

7. Criminal law 🔑1110(2).

Trial court's changing judgment, appeal from which was pending, to make sentences run concurrently rather than consecutively, was not correction of clerical error or mistake of fact therein, and was not effective, although defendant had agreed to waive appeal.

8. Criminal law 🔑1083.

That accused was present therein when trial court modified judgment, appeal from which was pending, might give trial court jurisdiction over his person, but not jurisdiction over subject-matter of action, which was vested in reviewing court.

9. Criminal law 🔑99.

Jurisdiction of subject-matter of offense cannot be conferred by agreement of parties or estoppel.

10. Criminal law 🔑83.

Jurisdiction of subject-matter of offense is governed by Constitution and statutes.

In Bank.

Proceeding by Gladys Johannes for a writ of habeas corpus on behalf of Jacob I. Johannes.

Writ discharged, and prisoner remanded.

Superseding opinion in 296 P. 654.

Bodkin & Lucas, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for respondent.

SHENK, J.

This is an application for a writ of habeas corpus, filed by Gladys Johannes on behalf of her husband, Jacob I. Johannes, who will be referred to as the defendant. The facts are not in dispute.

The district attorney of Los Angeles county filed an information charging Jacob Johannes with the offense of grand theft in five counts. By indictment the grand jury of that county charged him with the same but a separate offense. The actions were consolidated for trial. On June 22, 1928, the jury, the Honorable Charles S. Burnell, presiding as judge, found the defendant guilty as charged on all counts except the fourth and also returned a verdict finding him guilty as charged in the indictment. June 26th was named as the day for the pronouncement of judgment and sentence, at which time the defendant filed a motion for a new trial and a motion in arrest of judgment. On July 5th the court denied the motions and also denied the defendant's request to file an application for probation. Judgment and sentence was thereupon pronounced. By the judgment the sentences as to counts 1 and 2 of the information were made to run consecutively. The sentences as to counts 3 and 5 were made to run concurrently with counts 1 and 2. The sentence as to the charge laid in the indictment was made to run consecutively with the sentences on counts 1 and 2 of the information. Judgment commitments were thereupon issued; whereupon a written notice of appeal to the District Court of Appeal was filed by the defendant and a stay of execution pending appeal was granted. In view of the fact that a felony charge was then pending against the defendant in San Diego county, the court ordered that the sheriff of Los Angeles county deliver the defendant to the authorities of San Diego for trial there, at the conclusion of which the defendant was to be returned to the custody of the sheriff of Los Angeles county.

On July 13, 1928, the defendant appeared before said Los Angeles superior court and judge and stated, through his counsel and in the presence of a deputy district attorney of Los Angeles county, that the superior court in San Diego county had declared that if the defendant waived his appeal from the judgment rendered in Los Angeles county the court in San Diego county would dismiss the charge in that county on motion of its district attorney and that with this understanding the defendant had been returned to Los Angeles county. Defendant's counsel further stated that it was the desire of the defendant, then in open court, to waive his appeal on the condition that all of the sentences theretofore pronounced against him be made to run concurrently rather than consecutively. The Los Angeles district attorney's office expressed its approval of that course. Whereupon the court announced that, in view of the defendant's abandonment and withdrawal of his appeal, all five sentences imposed should run concurrently. No new or other judgment commitments were issued on this order except as hereinafter related. Without delay the defendant was delivered to the warden of the state prison at San Quentin accompanied by certified copies of the judgment commitments issued on July 5th providing therein that certain of the sentences shall run consecutively.

On September 23, 1928, the Los Angeles superior court issued an order purporting to revoke and set aside the judgment of July 5, 1928, to recall said commitments and to order a new judgment and amended and corrected commitments, so as to make all of the sentences run concurrently. When these so-called amended and corrected commitments were delivered to the warden at San Quentin is not disclosed. They appear herein certified by the clerk of the state board of prison directors as being among the official records of said board at San Quentin as of January 15, 1931.

At its meeting in October, 1928, the defendant appeared before the state board of prison directors and his term was fixed by the board "at five years and one year and one year consecutive sentences, five years and one year concurrently, paroled when served half time," said order having been based on the judgments of July 5, 1928.

Claiming that the board had erroneously based its order on the original judgments of July 5th and had unlawfully disregarded the amended and corrected judgments of July 13th, the defendant applied to the superior court in and for Marin county for a writ of habeas corpus, which was denied. On December 18, 1930, he renewed his application, this time to the District Court of Appeal of the First District, Division 2. The writ was granted and the petitioner was declared to be entitled to immediate parole. In his return to the writ the warden of San Quentin prison stated that he was holding the prisoner in restraint under authority of the judgment commitments of July 5, 1928, and that the state board of prison directors had authorized the release of the prisoner on parole as of date April 30, 1931.

It is conceded that if the state board of prison directors had fixed the term in accordance with the new judgment of July 13, 1928, the prisoner would have been entitled to parole as of date June 30, 1930; also that under the term as fixed in accordance with the judgments of July 5, 1928, the date of parole would be April 30, 1931. Johannes is now on parole. As the purpose of the present writ was to obtain an adjudication of the date on which he would be entitled to go on parole, and he being now on parole, it might appear to the casual observer that the matter has become moot. Indeed, the petitioner has represented to this court that if the matter were not decided prior to April 30, 1931, it would become moot. But such is not strictly the case. If the matter were declared now to present a moot question the term of the parole would still be left in doubt, depending on which of the judgments issued by the trial court be declared to be valid. The importance of the questions involved prompted the granting of the petition for a hearing and still moves us to pass upon the question of law presented notwithstanding the fact that such adjudication is of perhaps little consequence to the party involved.

[1-8] On the foregoing statement of facts the question is presented as to the power of the trial court to change its judgment of conviction and sentence and its commitment, which is evidenced by a certified copy of the judgment, pending an appeal from the judgment, which appeal is at the time undetermined. In this case a written notice of ap-

peal was filed on July 5, 1928. This appeal was pending and undetermined on July 13th, when the court assumed to change the judgment so as to affect the operation thereof, and also on September 23, when the court assumed to recall the first commitments and to issue amended and corrected commitments to conform to the new judgments. The appeal has never been dismissed or otherwise disposed of. It is insisted that the appeal was not perfected by the preparation, certification, and filing of the record in the District Court of Appeal, and that since the defendant appeared in the superior court and announced an abandonment of the appeal, jurisdiction was then revested in that court to deal with the judgment as if the appeal had not been taken. But that is not so. An appeal from the judgment or order denying a motion for a new trial removes the subject-matter thereof from the jurisdiction of the superior court. Pending the appeal the superior court has no jurisdiction to vacate the judgment or make any order affecting it. People v. Mayne, 118 Cal. 516, 50 P. 654, 62 Am. St. Rep. 256; Stowe v. Superior Court, 72 Cal. App. 174, 236 P. 985; 8 Cal. Jur. p. 520, and cases cited. The jurisdiction of the court on appeal is not determined by the presence or absence therein of the record on appeal. Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105. The appeal may be subject to dismissal, either by the appellant or by the respondent on proper grounds, or by stipulation, but until it is disposed of the jurisdiction of the subject-matter of the judgment is vested in the appellate tribunal. The law, of course, authorizes the preparation of the transcript after the notice of appeal is filed, and the trial court has power, notwithstanding the appeal, to correct clerical errors, omissions, and mistakes of fact in order that the record speak the truth. People v. McNulty, 93 Cal. 427, 26 P. 597, 29 P. 61; Biaggi v. Ramont, 189 Cal. 675, 209 P. 892. There is no merit in the claim that the trial court in this case modified its judgment in order to correct a clerical error or mistake of fact therein. The change was a matter of substance and directly affected the operation of the judgment. Assuming that the judgment of July 13th and the order of the court of September 23d and the commitments issued in pursuance thereof had been transmitted to the warden and to the state board of prison directors immediately upon their rendition and issuance, those officials were justified in disregarding them and basing their course of action on the judgment of July 5th. The fact that the defendant was present in court on July 13, 1928, might vest in the superior court jurisdiction over his person, but could not confer upon that court jurisdiction over the subject-matter of the action which was then vested in the reviewing court.

[9, 10] Something has been said about the desirability and necessity, from an equitable point of view, of holding the prosecuting officer strictly to account in any stipulation or agreement he may make with a defendant in relation to any substantial right of the latter. This is conceded and was recognized in People v. Schwarz, 201 Cal. 309, 257 P. 71. But when we are dealing with the question of the jurisdiction of the subject-matter of an offense, agreement of the parties or estoppel cannot confer it. That question is referable to the Constitution and the statutes.

Authorities from other jurisdictions are not helpful, inasmuch as the problem involved herein must be determined in accordance with principles well established in this state.

The writ is discharged, and said Jacob I. Johannes is remanded to the custody of the respondent warden subject to his right to parole in accordance with the order of the state board of prison directors based upon the judgment of July 5, 1928.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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213 Cal. 169

PADUVERIS v. PARIS.

S. F. 13476.

Supreme Court of California.

July 23, 1931.

1. **Divorce** ⚷160.

Defendant's default in divorce action constituted admission of plaintiff's allegation that property was community property.

2. **Judgment** ⚷568.

Admission by failure to answer is not equivalent of adjudication.

3. **Divorce** ⚷171.

Where divorce decree did not determine property rights, husband, although by failure to answer, admitting allegation that property was community, *held* not precluded from thereafter showing wife relinquished community interest pending divorce action.

4. **Husband and wife** ⚷266.

Wife may relinquish to husband interest in community property, which is thereby converted into separate property of husband (Civ. Code, § 158).

5. Husband and wife ⚷266.

Wife's transfer of interest in community property to husband *held* subject to rules controlling actions of person occupying confidential relations, and required to be shown to be fair to wife (Civ. Code, § 158).

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Dionysius Paduveris against Mary A. Paris. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Joseph E. Bien and Werner Olds, both of San Francisco, for appellant.

Eloise B. Cushing, of Oakland, for respondent.

SEAWELL, J.

Defendant appeals from a judgment for plaintiff in an action to quiet title to a lot in the city of Oakland. The parties were formerly husband and wife, and had resided upon the property to which the action relates until their separation. Defendant denied that her claim of interest was without right, and alleged that said property was community property of herself and her former husband; that neither the interlocutory nor final decree of divorce entered in the action commenced by her in April, 1917, made any provision for the distribution of the community property; and that no settlement of her community interest had ever been made. She prayed that the court decree the extent of her interest, and make such settlement thereof as it should deem proper.

Upon the trial of the action herein, plaintiff introduced in evidence a deed of said property from his wife to himself, and testified that said deed was signed by his wife in his presence in July, 1917, which was after she had filed suit for divorce, and immediately delivered to him. It was not acknowledged, and had never been recorded. Defendant denied having signed said deed or any other instrument transferring her community interest to her husband. By its general finding that plaintiff was the owner and entitled to the possession of the property involved, and that the claim of defendant was without right, the court below rejected defendant's contention that her signature was a forgery. Upon this appeal, defendant does not attack the court's conclusion in this regard, which we find to be amply supported by satisfactory evidence, but contends that, notwithstanding said deed may have been executed, it is of no legal effect.

This contention is based in part on the premise that the interlocutory and final decrees of divorce, entered after the date of the deed, which do not purport to dispose of the property of the parties, nevertheless determined that the property here involved was community in character, and the force of said adjudications cannot be overcome in the action herein by evidence of a transaction had before the entry of said decrees. Defendant must fail in this argument for the reason that neither the interlocutory nor final decree purport to determine the character of the property.

Defendant alleged, in her complaint for divorce on the ground of extreme cruelty, that the property herein described was the community property of herself and her husband, of the value of $4,000, and subject to a mortgage of $2,500, and that the household furniture was of the value of $50. She prayed that it be set aside to her. The complaint was filed on April 3, 1917. The deed under which plaintiff herein claims bears date July, 1917. He filed a general demurrer in the divorce action, which was overruled. On October 5, 1919, more than two years after the execution of the said deed, the wife filed a supplemental complaint alleging additional acts of cruelty, and describing the property, which she had referred to in the first complaint as 1046 Fifth avenue, Oakland, by metes and bounds. She again prayed that it be set aside to her. Although said supplemental complaint does not expressly state that said lots were community property, it was intended to supplement rather than to replace the original complaint, and the allegation as to the community character of the property must, under the circumstances, be considered as being made of the date of the filing of the supplemental complaint, which was subsequent to the execution of the deed to the husband. Defendant defaulted, and his default was duly entered on December 17, 1920. An interlocutory decree was rendered a year later, and thereafter a final decree was entered. Both decrees are silent as to the property of the parties, and neither made any provision as to alimony or custody and support of the six minor children of the parties.

[1-3] The default of the defendant in the divorce action constituted an admission of the truth of plaintiff's allegation that the property was community. 2 Freeman on Judgments, pp. 1392, 1398. Had the decree found in accordance with said admission, the defendant would have been precluded from proving, in a subsequent action instituted by him, that the property was his separate property on the date to which the adjudication made in the divorce decree related. Brown v. Brown, 170 Cal. 1, 147 P. 1168; Brown v. Brown, 170 Cal. 8, 147 P. 1171; Metropolitan Life Ins. Co. v. Welch, 202 Cal. 312, 260 P. 545. This result would follow from an application of the gen-

eral rules governing the conclusiveness of judgments. But an admission made by failure to answer is not the equivalent of an adjudication. Where the divorce decree fails to determine the property rights of the parties, the husband is not precluded from thereafter showing that the wife had relinquished her community interest pending the divorce action.

In Brown v. Brown, 170 Cal. 1, 147 P. 1168, a default decree of divorce, silent as to community property, was held to constitute an adjudication that there was no community property. But the complaint in that case alleged that there was no community property. It does not follow in the case herein, in which certain property was alleged to be community, that the court's silence can be construed as an adjudication that the property was community. Portions of the transcript of testimony taken at the time the interlocutory decree was granted were read in evidence. It appears that the court's failure to determine the property rights of the parties was due to plaintiff's abandonment of all questions in relation thereto as an issue in the divorce action. The attorney for plaintiff stated in said divorce action that plaintiff waived any claim to alimony or community property or custody of the children, and "just wanted to proceed with the divorce."

Said attorney then asked plaintiff the following questions:

"Q. Is there any community property? A. He has his own property.

"Q. You got property belonging to you and your husband. A. Yes, sir, that is on 5th Avenue.

"Q. Fifth Avenue? A. Yes, sir.

"Q. You waive all your right—you don't want anything of that house? A. No, I don't.

"Q. You gave that to your husband to take care of the children? A. Yes, sir.

"Q. And all the furniture and everything? A. Yes, sir."

The plaintiff in said divorce action filed a second divorce action against her husband on May 15, 1920. This action was dismissed upon the filing of a demurrer setting up the pendency of the prior action. In the complaint in the later action, she alleged that the property, together with the furniture therein, was community property, but that she claimed no interest therein. The evidence is to the effect that the wife was to relinquish all claim to the community real property, which was heavily incumbered, provided the husband would support and rear the six minor children, four of whom were females, the youngest being but an infant. She demanded and received the best part of the household furniture.

[4] Appellant also makes the point that her interest in the community property, which has been held to be only an estate in expectancy (Stewart v. Stewart, 199 Cal. 318, 249 P. 197), was not the subject of transfer from herself to her husband. That the wife may relinquish to her husband her interest in the community property, which is thereby converted into the separate property of the husband, is too well settled to require discussion. See Sanguinetti v. Sanguinetti, 51 Cal. App. 347, 196 P. 799, and cases there cited; Estate of Brix, 181 Cal. 667, 186 P. 135. Express authorization for such relinquishment, whether made as a part of a separation agreement or otherwise, is found in section 158, Civil Code. A deed from the wife to the husband is an obvious mode of accomplishing the termination of the wife's interest.

[5] Such transactions from which the husband gains an advantage are declared by section 158, supra, to be subject to the rules which control the actions of persons occupying confidential relations with each other, and must be shown to be fair as to the wife. In rendering judgment for plaintiff, the court below impliedly held that he had met the burden of showing the transfer to be fair as to his former wife, and we are not disposed to disturb its conclusion.

The parties had resided together with their six minor children upon the property until the wife left prior to the filing of her first complaint. The plaintiff herein testified that he and his wife had agreed to a dismissal of the divorce action, and he had paid her attorney a portion of his fee. They were unable to effect a lasting reconciliation. She transferred the property to him with the understanding that he should assume full care of the children. The property was worth between $3,500 and $4,000 and subject to a mortgage of $2,500, which had been paid off entirely by the respondent at the time he brought the present action. The wife has since remarried, and has not undertaken the care or contributed to the support of her children. The father seems to have had difficulty in properly discharging the obligation of parental care, as he had no means of support save his daily wages. The record indicates that at one time the children were committed to institutions because of his inability to care for them, and that one of the daughters was placed in a county tubercular hospital soon after the separation, and remained there for several years. One of the sons had been an inmate of the Whittier state school. However, the only home and support furnished by either parent was that given by the father upon the property here involved. At the time of the trial, several of the children were residing there with him. The case was considered in all of its aspects by the trial court, and we are not disposed to disturb its judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.

213 Cal. 151

BRUNS v. STATE BAR OF CALIFORNIA.

L. A. 12716.

Supreme Court of California.

July 17, 1931.

1. Attorney and client 🔑52.

Verified complaint is not prerequisite to state bar's jurisdiction in disciplinary proceeding.

2. Adoption 🔑12.

Statute does not eliminate necessity of notifying parent of adoption proceeding, notwithstanding parent has been divorced for cruelty, where court has subsequently granted child's custody to such parent (Civ. Code, § 224).

3. Attorney and client 🔑58.

Deliberately making false averment in petition for adoption, that minor's custody was in military school rather than in father, *held* violation of attorney's duty, requiring three months suspension (Code Civ. Proc. § 282).

4. Attorney and client 🔑53(2).

That attorney procured service of unfiled complaint for alimony *held* not conduct meriting infliction of punishment, under evidence.

> Evidence was that attorney's associate counsel had served the unfiled complaint upon the adversary counsel with the adversary counsel's consent, and, while the procedure was irregular and unusual, it could not have harassed the opposition to any great extent, for they were apprised of the fact that the complaint had not been filed nor summons issued thereon.

In Bank.

Proceeding by Paul H. Bruns to review a recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of law for a period of three months.

Petitioner suspended for three months.

Crail, Shutt, Penprase & Crail, D. W. Richards, and H. F. Poyet, all of Los Angeles, for petitioner.

O'Melveny, Tuller & Myers and Philbrick McCoy, all of Los Angeles, for respondent.

WASTE, C. J.

The board of governors of the state bar, following a hearing before a local administrative committee, has recommended that petitioner be suspended from the practice of the law for a period of three months. This recommendation is grounded on findings of unprofessional conduct.

[1] There is no merit in the contention of petitioner that the state bar is without jurisdiction to proceed in the absence of the filing of a verified complaint. In the Matter of Herron (Cal. Sup.) 298 P. 474. Furthermore, the complaint served on petitioner was properly verified. In re Collins, 147 Cal. 8, 10, 81 P. 220. There is nothing in the further point that the hearing before the board of governors "was had without due process." In re Petersen, 208 Cal. 42, 45, 280 P. 124.

The first and principal charge of unprofessional conduct made against petitioner has to do with his inclusion in a petition for adoption, filed on behalf of a client, of certain alleged false averments of fact. It appears that in 1924, one Clara E. Swanner filed an action for divorce in the superior court of Orange county, the complaint charging cruelty. An interlocutory decree of divorce was entered upon the default of the defendant. This decree and the final decree thereafter entered awarded custody of the minor child of the parties to the plaintiff-mother. On February 26, 1926, the decree was modified, and custody of the minor awarded to the father, with directions that he place the child in a military school, the right of visitation being reserved to each of the parents. In February of 1927, the custody of the father was again affirmed and continued, but the decree modified slightly to permit the mother to take the child from the military school on alternate week-ends. Petitioner came into the case for the first time in 1929, when on July 20 he filed a petition with the Orange county superior court, on behalf of the mother, requesting that the decree be further modified to again place custody of the child in her. This application averred the necessary facts to show that the custody of the child had theretofore been transferred to and placed in the father. While this petition for modification was pending and undetermined, petitioner, on behalf of the mother and her second husband (she having remarried), filed with the superior court in and for the county of Los Angeles a petition by which it was sought to secure an order authorizing the adoption of the minor by his stepfather. It is this petition which contains the false averments as to the custody of the minor being in the military school, thus obviating, so the petition alleges, the necessity of first securing the consent of the father of the child to the contemplated adoption.

In defense of his conduct in this regard, petitioner urges that he interpreted the order of modification of February 26, 1926, to mean that the actual custody of the child had been given to and placed in the military school, with a right of visitation only being reserved to the parents. Having so construed the order of modification, petitioner contends that he was warranted, under the terms of section 224 of the Civil Code, in suggesting to the court in the petition that the father of the child need not be informed of the pendency of the adoption proceeding. He also asserts that it was for the court to preliminarily determine, as a jurisdictional matter, whether the father should be given notice, citing Estate of McKeag, 141 Cal. 403, 407–408, 74 P. 1039, 99 Am. St. Rep. 80.

[2, 3] Section 224, supra, provides in effect that in adoption proceedings the consent of a parent divorced because of cruelty need not be secured. While this Code section may offer some explanation of petitioner's conduct, we cannot accept it as a complete and satisfactory excuse therefor. Research would have readily disclosed to him that under the authorities section 224 of the Civil Code does not eliminate the necessity of giving a parent notice of an adoption proceeding, even though the parent may have been divorced upon the ground of cruelty, where the court has subsequently granted custody of the child to said parent. Miller v. Higgins, 14 Cal. App. 156, 164, 111 P. 403. Aside from this phase of the case, however, there can be no justification for petitioner's inclusion of the clearly erroneous and false representation as to the custody of the minor being in the military school. His statement that he honestly misconstrued the order of modification to so read carries but little weight, for the original decree and each subsequent modification thereof is definite and positive in its award of custody. At the time petitioner employed the false averment above referred to, the records in the case of Swanner v. Swanner, clearly showed that the custody of the minor was then in the father. That petitioner was aware of this and must therefore have deliberately falsified the fact in the petition for adoption, with the intention of misleading the superior court of Los Angeles county, is attested by the fact that petitioner then had on file in the superior court of Orange county a petition seeking modification and transfer of custody from the father to the mother. This latter petition, which was still pending and undetermined at the time of the filing of the adoption petition, contains an averment that "at the present time the custody of said child is with the defendant [the father], but that said order * * * permits the plaintiff [petitioner's client] to have the custody of said child on alternate week-ends." It is thus apparent that petitioner had correctly informed himself as to the status of the custody of the child, and was not laboring under any misapprehension in this regard. Under these circumstances, his subsequent misstatement of the fact, made only six weeks thereafter, and to a court unfamiliar with the litigation, cannot be excused as an honest and unintentional error. That petitioner was seeking to secure an advantage for his client by deliberately misleading the court seems to us very clear. Such conduct is highly reprehensible, and a flagrant violation of an attorney's duty. Section 282 of the Code of Civil Procedure provides that "It is the duty of an attorney and counselor: * * * 4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. * * *" Petitioner's unethical conduct in the particular mentioned calls for severe condemnation and the infliction of suitable punishment.

[4] We need not go at any great length into the second charge of unprofessional conduct directed at the petitioner. Nothing of a serious nature is therein involved. It is found that petitioner had, either personally or otherwise, procured the service of an unfiled complaint for alimony alleged to be owing to the plaintiff from the defendant in the divorce action. There is evidence tending to show that petitioner's associate counsel, explaining at the time his inability to then return to Orange county for the filing thereof and requesting that service be accepted prior to filing, had served the unfiled complaint upon the adversary counsel. To this the adversary counsel agreed. Whatever may have been the motive, we do not perceive anything meriting the infliction of punishment. Petitioner and his associate may well have determined to abandon the action after having served the unfiled complaint. While the procedure was irregular and unusual, it could not have harassed the opposition to any great extent, for they were apprised of the fact that the complaint had not been filed nor summons issued thereon. Moreover, the defendant named in the complaint [the father of the minor], being himself an attorney, was probably not greatly disturbed by the service of an unfiled paper.

Because of petitioner's attempt to mislead the court in a pending proceeding by means of the false averment of a material fact within his knowledge, it is ordered that he be suspended from the practice of the law in all the courts of this state for a period of three months beginning on the tenth day from the date of the filing of this order.

We concur: SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

213 Cal. 158

WRIN v. OHLANDT.

S. F. 13483.

Supreme Court of California.
July 20, 1931.

1. Venue 🔑52(1).

Changing venue for witnesses' convenience rests largely in trial court's discretion.

2. Appeal and error 🔑965.

Trial court's exercise of discretion regarding changing venue for convenience of witnesses will not be disturbed unless abused.

3. Venue 🔑52(1).

Inconvenience of parties in attending trial cannot be considered on motion for change of venue for convenience of witnesses.

4. Venue 🔑52(1).

In action for medical services, refusing change of venue for convenience of witnesses, two of witnesses being real parties in interest, and only other material witness being expert, *held* not abuse of discretion.

In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Marian Wrin against Rae Ohlandt, as administratrix of the estate of Henry Ohlandt, Jr., deceased. From an order denying plaintiff's motion for a change of venue, plaintiff appeals.

Affirmed.

L. E. Johnston, of Napa, and Daniel W. Hone and Leo B. Hone, both of San Francisco, for appellant.

Dennis M. Duffy, of Napa, for respondent.

CURTIS, J.

Appeal from an order denying plaintiff's motion for a change of venue from the county of Napa to the city and county of San Francisco upon the ground of the convenience of witnesses. Substantially the only issue in said action pending in the superior court of the county of Napa involved the reasonable value of certain medical services rendered defendant's intestate by two physicians, the assignors of the claims sued on. In plaintiff's affidavit in support of her motion for a change of venue to the superior court of the city and county of San Francisco she set forth the names of these two physicians and that of one other, Dr. Lawrence Hoffman, all residents of the city and county of San Francisco, as witnesses who would testify that the services rendered by said physicians were of the reasonable value of $2,500, the amount claimed by plaintiff as the reasonable value of said services. In the counter affidavit filed by the defendant the latter gave the names of two physicians, residents of the county of Napa, who would certify as witnesses for the defendant that the services performed by the assignors of plaintiff were not of the reasonable value of $2,500. In said affidavit it is stated that defendant would prove by one of said witnesses that the reasonable value of said services of each of said two physicians, plaintiff's assignors, was the sum $375. As to the second witness, the amount which he would fix as the reasonable value of said services was left blank, probably by inadvertence. In addition to the three medical witnesses named by plaintiff in her said affidavit, she set forth the names of some six nurses, residents of said city and county of San Francisco, who, so it was averred in said affidavit, would testify that the services which were made the basis of the claim sued on were rendered by the assignors of the plaintiff, and also as to the nature of said services. As the defendant in her answer raises no issue as to the performance of said services, the testimony of these six nurses was not material to any issue in the case. Upon this state of the record the trial court denied the motion of plaintiff for a change of venue to the city and county of San Francisco.

[1, 2] It is well settled that a motion for a change of venue grounded upon the convenience of witnesses rests largely in the discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing of its abuse. Blossom v. Waller, 30 Cal. App. 439, 158 P. 509; Scott v. Stuart, 190 Cal. 526, 213 P. 947.

[3, 4] Two of the witnesses relied upon by the plaintiff are the two physicians who performed the services which were the subject of the claims sued on, and it may be reasonably presumed that they are the real parties in interest as plaintiffs in the action. The inconvenience of the parties in attending the trial is not a factor to be considered in a motion of this character. Blossom v. Waller, supra. Eliminating these two witnesses would leave only one witness for the plaintiff who would be inconvenienced by the trial of the action in Napa county. Furthermore, there is no showing that this remaining witness has any personal knowledge of any of the facts in the case. If called, he will testify simply as an expert witness as to the value of the services rendered by the assignors of the plaintiff. In the case of Security Investment Co. v. Gifford, 179 Cal. 277, 176 P. 444, this court held that the convenience of expert witnesses having no personal knowledge of any facts in the case should not be considered in determining the question of the convenience of witnesses.

Upon the foregoing statement of the facts in this case and the law applicable thereto, we are of the opinion that appellant has signally failed to show any abuse of discretion on the part of the trial judge in denying appellant's motion for a change of venue.

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; NOURSE, Justice pro tem.

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213 Cal. 164

COOMBES v. FRANKLIN et al.

S. F. 13939.

Supreme Court of California.

July 23, 1931.

Rehearing Denied Aug. 21, 1931.

1. Corporations 🔑**320(1), 326.**

General creditors' and stockholders' bill seeking to hold corporation directors for defalcations of fellow director *held* dismissible, because constitutional provision authorizing such an action was repealed without saving clause (Const. art. 12, § 3).

2. Statutes 🔑**276(1).**

Right dependent solely upon statute, not reduced to possession or perfected by final judgment, is destroyed by repeal of statute without saving clause.

3. Corporations 🔑**312(3), 333.**

Creditors and stockholders cannot recover at common law against directors for fellow director's defalcations.

4. Constitutional law 🔑**154(2).**

Repealing constitutional provision, making corporation directors responsible for fellow director's defalcations without saving clause, *held* not unconstitutional "impairment of obligation of contract" (Const. art. 12, § 3).

[Ed. Note.—For other definitions of "Impairing Obligation of Contract," see Words and Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Peirce Coombes against M. G. Franklin and others. From the judgment, plaintiff appeals.

Appeal dismissed.

Rehearing denied; LANGDON, J., dissenting.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, and McKinstry, Haber & Firebaugh, all of San Francisco, for appellant.

Lawler & Degnan, of Los Angeles, and Pillsbury, Madison & Sutro, of San Francisco (Alfred Sutro, and Eugene M. Prince, both of San Francisco, of counsel), for respondents.

PRESTON, J.

The appeal in this cause must be dismissed, and it is so ordered.

[1] The reason for this holding is that the authority for the maintenance of the action against respondent has been removed by the elimination of the constitutional provision which furnished its sole support.

The complaint assumes the form of a general creditors' and stockholders' bill seeking to hold the defendants, and particularly respondent Getz, for embezzlements and defalcations of a fellow director of the corporation known as Getz Bros. & Co., which said defalcations aggregated the sum of about $550,000. Demurrer of said respondent to the complaint was sustained. Appellant declined to amend, and judgment passed for respondent. This appeal followed.

Section 3 of article 12 of the state Constitution, prior to November 4, 1930, read in part as follows: "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee." On said last-mentioned day, however, the People approved at a general election an amendment to said Constitution which repealed the said provision above quoted without a saving clause or reservation of any kind.

[2] The rule of law in this respect is not in doubt. In Napa State Hospital v. Flaherty, 134 Cal. 315, 317, 66 P. 322, 323, the court stated the rule as follows: "It is a rule of almost universal application that where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause." This rule has been consistently and continuously adhered to since said date. Moss v. Smith, 171 Cal. 777, 787, 155 P. 90; Freeman v. Glenn County Tel. Co., 184 Cal. 508, 510, 194 P. 705; Callet v. Alioto (Cal. Sup.) 290 P. 438; Krause v. Rarity (Cal. Sup.) 293 P. 62. It

is again referred to and approved in Peterson v. Ball (Cal. Sup.) 296 P. 291. A case especially applicable to repeal of a constitutional provision is Willcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; see, also, People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, Ann. Cas. 1912B, 1148, and many other cases.

The cases of Berg v. Traeger (Cal. Sup.) 292 P. 495, and Harris v. Moore, 102 Cal. App. 413, 283 P. 76, are not in conflict with this conclusion. These cases, after declaring the rule as above noted, simply sustain appeals duly perfected prior to a change in the statute, shifting the appellate jurisdiction of that class of cases. To apply the above rule to a cause of action which has not yet reached the stage of final judgment is not to give the constitutional provision a retrospective operation. Hastain & Purman, Inc., v. Superior Court (Cal. Sup.) 300 P. 966, and cases therein cited.

[3, 4] Section 2 of article 22 of the Constitution manifestly has no application to the situation here, and constitutes no saving clause to the former provision here under discussion. Neither do we find any warrant for the contention that a remedy of the kind here sought existed at common law. Both in reason and authority this contention cannot be sustained. The same is true of the contention that an impairment of the obligation of the contract in violation of the Constitution would result from this application of the rule pronounced above; hence the conclusion already stated.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

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115 Cal.App. 518

PEOPLE v. YEOMAN.

Cr. 2078.

District Court of Appeal, Second District, Division 1, California.

July 17, 1931.

Rehearing Denied July 29, 1931.

Hearing Denied by Supreme Court Aug. 13, 1931.

1. Criminal law ⚷933.

To justify denying new trial, judge must be convinced, not only that evidence sufficiently supported verdict, but that in all respects verdict was legal and in furtherance of justice.

2. Criminal law ⚷1160.

Verdict supported by substantial evidence and denial of new trial are conclusive on appellate court.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Alvin Yeoman was convicted of robbery, and he appeals.

Affirmed.

S. S. Hahn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, of Los Angeles, for the People.

HOUSER, J.

Defendant appeals to this court from a judgment of conviction of the crime of robbery, and from an order by which his motion for a new trial was denied.

Appellant frankly admits that the rulings by the trial court "on the introduction of evidence were fair," and that no error was committed by it either in the giving of instructions to the jury or in rejecting any of the instructions which were offered by defendant. His sole complaint herein is that the evidence adduced on the trial of the action was insufficient to support the verdict and that the verdict is contrary to the evidence. For the prosecution, but a single witness positively identified defendant as one who, with another person, actively participated in the commission of the crime of which defendant was accused, although, aside from generalities, the witness was unable to describe in what manner defendant was clothed at the time the robbery occurred. However, comparing the appearance of defendant with that of the person who concededly assisted in the commission of the robbery, another witness testified that defendant "was the same type of man; * * * his general physical appearance was similar;" but that the witness "couldn't say * * * whether or not this defendant sitting at the counsel table here, the man with the glasses on, is the man." A third witness, who also was present at the time in question, failed to see defendant "or anybody else" other than the person who actually committed the robbery. A fourth witness testified that the "general appearance" of the man who assisted in the robbery "was the same as that of this defendant." Although the witness "couldn't say positively that the defendant Yeoman was the man," she also stated that, "if I were asked to stretch my imagination, I would say that he was." A fifth witness testified that he did not "believe * * * that he was able to see these men sufficiently so that he could identify either one of them," but that, as compared with the robber in question, defendant "was a man of similar build."

[1, 2] For the defendant a very strong "alibi" was presented. Judging from facts appearing in the reporter's transcript of the proceedings at the trial, no adverse criticism may properly be made of any of the witnesses who testified in that regard. Apparently each of them was a person of good reputation, and

the testimony given, which was of a most positive character, was clearly to the effect that under no condition would it have been possible for defendant to have participated in the commission of the crime of which he was charged. Indeed, viewed from the "cold record," it would be hard to conceive of a more convincing "alibi" in any case than was presented by defendant in his own behalf. If, considering the entire evidence adduced at the trial of the action, it be difficult to reconcile one's mind to the verdict of the jury, or to understand the reasoning by which the testimony given by defendant's witnesses failed to accomplish the result of creating in the "mind" of the jury a reasonable doubt as to the guilt of defendant, a compensating thought is presented with knowledge of the rule of law which presumably was followed herein, that, in order to be justified in his denial of the motion for a new trial, the judge who presided at the trial must have been convinced, not only that the evidence was sufficient to support the verdict, that the weight of the evidence was in favor thereof, but that in all respects it was legal and in furtherance of justice. 20 Cal. Jur. 25, et seq., and authorities there cited. Thus fortified, aided by the legal principle that on appeal from a judgment, if it appear that the verdict was supported by substantial evidence, the appellate tribunal is without authority to direct a reversal of the judgment or the order by which the motion of the defendant for a new trial was denied, the proper course of this court in the premises is clearly indicated.

The judgment and the order are affirmed.

We concur: CONREY, P. J.; BISHOP, Justice pro tem.

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115 Cal.App. 490

MOFFITT v. FORD MOTOR CO. et al.

Civ. 7279.

District Court of Appeal, Second District, Division 2, California.

July 16, 1931.

1. Appeal and error 🔑1127.

Appeal would be determined on merits, where it would require about same amount of work to determine motion to affirm.

2. Appeal and error 🔑811.

Respondent's age and financial condition and fact that case had not been tried on merits justified granting motion to advance hearing of appeal.

Respondent, the plaintiff in action for damages for personal injuries incurred through defendant's negligence, was depending on recovery in case for money to pay obligations, was nearly seventy-nine years of age, and was infirm in health and general physical condition.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Alice D. Moffitt against the Ford Motor Company and others. From the judgment, defendants appeal. On motion by respondent to affirm judgment or advance hearing of appeal on calendar.

Motion to advance granted, and motion to affirm denied.

See also (Cal. App.) 292 P. 698; (Cal. Sup.) 297 P. 553.

Lucius K. Chase and George H. Moore, both of Los Angeles, for appellants on the motion.

Benj. M. Stansbury and Mott, Vallee & Grant, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Motion by respondent to affirm judgment of the trial court, or advance hearing of appeal on the calendar.

[1] It would seem to require about the same amount of work to determine the motion to affirm as it would to determine the appeal on its merits, and we are of the opinion that the appeal should be so determined.

[2] With regard to the motion to advance, respondent urges, among other things, her financial condition, and that she is depending on recoveries in the case for money to pay her obligations. That of itself would seem to be a ground that most litigants who have a judgment in their favor or even hopes of obtaining one might urge, and does not impress us as a good cause for advancement, but the affidavit filed does show that respondent is nearly seventy-nine years of age and is infirm in health and general physical condition, and the case is one in which she is suing for damages alleged to have been incurred through the negligence of defendants, and, in view of the fact that the case has not yet been tried on the merits, we believe the question of whether it should or should not be so tried should be determined speedily, so that if a trial is to be had it may be reached while the respondent is in a physical and mental condition to present her case.

Good cause being shown and all briefs being now on file, the motion to advance will be granted, and the matter placed on the next regular calendar. Motion to affirm is denied.

We concur: WORKS, P. J.; CRAIG, J.

115 Cal.App. 408

In re BURNS' ESTATE.

FORRESTER et al. v. ROBBINS et al.

Civ. 7775.

District Court of Appeal, Second District, Division 1, California.

July 9, 1931.

1. Wills 🔑327.

Evidence being insufficient to show testatrix' mental incapacity, directing verdict for proponents on such issue and rendering judgment based thereon, *held* proper.

2. Wills 🔑326.

There being no evidence of undue influence or irregularity of execution of will, granting nonsuit on such grounds *held* proper.

3. Wills 🔑341.

Court, having properly nonsuited will contestants on issue of undue influence and rendered judgment for proponents on issue of incapacity, properly probated will and codicil.

4. Wills 🔑52(1).

Absent showing of undue influence or fraud, contestants must show "mental incapacity" or insanity affected testator's testamentary capacity.

[Ed. Note.—For other definitions of "Mental Incapacity," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

In the matter of the estate of Annie E. Burns, deceased. Action contesting the will of said decedent by Wm. H. Forrester and others, contestants, against Clay Robbins, executor, and others, proponents. From a judgment nonsuiting contestants and declaring testatrix' mental competency, and from the verdict and from an order denying motion for new trial, contestants appeal.

Judgment affirmed. Attempted appeals from the verdict of the jury and an order denying motion for new trial dismissed.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for appellants.

Fredericks, Hanna & Morton and Byron F. Story, all of Los Angeles, for respondents.

YORK, J.

This is an appeal from a judgment based upon a verdict rendered in response to the court's order made in connection with an order granting proponents' motion for a nonsuit.

[1-3] An examination of the evidence discloses the fact that there was not sufficient evidence to show mental incapacity to make a will either on August 7, 1923, or on January 23, 1924, at the time when the will and codicil were executed. Also, that there was no evidence showing undue influence or irregularity of execution of the will, and the court was therefore justified in granting the motion for nonsuit on such grounds. The court was justified in directing the jury to return a verdict in favor of the proponents on the other issue, to wit, mental incapacity, and such verdict was properly brought in by the jury. The court was also justified to render its judgment based upon such verdict that the decedent Annie E. Burns was mentally competent to make a last will and testament on August 7, 1923, and was mentally competent to make a codicil to her last will and testament on January 3, 1924, and the court was further justified in making its orders that the last will and testament of Annie E. Burns, dated August 7, 1923, and the codicil thereto, dated January 3, 1924, "be and the same are hereby admitted to probate."

[4] In order to constitute a ground for setting aside a will of a decedent it must be shown that mental incapacity or insanity of the testator was of such a nature as to affect the testamentary capacity of the decedent; and, unless this is shown by the contestants, the will of decedent cannot be declared to be void on the ground of mental incapacity, in the absence of any showing of undue influence or fraud.

The judgment is affirmed. The attempted appeals from the verdict of the jury, and from the order denying motion for a new trial, are dismissed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

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115 Cal.App. 326

KNOTT v. MEDINA NO. 1 et al.

Civ. 7787.

District Court of Appeal, First District, Division 2, California.

July 2, 1931.

Rehearing Denied Aug. 1, 1931. Hearing Denied by Supreme Court Aug. 31, 1931.

1. Mines and minerals 🔑109.

Right which lessees reserved to use equipment if driller abandoned oil well *held* not extended by lessees' procuring so-called renewal lease after original lease expired, terminating right (Civ. Code, §§ 1636, 1647).

Evidence disclosed that, by contract with driller, lessees agreed that if he should drill to specified depth without producing commercial oil, then equipment should become his property, but if he abandoned work, lessees reserved right to use equipment to continue drilling; that driller drilled well to specified depth and discontinued operations a few days before expiration of original lease; and that some time after lease expired, lessees obtained so-called renewal lease and took possession of equipment, contending that they were entitled to use thereof during term of renewal lease.

2. Contracts 🔑169.

Agreement should be construed according to circumstances of execution (Civ. Code, § 1647).

3. Appeal and error 🔑1056(1).

Where issue involved 1926 value of well-drilling equipment, error, if any, in excluding 1922 cost *held* harmless under testimony that no established prices existed, and that 1926 prices were inflated.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by B. F. Knott against Medina No. 1, an unincorporated association, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Robert L. McWilliams and G. C. Ringole, both of San Francisco, for appellants.

Norman A. Eisner, of San Francisco, for respondent.

SPENCE, J.

In this action, based upon the alleged conversion of personal property consisting of a certain oil well drilling outfit and equipment, the jury rendered a verdict in favor of plaintiff for the sum of $8,250 and interest. From the judgment entered upon the verdict, defendants appeal.

The defendants Medina No. 1 and Medina No. 2 are unincorporated associations, and the remaining defendants are individuals associated together under those names. Defendants held an oil and gas lease on certain lands in Medina county, Tex., which lease was for a term ending August 11, 1926. It was dated August 11, 1921, and provided: "It is agreed that this lease shall remain in force for five years from this date and as long as oil or gas or either of them is produced from said land by the lessee." Although defendants carried on drilling operations, no oil or gas was produced during the term of the lease. On January 2, 1926, being several months prior to the expiration of the lease, plaintiff entered into a contract with defendants relating to a well located on the property, which well had been partially drilled for defendants by the Pacific Southwest Development Company. This agreement was evidenced by a lengthy letter signed by defendants, the main purpose being expressed in the last paragraph reading: "Our proposition to you as outlined in the preceding portions of this document is conditional that you shall furnish sufficient money to start and continue drilling operations in said well immediately and that there shall be no stoppage in said operations which could be attributed to lack of funds until said well is drilled to 3200 feet or commercial oil in paying quantities. * * *" In consideration for the assistance of plaintiff, the agreement provided, among other things, as follows:

"4th. And we further agree that you shall have the same rights and title to the drilling outfit, equipment and casing in said well as are accorded to the Pacific Southwest Development Co. in the contract which we entered into with it, namely, that if you drill to 3200 feet, or any greater depth, without producing commercial oil in paying quantities then said outfit, equipment and casing shall belong to you so that you may salvage same and receive back the money you have expended in operations at the well, and in this connection will state that we are informed that said outfit and equipment, together with the casing when pulled from the well, should bring approximately eleven thousand dollars ($11,000.00);

"This paragraph 4 is subject, however, as reserved in said contract with the Pacific Southwest Development Co., to our right to the use of the outfit, equipment and casing to drill deeper in said well if you should abandon it at 3200 feet or at any greater depth. * * *"

Plaintiff commenced drilling operations under the contract, and ceased operations on or about August 5, 1926, being a few days before the expiration of the lease. Plaintiff claimed that he drilled the well to a depth exceeding 3,200 feet, and, although this was an issue between the parties in the trial court, appellants concede that there is ample evidence to show that a depth of 3,200 feet was reached. Defendants did not use the drilling outfit between the time of the cessation of operations by plaintiff and the expiration of the lease. Some time after the lease had expired, defendants took possession of the drilling outfit, and subsequently in December, 1926, started further drilling on the well, using this equipment. On the trial, defendants offered to show that in the latter part of August, 1926, and after the expiration of the original lease, they secured a new lease on the property for a further period of five years, which lease by its terms ran from August 11, 1926. They also offered to show that about the same time they notified plaintiff of their election to continue work on the well. To the foregoing evidence offered by defendants, objections were made and sustained by the court.

[1, 2] On this appeal, appellants contend that there was no conversion, as they were entitled to use the drilling outfit during the life of the "renewal lease," and that the trial court erred in excluding evidence relating to said "renewal lease" and to appellants' election to use the outfit after the expiration of the original lease. In our opinion, this contention is without merit. Unless the contract gave appellants the right to use the drilling outfit after the expiration of the original lease, there was a conversion and the evidence offered was properly excluded. The respondent had drilled the well to the required depth, and under the contract the drilling outfit became his property subject only to the right reserved by appellants. Although the contract did not prescribe in express terms the time within which appellants might exercise this reserved right, the agreement of the parties should be construed with reference to the circumstances under which it was made. Civ. Code, § 1647. At the time the parties made their agreement, they had before them the original lease, which was the source of their right to drill upon the premises. At that time, the existing right of both appellants and respondent to drill the well was measured by that lease and terminated with it. The lease made no provision for extension or renewal, and there was no evidence to show that at the time the contract was made the parties had arranged for or contemplated any new lease or "renewal" of the original lease. The intention of the parties at the time of contracting governs (Civ. Code, § 1636), and the only reasonable construction to place upon the contract is that appellants' reserved right to drill with respondent's equipment continued only so long as their right to drill on the premises under the existing lease had not terminated. That reserved right of appellants was not extended by obtaining a new lease at some time after the expiration of the original lease.

[3] Appellants further contend that the trial court erred in excluding evidence of the cost to appellants of the property in 1922. There was a sharp conflict in the expert testimony concerning the value of the property in 1926, and an effort was made on direct examination of one of the appellants to prove the price that appellants had paid for it in 1922. We do not deem it necessary to decide whether the court erred in excluding testimony relating to the purchase price paid four years previously. One of appellants' expert witnesses, after stating that he did not know the cost price of a Star rig in 1922, testified: "I know, in fairness, to tell the truth about it, that in 1926 prices were inflated on account of the demand for oil country equipment. Prices were quoted higher on new materials, and therefore carried a higher second-hand value. * * * And all second-hand oil well supplies are worth what you can get for them. * * * There is no established prices or established market." It was the value in 1926 which was in issue, and, from the foregoing testimony of appellants' witness, we conclude that the error, if any, in excluding evidence of the cost to appellants in 1922, was not prejudicial.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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115 Cal.App. 272

SAUER v. ANDREWS, Judge.

Civ. 408.

District Court of Appeal, Fourth District, California.

June 29, 1931.

1. Contempt ⚷8.

Writing contemptuous newspaper article concerning grand jury and judge was "indirect" or "constructive contempt" (Code Civ. Proc. § 170, as amended by St. 1929, p. 958).

[Ed. Note.—For other definitions of "Constructive Contempt" and "Indirect Contempt," see Words and Phrases.]

2. Prohibition ⚷28.

On prohibition against contempt proceedings, determination regarding contemptuous nature of context of article concerning superior court judge rests first with superior court.

3. Judges ⚷51(4).

In case of constructive contempt by writing newspaper article concerning judge, judge had no right to pass upon his own disqualification (Code Civ. Proc. § 170, as amended by St. 1929, p. 958).

Petition by A. R. Sauer for a writ of prohibition against C. N. Andrews, Judge of the Superior Court of the State of California in and for the County of San Diego.

Writ issued.

Curtis Hillyer, of San Diego, for petitioner.

Stephen Connell, Dist. Atty., and T. D. McLean, Asst. Dist. Atty., both of San Diego, for respondent.

OWEN, Justice pro tem.

The petitioner herein is the editor, publisher, and manager of the San Diego Herald, a newspaper printed and circulated in the city of San Diego. On the 13th day of March, 1930, this newspaper contained an article captioned as follows: "New Grand Jury is Sweet-scented Bunch of Hollyhocks Designed to 'Protect' San Diego. Judge Andrews Picked Them But Could Have Added More. (By A. R. Sauer.)"

The article in question is quite lengthy, and it is unnecessary to either set it out fully or to quote those portions alleged to be contemptuous. For the reason hereafter given, we express no opinion as to the nature of the context.

On the 20th day of March, 1930, Honorable C. N. Andrews, judge of the superior court, filed an affidavit for contempt of court, and thereupon issued a writ commanding the sheriff of San Diego county to attach the body of the said A. R. Sauer and have him forthwith before Judge Andrews to show cause why he should not be punished for contempt.

On the 25th day of March, 1930, the matter came on for hearing before Judge Andrews. At the hearing, the defendant, petitioner herein, filed his affidavit alleging disqualification of the respondent judge on account of actual bias and prejudice and made an application to have the matter transferred to another department of the San Diego superior court to hear and determine the alleged prejudice of Judge Andrews. The application for transfer was denied. Petitioner thereupon sought a writ of prohibition from this court. An alternative writ was granted, and we now have to consider whether the respondent should be permanently restrained from any further proceedings in the matter.

At the time the proceedings herein were instituted in this court the case of Blodgett v. Superior Court, 290 P. 293, 72 A. L. R. 482, was pending in the Supreme Court of the state. Shortly thereafter there came before the Supreme Court for consideration the case of Briggs et al. v. Superior Court, 297 P. 3, 7. There was thus presented to the highest court of the state two cases wherein must be determined the construction of section 170 of the Code of Civil Procedure (as amended by St. 1929, p. 958). The decision in this matter has been withheld pending the decision in Briggs et al. v. Superior Court, supra.

[1] In the Briggs decision the distinction between direct and constructive contempt has been clearly defined, and the confusion following the amendment of section 170 of the Code of Civil Procedure in the year 1927 (St. 1927, p. 1403) no longer exists. In the instant case the contempt was indirect or constructive. There can be no further uncertainty as to procedure. In cases of direct contempt the court should act summarily, and with such directness and certainty as is commensurate with the degree of interference with the due and orderly administration of justice, and the regular procedure of court.

It is held in Briggs et al. v. Superior Court, supra: "We nevertheless adhere to the views expressed in our earlier decisions as to the inapplicability of this section of the Code, whether as it read originally or as it has been made to read by its aforesaid amendment, to cases of direct contempt, and we place our present conclusion upon the same ground as that expressed in our former opinions, viz. that of necessity the courts must be held to retain their ancient and inherent power to summarily deal with all cases of direct contempt committed in the immediate view and presence of the court. * * *"

As to indirect contempts the same case holds: "We are unable to say that the Legislature was without power to provide such a procedure for the hearing and determination of cases of constructive contempt; and for an even stronger reason we are unwilling to hold that the Legislature by its recent amendment to section 170 of the Code of Civil Procedure was without power to prescribe the otherwise usual and salutary provision that the trial judge in such, as in all other cases save those of direct contempt, shall no longer be permitted to pass upon the question of his own disqualification."

[2, 3] We have expressed no opinion as to the subject-matter of the article published by the petitioner herein. The determination as to the contemptuous nature of the context rests first with the superior court. The only matter involved here is the question of respondent's right to pass on his own disqualification. We find that he has no right to do this. Let another judge of the superior court hear and determine the question of respondent's disqualification, until which time the respondent is restrained and prohibited from any further proceedings in the matter.

It is ordered that the writ of prohibition issue as prayed for.

We concur: BARNARD, P. J.; MARKS, J.

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115 Cal.App. 517

KLING et al. v. KIMBALL PUMP CO., Inc.

Civ. 7794.

District Court of Appeal, Second District, Division 1, California.

July 17, 1931.

1. Exceptions, bill of ⟹36(3).

Appeal will not be dismissed for failure to file proposed bill of exceptions or make service thereof within statutory period, where written notice of order denying motion for new trial was not given (Code Civ. Proc. § 953d).

2. Exceptions, bill of ⟹36(3).

Law limiting time for preparing and serving bill of exceptions did not repeal law requiring written notice of order denying motion for new trial or waiver thereof (Code Civ. Proc. § 953d, and § 650 as amended by St. 1929, p. 839, § 1).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by D. G. Kling and another against the Kimball Pump Company, Incorporated, wherein defendant filed a cross-complaint. Judgment for defendant and cross-complainant, and plaintiffs and cross-defendants appeal.

Motion to dismiss appeal denied.

D. G. Kling and W. P. Hyatt, both of Los Angeles, for appellants.

Freston & Files, of Los Angeles, for respondent.

PER CURIAM.

[1, 2] Respondent moved to dismiss the appeal from the judgment entered in the court below upon the ground that appellants did not file their proposed bill of exceptions or make service thereof within the period prescribed by law. The record shows that after the entry of judgment plaintiffs duly presented their motion for new trial, which motion was denied on June 26, 1930. It does not appear that the defendant ever gave notice in writing of the order denying said motion for a new trial, or that written notice thereof has been waived in writing or by oral stipulation made in open court and entered in the minutes in accordance with the provisions of section 953d of the Code of Civil Procedure. According to section 650 of said Code, the time limited for preparing and serving a bill of exceptions begins to run with the date of notice of the order denying the motion for a new trial, or other determination thereof, when such motion has been made. By reason of these Code provisions it has been held, and is now the established rule, that where the record stands in the condition hereinabove stated in respect to this case, a motion like that here presented should be denied. Sterling Corp. v. Superior Court, 207 Cal. 370, 278 P. 859; Griffin v. Kent, 206 Cal. 263, 274 P. 56. To avoid the effect of the foregoing decisions, respondent contends that section 650, Code of Civil Procedure, as amended in 1929 (St. 1929, p. 839, § 1), by implication repeals section 953d of the Code of Civil Procedure in so far as this section was previously applicable to bill of exceptions. We are of the opinion that there is no such repeal intended or accomplished.

The motion to dismiss the appeal is denied.

115 Cal.App. 451

STEEL v. DUNTLEY.

Civ. 6674.

District Court of Appeal, Second District, Division 1, California.

July 13, 1931.

1. Frauds, statute of ⟹115(3).

Party to be charged is only one who must sign in order to satisfy statute of frauds (Code Civ. Proc. § 1973, subd. 5).

2. Frauds, statute of ⟹103(1).

Escrow instructions, containing terms of oral agreement with additional terms to be expected in escrow, constituted written contract subscribed by party to be charged within statute (Code Civ. Proc. § 1973, subd. 5).

3. Frauds, statute of ⟹115(4).

Escrow instructions signed by vendor constituted sufficient memorandum of oral contract to satisfy statute (Code Civ. Proc. § 1973, subd. 5).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Sarah M. Steel against George M. Duntley. Judgment for plaintiff, and defendant appeals.

Affirmed.

George Clark and C. W. Pendleton, both of Los Angeles, and Hugh Gordon, of San Francisco, for appellant.

John C. Miles and Donald R. Peck, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Upon the second trial of this action, based on the breach by the vendor of a contract to sell real estate, the parties stipulated "that the only question at issue before the court was whether or not the escrow instructions of the respective parties * * * constituted an agreement in writing legally sufficient to satisfy the Statute of Frauds (section 1973, subd. 5, Code Civ. Proc.)." The trial court was satisfied that the statute had been complied with, and with this conclusion we agree.

[1] One of appellant's premises, advanced by counsel not now in the case, is that the writing required by the statute must be subscribed by the vendee, the plaintiff in this cause. This is not the requirement of the law. The party to be charged is the only one who must sign, and in the situation before us that is the vendor (who did sign). Benson v. Shotwell (1890) 87 Cal. 49, 25 P. 249; Cavanaugh v. Casselman (1891) 88 Cal. 543, 26 P. 515; Easton v. Montgomery (1891) 90 Cal. 307, 27 P. 280, 25 Am. St. Rep. 123; Cowan v. Trem-

ble (Cal. App. 1931) 296 P. 91. See Harper v. Goldschmidt (1909) 156 Cal. 245, 104 P. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124. In each of these cases there was a down payment made by the vendee, but this was not part performance taking the contracts out from the statute of frauds (Dondero v. Aparicio [1923] 63 Cal. App. 373, 218 P. 608), and the fact of payment was not relied upon by the court in determining that the contracts were valid. The statute of frauds does not require the signature of any party other than the one to be charged.

[2] Following an oral contract to sell and buy the piece of property involved in this action, defendant and plaintiff signed separate escrow instructions; the defendant signing personally, the plaintiff by her nephew, who had acted as her agent throughout the deal. It is of no consequence that the nephew had no written authorization to act as plaintiff's agent. These escrow instructions, signed the same day, referring to the same property, containing the terms of the oral agreement, but with additional terms to be expected in an escrow, constitute a written contract subscribed by the party to be charged; i. e., the defendant. Tuso v. Green (1924) 194 Cal. 574, 229 P. 327; Neher v. Kauffman (1925) 197 Cal. 674, 242 P. 713; Hudson v. Slonaker (1928) 89 Cal. App. 620, 265 P. 346; Wilson v. Coffey (1928) 92 Cal. App. 343, 268 P. 408. The escrow instructions before us do not vary in any material provision from those under consideration in the last two cases cited. Nor is there any circumstance which requires a different conclusion from that reached in those cases.

[3] But, if the escrow instructions were insufficient to constitute a written contract, the instruction signed by the defendant constitutes a sufficient memorandum of the oral contract, into which the parties had entered, to satisfy the statute. Coulter v. Howard (1927) 203 Cal. 17, 262 P. 751; Fritz v. Frost (Cal. App. 1931) 300 P. 454.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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115 Cal.App. 414

MARTIN MUSIC CO. v. ROBB.

Civ. 857.

District Court of Appeal, Fourth District, California.

July 9, 1931.

1. **Sales 🔑479(1).**

On buyer's breach of conditional sale contract, seller may either disaffirm contract and retake property, or affirm contract and sue for purchase price.

2. **Sales 🔑479(1).**

On buyer's breach of conditional sale contract, seller's exercise of either option to disaffirm contract and retake property, or to affirm contract and sue for purchase price, constitutes abandonment of right under other option.

3. **Sales 🔑477(4).**

Any act of conditional seller clearly manifesting intention to rely on unpaid purchase price as absolute debt precludes seller from thereafter retaking property.

4. **Sales 🔑477(4).**

Commencement of any litigation by conditional seller that can proceed only on theory that title has passed to buyer generally constitutes election which seller may not revoke.

5. **Election of remedies 🔑9.**

In absence of mistake, commencement of proceeding to enforce one remedial right generally constitutes conclusive election barring subsequent prosecution of inconsistent rights.

6. **Sales 🔑477(4).**

Commencement of suit by conditional seller for contract price constitutes election passing title to piano to buyer.

7. **Bankruptcy 🔑341.**

Referees in bankruptcy are judicial officers clothed with power to adjudicate in first instance over claims against bankrupt's estate.

8. **Bankruptcy 🔑341.**

Findings of referees in bankruptcy on claims presented against bankrupt's estate are entitled to respect given to officers acting judicially.

9. **Bankruptcy 🔑341.**

Referees' allowance of claims presented against bankrupt's estate constitutes final judgment binding on both creditors and bankrupt.

10. **Bankruptcy 🔑364.**

Finding that action of conditional seller in suing for contract price and subsequent filing and allowance of seller's claim as creditor in buyer's bankruptcy proceeding constituted election precluding seller from pursuing inconsistent remedy of repossession *held* supported.

11. Appeal and error 🔑1052(8).

Admission of hearsay evidence *held* harmless where sufficient competent evidence warranted finding.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Action by the Martin Music Company against Ada E. Robb and Ada E. Robb, bankrupt. Judgment for defendant, and plaintiff appeals.

Affirmed.

Ed Fitzpatrick, of Los Angeles, for appellant.

Edward W. Forgy, of Los Angeles, for respondent.

GRIFFIN, Justice pro tem.

The plaintiff, claiming to be the owner and entitled to the possession of a certain piano, brought this action to recover possession thereof. Judgment having been entered in favor of defendant, the plaintiff appeals therefrom.

The right of possession in plaintiff is based on a monthly installment note contract under which defendant agreed to pay $2,250. She was given credit thereon in the sum of $286, being in default as to the balance due of $1,964. The evidence indicates that a piano was taken in by plaintiff from defendant in the transaction. The contract bears date August 21, 1925. The complaint in this action was filed July 14, 1927.

The contract provides, among other things, that title shall remain in the plaintiff, and "if she fails to pay any of said instalments when due * * * then the entire unpaid balance of this contract with interest and all accrued costs, including drayage and attorney's fees, shall in any of said cases immediately become due and payable and Martin Music Company or assigns may enforce payment of the entire amount of principal, interest and costs aforesaid then unpaid, or if they so elect, they may cancel this contract and take possession of said instrument without legal process."

A statement of the facts discloses the following: That prior to the 26th day of May, 1926, plaintiff assigned the above-mentioned contract to one B. J. Tobey for collection; that on said 26th day of May, 1926, after several demands had been made for payment of the amount due, this assignee brought suit in his name against the defendant Ada E. Robb, to enforce payment of the full amount due under the contract, and alleged in his complaint under oath that "plaintiff has elected to exercise the option set forth in said contract and declare the whole amount of principal and interest due under the terms of said contract, and does hereby exercise said option and declares that whole of said principal sum of $1,964.00 and interest immediately due and payable." That Mrs. Robb was served with summons on May 27, 1926. Default of defendant for failure to appear was entered by the plaintiff in said action June 8, 1926. That on July 31, 1926, plaintiff filed a dismissal of said action and it was dismissed as of that date, without prejudice. No demand for the return of the piano was made.

The evidence further discloses that on June 5, 1926, Mrs. Robb filed her voluntary petition in bankruptcy and on the same day was adjudicated a bankrupt by the United States District Court. In her petition in bankruptcy she listed the claim of Martin Music Company as a "secured claim," stating in said listing that it was assigned to Tobey and that he had sued thereon in the superior court of Los Angeles county. That after the dismissal on July 31, 1926, of the above-mentioned suit, Tobey reassigned the claim to the Martin Music Company; that on December 8, 1926, the Martin Music Company filed with the bankruptcy referee proof of secured claim based upon said contract, which was allowed in full by the referee. Claims of other creditors were also filed.

On March 25, 1927, the Martin Music Company filed its petition for reclamation of the piano, based upon said contract, which petition was denied by the referee on June 14, 1927. In his order denying the petition the referee permitted Mrs. Robb to amend her original petition in bankruptcy so as to include the piano among her property claimed as exempt under subdivision 2, section 690, Code of Civil Procedure, and further stated in said order that it had not been shown by evidence that the trustee ever had possession of the piano, and it then appearing that the piano would not become any part of the estate of the bankrupt coming into the hands of the trustee, the petition would be denied. On January 16, 1928, she was granted a final discharge in the bankruptcy proceedings. No appeal from any of the orders was taken.

At least four suits were filed against Mrs. Robb before bankruptcy, one being before the Tobey action. Mrs. Robb testified that prior to the Tobey suit her creditors had been pressing her for payment, but had agreed to give her a chance and that this arrangement was interrupted because of that suit. That she had no intention of going into bankruptcy until this suit was filed. This last-mentioned evidence was admitted over objection.

The trial court found that the plaintiff did, prior to the bringing of this action, exercise one of the two options which it was entitled to exercise under the terms of said contract and did fully and irrevocably elect to enforce payment of the purchase money for the piano, and did fully and irrevocably waive its option to repossess itself of such piano, and that prior to the bringing of this action title to the piano was fully and finally vested in the defendant.

Respondents contend that in addition to having made an election, which was complete on a matter which required an election, plaintiff specifically placed itself within the jurisdiction of the bankruptcy court in two ways, first, by filing its proof of claim, which was approved, and, secondly, by filing a petition for reclamation, which was denied, no appeal or attempt to modify either determination having been made, and that subsequently thereto, the discharge in bankruptcy was granted, making the matter res adjudicata.

Appellant contends that the evidence does not support the finding and that the trial court erred in the reception of certain evidence over objection. Appellant urges with some sincerity the equities of the case in support of his argument as to the law applicable. If it were a matter to be determined by equity rather than the law of the case, we find considerable merit in his contention.

In Holt v. Ewing, 109 Cal. 353, 42 P. 435, it was held, in a case where an election had been made as to goods sold on a conditional sale contract, where a claim was filed against an estate rather than repossess the goods under the contract, that the vendor in a conditional sale, electing to present a claim for the whole remainder of the purchase money against the estate instead of retaking possession of the property sold under the terms of the contract, without investigating and ascertaining whether the estate is solvent or insolvent, is not protected from the result of want of care in such investigation by reason of ignorance of the real condition of the estate; and the fact that the whole of the claims allowed against the estate largely exceed the value of the assets as shown by the inventory does not prevent the election from being binding upon him where it does not appear that he was misled by anyone as to the condition of the estate.

[1, 2] As a rule, on breach of a conditional sale contract by the buyer, the seller may either disaffirm the contract and retake the property, or he may affirm the contract, declare the subsequent payments due and sue for the purchase price. But since these remedies are inconsistent, he cannot have both and an assertion of one of them is an abandonment of and bars any right under the other.

[3, 4] No general rule as to what will constitute a waiver of his reserved title by the seller under a conditional sale contract can be laid down other than this: A waiver can be inferred whenever the conduct of the seller is inconsistent with the idea that he still intends to enforce a return of the goods if the conditions are not performed; whether or not such is the case is a question of fact. Any act on the part of the seller clearly manifesting an intention to treat and rely upon the unpaid purchase price as an absolute debt from the purchaser will be deemed an election to waive the conditions of the sale, resulting in title passing to the purchaser, and precluding the seller from thereafter retaking the property. The commencement of any litigation that can proceed only on the theory that title has passed to the purchaser on waiver by the seller generally constitutes an election which the seller may not revoke. Bancroft's Code Practice and Remedies, vol. 1, § 196, pars. 297, 298; Muncy v. Brain, 158 Cal. 300, 305, 110 P. 945; Parke v. White River Lumber Co., 101 Cal. 37, 35 P. 442; Boas v. Knewing, 175 Cal. 226, 229, 165 P. 690, L. R. A. 1917F, 462.

[5] While the decisions are not harmonious as to the effect of commencing an action to enforce one of two or more remedial rights arising out of the same facts, in the absence of mistake, or some other legal excuse, according to the weight of authority the commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain such proceeding, is generally such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent rights. 20 Cor. Jur. p. 29, E., and cases cited.

In Spurdis v. Karadontes (Sup.) 170 N. Y. S. 92, 93, it was held that: "This election must be held to have taken place, notwithstanding the fact that the former action was abandoned, since it is the affirmative act of the plaintiff in commencing the action which determines his election, and not the result of the action." Citing Matter of Garver, 176 N. Y. 386, 68 N. E. 667.

In Silverstin v. Kohler & Chase, 181 Cal. 53, 183 P. 451, 452, 9 A. L. R. 1177, it being a case involving a contract sale of a piano, we find this language: "In many states it is held that where the full amount of the purchase price is due and the seller brings an action to recover the same he thereby confirms the title in the purchaser. This rule has been recognized in this state." Citing Parke v. White River Lumber Co., supra.

A case involving the sale of a piano under a contract similar to the one before us, but where the piano in question was attached at the time of filing the action, is Birkel v. Nast, 20 Cal. App. 651, 654, 129 P. 945, wherein the court held, after citing the cases of Muncy v. Brain, Holt v. Ewing, and Parke v. White River Lumber Co., supra: "The legal effect of such election was, *immediately upon the filing of the complaint* [italics ours], to transfer to and vest in defendant title to the piano as completely as though defendant had made full payment therefor."

Appellants rely principally upon the reasoning given and cases cited in De Laval

Pacific Co. v. United C. & D. Co., 65 Cal. App. 584, 224 P. 766, 767, where certain machinery was returned under a similar contract of sale and suit was subsequently brought for the total purchase price after default in payment. The court there (citing 9 R. C. L. 960) held that: "The commencement of an action to enforce one of such remedies is generally considered sufficient to estop a party from thereafter pursuing the other remedy. * * * Although it has also been held that 'the more reasonable rule is that the mere bringing of an action which has been dismissed before judgment, and in which no element of estoppel in pais has arisen, that is, where no advantage has been gained or no detriment has been occasioned, is not an election.' Brice v. Walker, 50 Cal. App. 49, 194 P. 721. * * * The rule might therefore be stated as follows: Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in the pursuit of such remedy, whereby he has gained any advantage over the other party, or he has occasioned the other party any damage, he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right."

The cases in this state, where the principle has been invoked, are generally those where a party, having two inconsistent remedies for the enforcement of a right, has pursued one to judgment and then, finding that the other would be more effectual, attempts to invoke it. Hines v. Ward, 121 Cal. 115, 53 P. 427. In this case it was stated that the general rule in other jurisdictions is this: That where a party has brought an action in pursuit of one remedy he cannot, by dismissing it before judgment, be permitted to pursue another and different remedy, but the commencement of the first is a conclusive election by which he is bound.

But the court in that case did not determine whether the rule should be so extended in this state. Some cases (De Laval Pacific Co. v. United C. & D. Co., supra, and Brice v. Walker, supra) infer, if they do not hold, that in certain cases the filing of a complaint, in which no element of estoppel in pais has arisen, i. e., where no advantage has been gained or no detriment has been occasioned, is not an election, the doctrine of election of remedies being generally regarded as being the application of the rule of estoppel.

If we accept the theory that the commencement of the first action in this case was as a matter of law an election of an inconsistent remedy, then appellants would be foreclosed of seeking the possession of the piano through this present action. If we accept the rule last cited, that in addition thereto there must be the element of estoppel in pais, we must go to the evidence to establish facts, inferences, and deductions to warrant the finding the court has made.

Respondent testified in substance as follows: That at the time appellants were pressing her for money she had made arrangements with her other creditors (who were at the same time demanding their money from her) to pay a certain amount per month on their claims, and by reason of the filing of the suit declaring the whole amount due under this piano contract, her other creditors were discouraged with this arrangement. She then thought her only redress was to file a voluntary petition in bankruptcy, which she did.

[6] When suit was filed seeking a judgment for the full amount of the contract price rather than the repossession of the piano, under the case of Birkel Co. v. Nast, supra, the title to the piano in question passed to the vendee upon the election specified in the complaint, the vendee being notified of vendor's election by service of a copy of the complaint and summons and she having defaulted. Knowing of their election to declare the whole amount due, she had the right to list this property among her assets in the bankruptcy proceedings or make any other disposition of it that she desired not inconsistent with the bankruptcy proceedings. Plaintiff failed to attach the piano in this case as was done in the Birkel Case. Other creditors, being interested third parties, had the right to rely upon this election and have this property listed in the proceedings among the assets of the estate until its exemption was declared and determined.

[7-9] Referees in bankruptcy are judicial officers clothed with power to adjudicate in the first instance over the allowance or disallowance of claims presented against the bankrupt's estate, and their findings are entitled to the respect and credit given to officers acting judicially. The allowance of the claim is an adjudication of all issues properly presented for determination and constitutes a final judgment which is binding upon both the creditors and the bankrupt. 7 C. J. 323, § 529.

Appellants having filed a claim in the bankruptcy proceedings and it having been allowed in the full amount of the contract price by the referee, this decree or order allowing the claim of appellant was final. The case of Elmore Quillian & Co. v. Henderson, etc., 179 Ala. 548, 60 So. 820, 43 L. R. A. (N. S.) 950, citing Cromwell v. County of Sac, 94 U. S. 351, at page 371, 24 L.Ed. 195, definitely held that a decree of the trustee in bankruptcy ordering the allowance of a claim arising under a contract to be a bar to a subsequent suit on the contract and operated as an estoppel.

Appellant's subsequent action of filing a petition for reclamation was an inconsistent act indicating that the other option (that of repossession) was being pursued. The bankruptcy court for reasons specified in the order denied the petition for reclamation. We note that after a full hearing in the matter wherein the bankrupt appeared, contested, and opposed the petition, the referee denied, rather than dismissed, the petition for reclamation.

[10, 11] It was held in Nauman Co. v. Bradshaw (C. C. A.) 193 F. 350, that an assertion of ownership under a conditional sale contract is not one of debt of the bankrupt or of his estate and the claimant of property is not even a creditor of the bankrupt and has no debt or demand against the estate. The trial court in the case at bar found that the actions of appellant in the filing of the original complaint and proceedings had therein, and subsequent filing and allowance in full of the claim as a creditor in the bankruptcy proceedings, were sufficient to constitute an election and that plaintiff was estopped from pursuing the inconsistent remedy of repossession under claim and delivery. We are of the opinion that there is sufficient evidence to warrant the finding. Certain evidence was admitted over objection, which was hearsay, but we believe it to be harmless, there being sufficient competent evidence on the subject to warrant the finding, even if that portion had been denied admission. We deem it unnecessary to the decision to decide other points raised.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

115 Cal.App. 423

PROGRESSIVE FINANCE CORPORATION v. VINING et al.

Civ. 6445, 6533.

District Court of Appeal, Second District, Division 1, California.

July 10, 1931.

Hearing Denied by Supreme Court Aug. 31, 1931.

1. Appeal and error 🔑113(1).

Order denying motion to vacate judgment *held* appealable (Code Civ. Proc. § 663).

2. Bills and notes 🔑517.

Evidence *held* sufficient to sustain finding that signature on note was that of purported maker.

3. Evidence 🔑222(10).

Testimony respecting conversation between one of joint makers and another as to genuineness of signatures on note was inadmissible as against other maker.

4. Appeal and error 🔑1052(4).

Introduction of exhibits before proper identification *held* not erroneous, in view of full identification before close of case.

5. Evidence 🔑471(2).

Questions respecting witness' belief as to necessity to find out whether indorser owned note *held* properly excluded as calling for conclusion.

6. Appeal and error 🔑883.

Acquiescence in court's ruling on objection to questions prevented consideration thereof on appeal.

7. Bills and notes 🔑529.

Holder in due course of note *held* entitled to enforce payment for full amount, rather than for lesser amount which it had paid for same (Civ. Code, § 3138.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Progressive Finance Corporation against Marion L. Vining and others. Judgment for plaintiff, and, from an order refusing to vacate judgment on ground conclusions of law were incorrect, plaintiff appeals, and defendants appeal from judgment.

Modified, and, as modified, affirmed.

Superseding opinion in 299 P. 768.

Willebrandt & Horowitz and Girard F. Baker, all of Los Angeles, for plaintiff.

Tanner, Odell & Taft, of Los Angeles, for defendants.

PER CURIAM.

On petition of plaintiff praying that the decision and order of this court, entered on June 17, 1931 (300 P. 979) be set aside, and that the judgment of the Superior Court be affirmed with modifications in accordance with the original decision rendered herein on May 20, 1931, 299 P. 768.

The said order of June 17th was made in response to a suggestion of counsel for defendants that the appeal of plaintiff from the order denying plaintiff's motion to vacate the judgment of the court below was an attempted appeal from a nonappealable order. In support of this point, counsel for defendants relied upon certain decisions of the Courts of Appeal which undoubtedly support their contention. In our order of June 17th, we followed those decisions on the assumption that if there had been Supreme Court decisions to the contrary they would have been brought to our attention.

[1] Now, on petition filed by plaintiff, we find that it has been directly decided by the Supreme Court in ruling on a motion to dis-

miss an appeal taken from an order denying a motion to vacate a judgment, which motion was made in accordance with section 663, Code of Civil Procedure, that an appeal does lie from an order denying such motion. Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097, and cases there cited.

In view of the foregoing, we are constrained to hold that the judgment of this court entered on June 17th dismissing the appeal from said order and affirming the judgment should be set aside, and the entire cause reopened for decision on the appeals as originally presented. The cause having been fully presented on the merits and carefully considered may now be decided without further argument.

The opinion on the merits of these appeals, written by Mr. Justice York and filed herein on May 20, 1931, is hereby adopted as the opinion of the court:

YORK, J.

The action out of which these appeals arise was brought to recover on a promissory note for the sum of $3,000, executed by defendants Vining and Lane in favor of one Dennis, who indorsed the same to one Albert Lane, who in turn indorsed it to plaintiff before maturity and without recourse.

Defendants denied execution and delivery of the note, alleged that it was obtained without consideration, through misrepresentation, fraud, and trickery of the original payee, and that plaintiff had notice thereof.

The trial court found that the defendants Vining and Lane executed and delivered to John B. Dennis their certain promissory note in writing, wherein they agreed to pay to him the sum of $3,000; that said Dennis obtained the note from said defendants through misrepresentation, fraud, and trickery, and without consideration, but that plaintiff in purchasing the note had no notice or knowledge of want of consideration and took it without notice of any infirmity attaching thereto; that before purchasing said note, plaintiff received from defendants Vining and Lane a statement in writing that the note was executed for a good and valuable consideration, and that they had no claim or defense against the said note.

As a conclusion of law from said findings, the court rendered judgment in favor of plaintiff against defendants for the sum of $2,000, with interest at 7 per cent. per annum, $200 attorney's fees, and costs of suit. Plaintiff promptly moved to vacate said judgment and to enter another and different judgment, on the ground that the conclusions of law were incorrect, inconsistent, and not supported by the findings of fact. This motion was denied, and from such denial of said motion, plaintiff takes appeal No. 6445, contending that a judgment in favor of plaintiff for the sum of $3,000, the face of the note, should be entered to conform to the findings of fact.

[2] Defendants, on the other hand, appeal from the judgment, being the appeal No. 6533, which we will take up first. Defendants' first point is that the evidence is insufficient to justify the finding that the note sued on was executed by defendants Vining and Lane, and also that the evidence is insufficient to justify the decision as to Mrs. Vining's signature on the note. We have scanned the record very carefully, and are of the opinion that the evidence is amply sufficient to justify the findings referred to. The witness Carlson—a handwriting expert—made careful examination of the signatures of defendants on the various exhibits, including the signatures on the defendants' verifications of their pleadings, and gave as his opinion that the signatures as written in the admittedly genuine documents were written by the same persons who signed the note which is the subject of this action. On cross-examination, he carefully analyzed various letters and strokes in his comparisons of the signatures. Defendants' testimony that the signatures on the note were not their signatures accomplished no more than to produce a conflict in the evidence.

[3] Defendants objected to the admission of testimony relating to a conversation had between Cora Lane and Albert Lane as to the genuineness of the signatures on the note, offset statement and financial statement, maintaining that, while it was admissible as against Miss Lane, it was prejudicial to the cause of Mrs. Vining, who was not present when the conversation took place. Said testimony was not admissible as against Mrs. Vining; but, in view of all the evidence produced, it does not appear that the erroneous ruling had any important bearing on the court's decision of the case.

[4] Defendants objected to the introduction of the note and the financial statement as exhibits at the time they were offered, on the ground that they had not been properly identified, in so far as the signature of Marion L. Vining was concerned. These exhibits were fully identified before the close of plaintiff's case, so that no error resulted from their introduction.

[5] Defendants also object to the ruling of the court in sustaining objections to two questions asked of Albert Lane, president of the plaintiff corporation, on cross-examination, it being maintained that the circumstances under which said Lane bought the note from Dennis were such as to put him on guard that the note was either fraudulently obtained by Dennis or was a forged note. The questions referred to are as follows:

"Q. Did he (Dennis) say anything about using this note for the purpose of assignment in this real estate transaction? A. Absolutely not.

"Q. In this deal? A. No sir.

"Q. He didn't say it was his note? A. Yes sir, he said it was a note that belonged to him and that he wished to sell.

"Q. Oh, he said it belonged to him? A. Absolutely.

"Q. Did he say he paid anything for it? A. He said he got it—I asked him how he got this note and he said it was in some real estate transaction.

"Q. Did you think it was necessary to find out whether he owned the note?

"Mr. Horowitz: We will object to it on the ground that it calls for a conclusion of the witness.

"The Court: Sustained.

"Q. By Mr. Odell: Did you make any inquiry of the makers of the note as to whether it belonged to Mr. Dennis?

"Mr. Horowitz: I object to that on the ground that it is assuming facts not in evidence.

"Mr. Odell: I reckon he is right about that."

[6] Defendants cannot now in this court for the first time raise an objection to the second of these rulings because of his acquiescence in the ruling at the time it was made. As to the first ruling, we are of the opinion that the question called for a conclusion of the witness, and defendants cannot complain without an attempt to reframe the question so as to properly bring out some answer that would have been proper along this line.

[7] As to appeal No. 6445 taken by plaintiff from the order denying its motion hereinabove referred to, the trial court found that plaintiff corporation was a holder in due course of the note here involved, and, that being true, it was entitled to enforce payment of the note for its full amount (Civ. Code, § 3138), rather than for the lesser amount which it had paid for the same.

The petition of plaintiff for rehearing is granted. The said order of June 17th is set aside. The cause is resubmitted for decision. The order denying plaintiff's motion to vacate the judgment and enter another and different judgment is reversed, and the Superior Court is hereby directed to vacate the judgment heretofore rendered herein, and to enter judgment in favor of plaintiff for the sum of $3,000, with interest from August 27, 1926, at the rate of 7 per cent. per annum, together with the sum of $200 as and for attorney's fees, together with plaintiff's costs and disbursements.

The judgment, as so modified, is affirmed.

SECURITY CO. v. RICE.*

Civ. 6514.

District Court of Appeal, Second District, Division 1, California.

July 13, 1931.

Rehearing Denied Aug. 5, 1931. Hearing Granted by Supreme Court Sept. 10, 1931.

1. Evidence 🔑419(13).

Mere recital as to consideration in contract for purchase of property is not conclusive, and true consideration may be proved by parol testimony.

2. Evidence 🔑419(13).

Parol testimony in respect to true consideration in contract for purchase of property *held* properly admitted.

Contract for purchase of property, executed after condemnation proceeding had been filed, provided expressly for consideration to be paid, but was silent, however, as to what would happen when award was rendered in condemnation proceeding then pending, so that consideration as expressed in contract was not conclusive upon question.

3. Eminent domain 🔑153.

Parol reservation in contract for sale of property in respect to condemnation award in pending proceeding carries with it right of vendor to receive moneys awarded.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by the Security Company against Paran F. Rice. Judgment for defendant, and plaintiff appeals.

Affirmed.

William P. Mealey, of Los Angeles, for appellant.

D. Z. Gardner, of Los Angeles, for respondent.

YORK, J.

This is an appeal from a judgment rendered in favor of the defendant in an action brought for money had and received. The cause of action of plaintiff is predicated upon a written contract of date March 1, 1926, for the purchase of a certain piece of property in the city of Monrovia; defendant having thereafter received from the city of Monrovia for lands condemned by the city the sum of $6,400, the plaintiff demanding from defendant $^{92}/_{150}$ of said sum. Defendant contended that the amount awarded in the condemnation proceeding was wholly his and that plaintiff had no interest in said sum. The complaint in the condemnation proceeding

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 9 P.2d 817.

was filed on the 1st day of December, 1925; summons thereon being issued on the same day and lis pendens properly recorded. Defendant alleges that he was the actual owner of all of the land involved, and that the title thereto stood in the name of one Webster for convenience and as trustee for the said defendant only. Defendant denies that the plaintiff purchased from him the easterly 92 feet of lot 1 or the northerly 18 feet of lot 2, as alleged in the complaint, except that defendant alleges that at the time of the sale by defendant to plaintiff, plaintiff was aware of and knew all of the facts concerning the proceedings of the city of Monrovia for the condemnation for street purposes of 16 feet along the northerly side of said lot 1, and that it was expressly understood and agreed between them that, if the said city completed the condemnation proceedings with respect to said northerly 16 feet of said lot 1 and paid for the same, the moneys paid therefor should be paid to and received by the defendant and were not to be paid to or received by the plaintiff. Defendant further alleged that the price paid by plaintiff to the defendant for the property purchased was fixed in accordance with and in view of said fact that the said condemnation money should be paid to and received by the defendant. Defendant further denied that the plaintiff acquired from the defendant 92/100 or any part at all of said lot 1, sought to be condemned by the city of Monrovia, or the right to any part of the moneys paid by said city therefor.

[1] The original receipt was somewhat ambiguous, but did state that the description was to be based upon the new improved lines, as established by the widening of Myrtle avenue and White Oak. Plaintiff contends that it was conclusively established that the appellant actually contracted for and purchased exactly what the deed called for, which it claims is the east 92 feet of lot 1 and the northerly 18 feet of the east 92 feet of lot 2, and it contends that the question for determination is whether or not the appellant is entitled to that portion of the award which was allowed for the northerly 16 feet of the east 92 feet of lot 1, which is the amount being sued for herein, and contends that the appellant should prevail for two reasons: First, that the contracts for the purchase and sale of the property provided in full for the consideration; and, second, that by the deed itself the appellant is entitled to the award. The appellant contends that it was error for the trial court to admit oral evidence to prove that the consideration was different from that expressed in the contracts, and it also objects to the admission of oral evidence that the vendor, who is the respondent herein, reserved the award to himself. Appellant admits that it is a well-established principle that a mere recital as to the consideration is not conclusive, and that the true consideration may be proved by parol testimony. Here, however, the appellant contends that the very subject-matter of the contract was the consideration, and to permit oral evidence to be introduced to change the consideration operates to change the effect thereof.

[2] The contract, although it provides expressly for the consideration to be paid, is silent as to what will happen when the award is rendered in the condemnation proceeding then pending. We think that the consideration as expressed in the contract is not conclusive upon the question, and that the court did not err in admitting testimony establishing the true consideration. Russakov v. McCarthy Co., 206 Cal. 682, 275 P. 808.

[3] Appellant further contends that the grant deed, without any reservations whatsoever with reference to the condemnation proceedings which had been commenced, conveyed to the appellant all of the rights the respondent had in the then pending action. Appellant states that at the time of the trial of this case in the lower court there was no decision of our Supreme or appellate courts upon this question, but that since the trial the case of Russakov v. McCarthy Co., 206 Cal. 682, 275 P. 808, has been rendered, and the principle established that the owner of the property at the time of the taking under condemnation proceedings is entitled to the award. Appellant states that the court also points out that the property is not taken by the city until actual payment is made, but admits that this decision holds that the vendor is entitled to make a parol reservation as to the award moneys to be paid in the condemnation proceedings, and further contends that in holding this the Supreme Court has committed a grievous error and one which may lead to serious results. However that may be, the decision should be followed here, and is, we believe, determinative of the question as to whether parol evidence may be introduced in the very kind of case as the one now before this court, and holds that it can be so introduced; and it is further determinative that, if it is a fact that such reservation was made by parol, it carries with it the right of the vendor to receive the moneys awarded in the condemnation proceeding.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

115 Cal.App. 238

SAN FRANCISCO IRON & METAL CO. v. AMERICAN MILLING & INDUSTRIAL CO. et al.

Civ. 7416.

District Court of Appeal, First District, Division 1, California.

June 27, 1931.

1. Joint adventures 🔑5(3).

Where evidence tends to prove intention to join efforts for joint profit, existence of relationship of joint adventurers is for jury.

2. Joint adventures 🔑1.

Evidence sustained finding of joint adventure and violation of agreement by defendant's secret purchase of property on own account.

Parties entered into agreement to purchase unassembled railroad cars and resell same at profit. Document was prepared reciting that it was preliminary purchase and sales agreement covering cars; that parties were contemplating purchasing same in joint account on fifty-fifty per cent. basis of purchase price and selling price, each to put up equal amount of money or credit to pay for same including expenses to be shared equally between parties; and that buying and selling price and all other conditions should be mutually agreed on and accepted by parties. Plaintiff entered into extensive negotiations for purchase of cars, and informed defendant that he could make purchase. Initial payment was made by plaintiff to obtain option on property, but second payment was not made in absence of reply from defendant. In meantime defendant had been secretly negotiating for purchase of railroad cars on own account, and consummated purchase after plaintiff's option had expired.

3. Joint adventures 🔑1.

Joint adventure is consummated when minds of parties meet on point of entering into it and mutual promises are exchanged, though subsequent acts are to be performed.

4. Joint adventures 🔑1.

Agreement for joint adventure in purchase of personalty without limitation of time stated for making purchase remains in full force until purpose is accomplished or it is definitely ascertained that purpose cannot be accomplished.

5. Joint adventures 🔑1.

While agreement of joint adventure is in force, neither party can withdraw because no longer advantageous or for purpose of acting independently.

6. Joint adventures 🔑4(1).

Fiduciary relationship exists between coadventurers requiring utmost good faith and forbidding accrual of any profit or secret advantage by one coadventurer over other.

7. Joint adventures 🔑4(1).

Coadventurer breaching agreement for joint adventure by purchasing property on own account *held* liable to other coadventurer for difference between purchase price and market value of property at time of breach.

8. Joint adventures 🔑5(1).

Coadventurer suing for breach of agreement of joint adventure providing for sharing of expenses *held* entitled to recover expenses incurred to time it learned of defendant's breach.

9. Evidence 🔑215(1).

In action for damages for breach of agreement of joint adventure by defendant purchasing property on own account, cablegram from defendant to agent was admissible as declaration against interest.

10. Evidence 🔑213(3).

Cablegram to agent by coadventurers sued for breach of agreement by purchasing property on own account *held* not objectionable as relating to compromise, where there were no such communications between parties to joint adventurers.

11. Appeal and error 🔑1058(1).

Exclusion of evidence on cross-examination *held* not prejudicial where evidence was otherwise admitted.

12. Joint adventures 🔑5(1).

Where coadventurer violated agreement for joint adventure by secretly purchasing property on own account rendering it impossible for him to perform, other coadventurer was not required to offer to perform to recover damages for breach (Civ. Code, § 1440).

13. Joint adventures 🔑2.

Strict rules governing ordinary contracts *held* inapplicable to joint adventure agreement involving fiduciary relationship, particularly where party invoking rule violated relationship.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the San Francisco Iron & Metal Company against the American Milling & Industrial Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

J. G. De Forest and Manson & Allan, all of San Francisco, for appellants.

Brownstone & Goodman and Goldman & Altman, all of San Francisco, for respondent.

KNIGHT, J.

The controversy involved in this appeal arises out of the alleged breach of a joint adventure agreement relating to the purchase and sale of personal property. The complaint contains three causes of action, separately stated. The first is for the reasonable value of services rendered, the amount claimed being $4,000; the second is to recover $8,000 which plaintiff claims to have expended for the use and benefit of the defendants; and the third is for damages in the sum of $250,000, it being alleged in this regard that after plaintiff and defendants entered into said agreement defendants violated the same by secretly acquiring the property and reselling the same on their own account. The first cause of action was subsequently dismissed, and the amount sued for in the second was reduced to $4,802.92. The trial took place before a jury which returned a verdict in plaintiff's favor for the sum of $20,000. Judgment was entered accordingly and defendants have appealed. Insufficiency of the evidence to support the judgment, errors of law committed during the course of the trial in ruling upon the admissibility of evidence, and the giving, refusal to give, and modification of certain instructions to the jury, constitute the main grounds of appeal.

The subject-matter of the enterprise consisted of 4,000 unassembled railroad cars which for several years had been lying at Coquitlam and Vancouver, British Columbia. They were manufactured during the war for the use of the Russian government under the Kerensky regime, and while en route across Canada the powers of that regime were overthrown, and thereupon the cars were seized by the British government and subsequently passed into the hands of private ownership, and were offered for sale. Plaintiff's business was that of buying and selling new and secondhand iron and metal commodities of various kinds including old railroad equipment. Its principal owners were Harry Silberman and his son, Lou Silberman, and its place of business was in San Francisco. The defendant company was owned by the Kagan family and was engaged in the general mercantile business in China. A. I. Kagan, its principal owner, resided in Harbin, Manchuria, and his son, Jacob Kagan, was its American representative. Previously the two companies transacted some business together, and on August 27, 1925, while A. I. Kagan was visiting in San Francisco, the Silbermans called a conference at plaintiff's office, at which they brought to the attention of the Kagans the existence and location of said cars, the history of their manufacture and seizure, etc., and unfolded a proposition to purchase and sell the same on joint account as scrap iron, in this country, which they said could be done at a good profit. There is a dispute as to whether the Kagans had any previous knowledge of the existence of said cars; Lou Silberman having testified that the Kagans knew nothing of them, and Jacob Kagan having testified that he was aware of their existence. However that may be, the Kagans agreed to enter into the enterprise, claiming, however, that much larger profits could be realized by allowing them to sell the cars, assembled, to the present Russian government, which they asserted they would be able to do. Little, if anything, was known at that time about the material, either as to its quantity, quality, condition or price; and consequently an agreement could not be drawn embodying all of the details of the execution of the proposed enterprise; but after much discussion a document was prepared, which was revised by the Kagans, and then signed by the respective parties. It read as follows: "Preliminary Purchase and Sales Agreement Covering 4000 Cars, Between A. I. Kagan and the San Francisco Iron & Metal Company. August 27, 1925. Mr. A. I. Kagan, Berkeley, California. Dear Sir:—With reference to the 4000 cars now stored in Canada which we are contemplating on purchasing in joint account with you. It is to be understood that in the event this purchase is consummated that it will be on a 50-50 per cent. basis of the purchase price and the selling price between us, each one putting up an equal amount of money or credit to pay for same, on basis of purchase price, also all expenses incurred such as freight, insurance, etc., to be stood equally between us. Also the buying and selling price covering this material and all other conditions to be mutually agreed upon and accepted by both parties hereto mentioned. Final detail, agreement to be made at the time of purchasing of material. Very truly yours, San Francisco Iron & Metal Co. By L. H. Silberman Vice-President. Accepted A. Kagan." Shortly afterwards, A. I. Kagan returned to China, and in conformity with the plan previously agreed upon Lou Silberman, who transacted all of the subsequent business on behalf of his firm, proceeded at once to execute the plans for the acquisition of the property. He first inspected the material in British Columbia, and found it in good condition. Upon his return to San Francisco he so reported to Jacob Kagan, and was urged by the latter to prosecute with all diligence the negotiations for its purchase, which Silberman proceeded to do. His efforts met with many obstacles, however, and extended over some 16 months. During that period he made four trips to New

York to confer with the owner's representatives. The first trip was made in September, 1925, the second in June, 1926, the third in September, 1926, and the fourth in December, 1926; and during the intervals between trips he carried on negotiations through correspondence. At first he was told that the cars were "out on option" and not subject to purchase. Later the owners indicated a willingness to sell, but insisted on imposing burdensome restrictions upon the resale thereof, which would have prevented the execution of the enterprise as planned by the parties; and later he was told again that the cars were "out on option" and could not be purchased until the option expired. During the progress of these negotiations he reported the results to Jacob Kagan and was at all times urged by the latter to continue his efforts to acquire the property. On his third trip to New York, which occurred in September, 1926, he was informed that an option was then outstanding on the cars; and consequently, to avoid the expense and delay of remaining in New York, he turned over the negotiations to a New York broker named Dulien, with instructions to close the purchase of the cars if possible at the expiration of said option. On December 15, 1926, Dulien phoned Silberman from New York that the opportune time had come to make the purchase; that the dealers were anxious to sell and that the cars could be obtained for $14 or $15 a ton. Thereupon Silberman cabled A. I. Kagan as follows: "Have indication can purchase Vancouver cars. Are you interested in. Please reply at once." On December 17th Kagan replied as follows: "Your silence eighteen months consider you are not interested in cars. Telegraph fully your views at what price you can buy F. O. B. Vancouver delivery within six months and all other conditions. Can you secure letter credit ninety per cent? Await your reply." Within the next few days Dulien phoned Silberman from New York again urging him to act at once if he were to consummate the purchase, and on December 21 at Dulien's request Silberman telegraphed Dulien $5,000 with which to make the initial payment on an option. On December 24 Dulien again phoned Silberman as to the necessity of consummating the purchase at once, whereupon Silberman again cabled A. I. Kagan as follows: "Vancouver cars can buy fourteen dollars per ton two thousand pounds. Telegraph immediately if you are interested in and will put up letter credit fifty per cent. as per agreement." No reply was received to this cablegram. On December 27 Silberman received a letter from Dulien enclosing the option he had obtained. It was dated December 21, 1926, acknowledged receipt of the down payment of $5,000, and provided for an additional payment of $30,000 on or before December 28, 1926, "or a full, clean, irrevocable letter of credit for the entire amount of approximately $400,000 buyer's option." The price fixed for the property was $12.75 a ton. Upon the receipt of this letter, which was the first knowledge Silberman had of the terms of the option, he went to New York at once; but having received no reply from the Kagans the second payment of $30,000, due on December 28, 1926, was not made, and consequently the option lapsed; and upon his arrival in New York he learned that the Kagans had been secretly negotiating for the purchase of the cars on their own account and had made an initial payment thereon, but did not learn of the terms of the Kagan purchase until the following June.

The circumstances under which these secret negotiations were carried on and consummated were revealed by a series of cablegrams, in code, passing between Kagan and his son, which plaintiff caused to be produced at the trial. The first was sent by Kagan to his son on November 1, 1926, and was as follows: "Proceed E. D. Locke to New York Open negotiations with Rikhoond [Richmond] Scrap Steel Company 10 Woolworth Building. In strict confidence May we buy entire quantity material for cars Vancouver 36,000 tons of 2240 lbs. including parts inside warehouse $14.50 per ton of 2240 lbs. alongside vessel Will deposit 10% against Bank guarantee in fulfillment of contract Balance payable about 4 to about 5 months against shipping documents. Storage and interest from January 1st. for our account. Do your utmost. If you are unable to what can be done option on now Telegraph present position Matter Message ends Commission 1½% for both together." Subsequently, however, as will be remembered, Kagan, Sr., received a message from Silberman with reference to the purchase of the cars, to which he replied, on December 17, 1926, and the inquiries he made therein indicated that he was still collaborating with them under the joint venture agreement; whereupon and on December 20, 1926, he cabled his son as follows: "Have a telegram from Silberman (San Francisco Iron & Metal Co.) whether we interested in cars what is your relation with him do they wish buy for joint account or commission what is the price what is your opinion regarding it joint account telegraph immediately." The reply message from his son was as follows: "Ref. to your telegram of 20th inst. We have not been in negotiations with Silberman (San Francisco Iron and Metal Co.) Strongly recommend that you do not joint account unless absolutely necessary. Buy for our account. Can you make firm offer. Why do you not write. No letters from you." Upon the receipt of this reply Kagan, Sr., proceeded to close the purchase of the property on his own account, and on December 22, 1926, cabled his son as follows: "Ref. to your telegram of 20th inst. Following is strictly confidential and must not be communicated to anyone. Negotiated through us owners agent at port of loading. Hope to secure (it) Very probably you will have to go in a few days to Vancouver Have written 5th December. * * *" And on December 27, 1926, he again cabled his son that he had closed the transaction with the owners and gave instructions to his son as to handling the property. The total amount paid for the property was $395,000, the price per ton being $12.50. An initial payment of $10,000 was made thereon on December 31, 1926, which was three days after the Dulien option had expired; a second payment of $27,500 was made on January 8, 1927, on which date a formal sales contract was executed; $56,250 was paid on or before January 15, 1927, and it was agreed that the balance of $281,250 should be paid in June, 1927.

[1, 2] Defendants' principal contention is that the question of the existence of the joint venture agreement is necessarily one of law which must be determined from the terms of the document signed by the parties on August 27, 1925, to the exclusion of all other matters leading up to and following the preparation and signing thereof, and all oral understandings had between the parties as to the plan of executing the joint adventure; and that the terms of said document are legally insufficient to create a joint adventure agreement, and at best constitute merely a contract to enter into a contract in the future, which not only was lacking in mutuality, but otherwise was unenforceable in law and eventually was abandoned by the parties. The rule appears to be well settled, however, that where the existence of the relationship of joint adventurers is in issue, and there is substantial evidence tending to prove that the parties intended to join their efforts in furtherance of the enterprise for their joint profit, the question is pre-eminently one of fact for the determination of the jury (Hoge v. George, 27 Wyo. 423, 200 P. 96, 18 A. L. R. 469; Van Tine v. Hilands [C. C.] 151 F. 124; Brady v. Colhoun, 1 Pen. & W. [Pa.] 140); and in our opinion the evidence in the present case is legally sufficient under the authorities hereinafter cited to sustain the implied finding of the jury that a joint adventure agreement was entered into between the parties as alleged in the complaint and that the same was subsequently violated by the defendants.

As said in Goss v. Lanin, 170 Iowa, 57, 152 N. W. 43, 46, which appears to be one of the leading cases, and is cited by both parties: "It is not necessary that there should be a specific formal agreement to enter into a joint enterprise, or that the interests of the parties should be definitely settled in such agreement, or that there should be a formal agreement as to sharing in the profits. If there be a joint enterprise proven, either by direct evidence of a mutual agreement to that end, or by proof of facts and circumstances from which it is made to appear that such enterprise was, in fact, entered into, the law fixes their rights. [Citing cases.]" In other words, to appropriate the language of the court in Anderson v. Blair, 202 Ala. 209, 80 So. 31, 35: "* * * The great majority of contracts of joint adventure and of partnership * * * do not point out precisely what each party is to do under them. Such a provision is quite unusual, and, we should say, quite impossible in many cases." Such is the law in this state, and it has been expressly so restated in the recent case of Andrews v. Bush (Cal. App.) 293 P. 152, 154, wherein the court said: "Such an agreement is not invalid because of indefiniteness in respect to its details. 33 C. J. 848. Thus a partnership, which in many respects is similar to a joint adventure (Menefee v. Oxnam, 42 Cal. App. 81, 85, 183 P. 379), is none the less a partnership though there be no definite agreement as to how the profits shall be divided (Doudell v. Shoo, 20 Cal. App. 424, 438, 129 P. 478). Likewise, with a joint adventure. Hoge v. George, 27 Wyo. 423, 200 P. 96, 99, 18 A. L. R. 469; Goss v. Lanin, 170 Iowa, 57, 152 N. W. 43, 46. In considering whether or not a relationship such as that of joint adventurers or partners has been created, the courts are guided, not only by the spoken or written words of the contracting parties, but also by their acts." (Citing numerous authorities, including Niroad v. Farnell, 11 Cal. App. 767, 106 P. 252, and Saunders v. McDonough, 191 Ala. 119, 67 So. 591, 596, hereafter referred to.)

[3-5] Defendants stress some of the language used in the document in question, such as "*preliminary* purchase and sales agreement"; also "it is to be understood that *in the event* this purchase is consummated that it will be on a 50-50 per cent basis, * * *" etc. (italics ours), contending that the italicized words indicate only an intention to create a joint adventure upon future agreement at the option of the parties. But as held in Miller v. Walser, 42 Nev. 497, 181 P. 437, the joint adventure is consummated when the minds of the parties meet upon the point of entering into it and their mutual promises are exchanged; and it is evident that in making the above contention defendants fail to draw the distinction between such act, that is, the meeting of the minds of the parties in their decision to join in the adventure, of which there is ample evidence, and the subsequent act of the parties in attempting to reduce to writing some of the promises upon which the adventure was founded and the conditions upon which it was to continue, the controlling one being the successful efforts of the parties to purchase the cars. And there appears to be nothing peculiar about the language referred to by defendants for it is self-evident that any joint adventure agreement must of necessity relate to acts to be performed in the future; and the entire document

when read in the light of and considered in connection with the testimony of the parties as to what transpired immediately preceding its execution clearly implies what the oral testimony shows, that the parties had already agreed to enter into the enterprise. True, "in the event" the cars the parties "contemplated on purchasing in joint account" could not be purchased, the enterprise would necessarily terminate; but there was no limitation of time stated within which they were to be purchased, and consequently no date was fixed for the termination of the adventure and the authorities are uniform in holding that such an agreement remains in full force until its purpose is accomplished or it is definitely ascertained that its purpose cannot be accomplished (Goss v. Lanin, supra); and that while it is in force neither party has the right to withdraw therefrom upon the ground that it is no longer advantageous to him (Bane v. Dow, 80 Wash. 631, 142 P. 23), or for the purpose of acting independently to the exclusion of his coadventurers (Goss v. Lanin, supra).

[6] The existence of the joint adventure being established, it follows that a fiduciary relationship between the coadventurers arose therefrom, which demanded of them the utmost good faith in all their dealings with each other; and this requirement of good faith alone forbade the accrual of any profit, or the acquisition of any secret advantage by one of the coadventurers over the other. Goss v. Lanin, supra; Miller v. Walser, supra; Hardin v. Robinson, 178 App. Div. 724, 162 N. Y. S. 531; Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820; Kent v. Costin, 130 Minn. 450, 153 N. W. 874; Selwyn & Co. v. Waller, 212 N. Y. 507, 106 N. E. 321, L. R. A. 1915B, 160; Sicklesteel v. Edmonds, 158 Wis. 122, 147 N. W. 1024; Saunders v. McDonough, supra; McMullen v. Harris, 165 Iowa, 703, 147 N. W. 164, 165; Rich v. Teasley (C. C.) 194 F. 534; Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914C, 689.

[7, 8] Defendants further contend that even though the joint adventure was created, plaintiff can recover only upon proving that defendants disposed of the property at a profit; and in this connection they offered evidence to show that they sold the material at a loss; but the evidence was excluded. The rule thus sought to be invoked would doubtless apply if the material had been purchased and disposed of in pursuance of the joint adventure agreement, and plaintiff were here seeking relief in equity in a suit for an accounting and its share of the alleged profits. But such is not the case. The agreement was breached by the defendants at the very threshhold of the enterprise by secretly negotiating for and purchasing the property on their own account, and the settled rule in such cases is, as stated in Keyes v. Nims, 43 Cal. App. 1, 184 P. 695, 699, "* * * that one party in a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure; but the right thus to sue at law does not preclude a suit in equity for an accounting. 15 Ruling Case Law, p. 507." See, also, McCreery v. Green, 38 Mich. 172; Saunders v. McDonough, supra; Joseph v. Sulzberger, 136 App. Div. 499, 121 N. Y. S. 73; Lind v. Webber, 36 Nev. 623, 134 P. 461, 135 P. 139, 141 P. 458, 50 L. R. A. (N. S.) 1046, Ann. Cas. 1916A, 1202. Here the plaintiff elected to sue for damages on account of such breach, and having shown that the material in question had a ready and ascertainable market value, was entitled to recover from the defendants upon the basis of the difference between the purchase price thereof and the market value at the time of the breach (Joseph v. Sulzberger, supra); and in view of the terms of the document dated August 27, 1925, plaintiff was entitled to recover also the expenses incurred in promoting the enterprise up to the time it learned of the breach. Goss v. Lanin, supra. The evidence is amply sufficient to support the award made by the jury as to both elements. In fact, it would have been legally sufficient to sustain the verdict for a much larger amount, eliminating entirely the element of expenses.

[9-11] Nor do we find any error in the rulings of the trial court relating to the testimony of the witness Rocca. The cablegram from Kagan, Sr., to Rocca, dated May 27, 1928, was admissible as a declaration against interest; and it was not objectionable upon the ground that it related to a compromise, as defendants contend, for admittedly there were no communications whatever between the parties themselves to that end. Smith v. Whittier, 95 Cal. 279, 30 P. 529, citing a number of cases from other jurisdictions; Story v. Nidiffer, 146 Cal. 549, 80 P. 692; Ashlock v. Linder, 50 Ill. 169. And even assuming that the trial court should have been more liberal in its rulings on cross-examination, in permitting defendants to introduce certain evidence showing the circumstances leading up to the activities of Rocca, an examination of the entire testimony given by the witness discloses that all the facts surrounding the matter were eventually laid before the jury, and consequently defendants could not have been prejudiced by the rulings complained of.

[12, 13] Plaintiff alleged in its complaint that it was ready, able, and willing to perform the contract according to its terms; but defendants claim that no evidence was offered to substantiate such allegation, and that consequently plaintiff failed in its proof. In support of this contention defendants have cited a number of cases involving ordinary contracts of purchase and sale in which it is held generally that in order that one party may place the other in default upon a contract consisting of mutual dependent obligations, he must not only be able to perform, but must offer to perform. Hanson v. Slaven, 98 Cal. 377, 33 P. 266. But the record in the present case is not barren of such proof for it discloses that while Jacob Kagan was testifying as a witness plaintiff's counsel elicited from him the admission that during certain court proceedings in Vancouver growing out of this controversy counsel for plaintiff there stated to him that plaintiff was at all times ready, able, and willing to pay one-half of the purchase price of said material. Assuming however, as defendants argue, that the foregoing testimony is legally insufficient to prove the facts mentioned, it would seem that under the circumstances of this case such proof was not essential, for in the first place, under the provisions of section 1440 of the Civil Code, if one party to a contract or agreement gives notice that he will not perform, the other party is excused from making an offer to perform; and while there was no express notice given by the Kagans that they would not proceed with the joint adventure, their actions in violating the fiduciary relationship in secretly acquiring the property on their own account, to the exclusion of plaintiff, rendered it impossible for them to perform. Secondly, it is unquestionably well settled that the strict rules governing in cases of ordinary contracts, which defendants seek to invoke here, have no application to cases of agreements involving the fiduciary relationship, such as copartnerships, joint adventures and the like, particularly where, as here, the party in whose behalf the rule is sought to be invoked first violated such relationship by acquiring interests antagonistic to his coadventurers, and thus prevented the accomplishment of the object for which the joint adventure was formed. One of the leading cases upon the subject is Saunders v. McDonough, supra, and it was there said: "It [the rule mentioned] cannot be justly applied, and we believe it has never been applied, to obligations arising out of partnerships or quasi partnerships, which are founded upon trust and confidence, and which, without some express stipulation, are not presumed to exact, as conditions precedent to the continuance of the relation and the enjoyment of its fruits, the prompt and equal discharge, or readiness to discharge, by each partner or associate, of his various obligations concurrently with the occasion. For his defaults of duty a partner may be taxed with the loss he inflicts upon the business; and in grave cases the partnership may be dissolved by judicial decree; but it is not dissolved ipso facto." To the same substantial effect are Botsford v. Van Riper, 33 Nev. 156, 110 P. 705, and Miller v. Walser, supra. The question of the application of the rule arose in this state in the case of Andrews v. Bush, supra, under circumstances somewhat similar to those presented, but the court refused to apply it. Even assuming that grounds may exist for applying such rule in exceptional cases such as suits in equity wherein the purpose of the joint adventure is substantially accomplished, but the plaintiff claims he has not received his share of the alleged profits, we have no such situation here.

The assignments of error relating to the instructions involve only those questions of law which have already been discussed and disposed of, and consequently they are to be governed by the views already expressed and do not require further notice.

The judgment is affirmed.

I concur: TYLER, P. J.

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115 Cal.App. 443

In re MYERS' ESTATE.

Civ. 7902.

District Court of Appeal, Second District, Division 2, California.

July 10, 1931.

Rehearing Denied Aug. 7, 1931.

1. Executors and administrators ⚿185.

Antenuptial contract that property should pass to heirs of spouses as though no marriage had been contracted did not waive widow's right to family allowance.

> Under the antenuptial contract the spouses agreed to waive any rights acquired by law by their marriage in the property of each other, and that each spouse's property should pass to the heirs of the spouses as though no marriage had been contracted. The spouses lived together until the death of the husband, the husband supporting his wife up to that time, and under his will granting wife a life estate in the home in which they had lived.

2. Executors and administrators ⚿173.

Right to family allowance is not based upon right of inheritance.

3. Executors and administrators ⚿185.

Doubt as to whether antenuptial contract waived widow's right to family allowance

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should be resolved in favor of allowance, law strongly favoring widow's claim to family allowance.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Proceeding in the matter of the estate of Solomon K. Myers, deceased, between Amy L. Lathrop, residuary legatee, and Elsa F. Myers, administratrix, of the estate of Solomon K. Myers, deceased. From an order granting a family allowance to deceased's widow, the residuary legatee appeals.

Affirmed.

Norman T. Mason, of Los Angeles, for appellant.

Harry L. Cohn and Cohn, Lambert & Jones, all of Long Beach, for respondent.

IRA F. THOMPSON, J.

This is an appeal from an order granting a family allowance to the widow of deceased. The appeal is taken by the residuary legatee under deceased's will, who is a daughter of the latter by a former marriage. No children were born of the second marriage. The appeal is based upon an antenuptial contract executed in the state of Iowa by the deceased and respondent, the material portions of which read as follows:

"* * * [I]t is hereby agreed that each of said parties to this Ante-Nuptial Contract hereby agrees to waive, and does hereby waive, all and every right whatsoever which he or she might have or acquire by law by such marriage in any and all property of every kind and character, real, personal or mixed, now owned or which may hereafter be acquired by the other party; it being understood and agreed that all of the property and property rights which each of these parties now has, or which each may hereafter acquire, shall pass to her or his heirs at law, devisees or legatees in precisely the same manner and with the same effect as though no marriage were ever consummated.

"It is further agreed that each party hereto shall have control and management of, and the right to sell, convey or transfer any and all of their separate properties during marriage without the signature or joining in by the other, as freely as if no marriage had taken place."

[1, 2] The cases cited by appellant are distinguished from the situation here by reason of the fact that in those cases the parties separated and entered into agreements which specifically provided that the support of the wife should be waived. It is to be observed that in the instant case the contract contains no such provision, but only provides that the property shall pass to the heirs of the parties as though no marriage had been contracted. Here also the parties lived together until the death of the husband, he supporting her up to that time, and under his will granting her a life estate in the home in which they had lived.

In re Estate of Woodburn (Cal. Sup.) 300 P. 22, is, we think, decisive of the present appeal. In that case an antenuptial agreement was executed by the intending spouses in contemplation of their marriage and they undertook "to make a full and complete settlement of their property rights prior to said marriage," and both agreed that, "in consideration of the marriage contract above referred to," each party "does hereby expressly waive and relinquish any and all right, title and interest in and to any property either real or personal now owned or that may be hereafter acquired by" said parties which they "might be entitled to by reason of being the husband" or wife of the other party to the agreement. In connection with the wife's agreement, however, it was provided that the husband should furnish her for "as long as she may live a good and comfortable home, * * * and it is agreed that said property may be held as a home for" her "so long as she may live." The entire estate was not greater than $1,500, and the wife thereafter presented her petition to have the same set aside to her under the provisions of section 1469, Code of Civil Procedure. There were no children of their union, but her petition was resisted by an adult daughter of deceased by his first marriage. In affirming the order granting her petition, our Supreme Court said: "Upon the merits of this appeal we are of the opinion that the antenuptial settlement entered into between" deceased "and the lady who was to become his wife and widow, and who is the respondent herein, while the parties thereto expressly waived and relinquished each on his and her own part all right, title, and interest in the property then owned or thereafter to be acquired by the other party, and all right of inheritance therein to which either party might be entitled as the husband or wife of the other. cannot be held to have accomplished a waiver of those rights to which the widow or minor children, if any, of a decedent are entitled under the provisions of article 1, chapter 5, part 3, title 11 of the Code of Civil Procedure (sections 1464–1470). The provisions of said chapter and article expressly relate to the support of the family of a decedent, and to which the widow and minor children of said decedent become entitled upon his death and the probate of his estate, without regard to any interest which they or any of them may have had in the property of said decedent during his lifetime, and without reference to their heirship or right of inheritance therein. * * * The rights to which this widow became entitled under the foregoing provisions of the Code were in no sense either the rights of inheritance or rights depending upon any previous interest in the property of the decedent owned by him during his lifetime, and which she may or may not have surrendered by virtue of the terms of their ante nuptial agreement." In principle there is no distinction between the cases, for it is noted that the right to an allowance is not based upon a right of inheritance.

[3] It must be borne in mind that, if there exist a doubt concerning the interpretation of the contract, it should be resolved in favor of the respondent, for, as it is said in Re Estate of Whitney, 171 Cal. 750, 154 P. 855, 857: "The widow's claim to a family allowance is strongly favored in our law. In re Lux, 100 Cal. 593, 603, 35 P. 341; Estate of Welch, 106 Cal. 427, 432, 39 P. 805; Estate of Cowell, 164 Cal. 636, 642, 130 P. 209. The right of testamentary disposition, and the right of beneficiaries to take under the will, are alike statutory, and are both subject to the power of the court having jurisdiction of the estate to make a provision for the support of the widow (or minor children) out of the estate. Estate of Bump, 152 Cal. 274, 92 P. 643. A family allowance is, in this respect, analogous to a probate homestead, which, as has been held, may be ordered even out of property specifically devised. Estate of Huelsman, 127 Cal. 275, 59 P. 776; Estate of Gray, 159 Cal. 159, 112 P. 890. A will may, of course, be so drawn as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance. So, too, the wife may, by agreement, surrender the privilege of applying for an allowance. Whether the right to demand an allowance is inconsistent with the will, or has been surrendered, is a question of interpretation of the will or the contract. In the case of a contract, we think the right should not be held to have been surrendered by an agreement between the spouses 'except by clear and explicit language.' This was the rule of construction applied by this court to an antenuptial agreement which, as was claimed, barred the wife's right to select a homestead out of the separate property of the husband while both spouses were living. Warner v. Warner, 144 Cal. 615, 78 P. 24. In reason, the same principle should apply to the matter under consideration in this case."

For other authorities in harmony with these views reference may be had to In re Chisholm's Estate (Wash.) 294 P. 973; In re Gould's Estate, 181 Cal. 11, 183 P. 146; Remington v. Remington, 72 Colo. 132, 209 P. 802; Deeble v. Alerton, 58 Colo. 166, 143 P. 1096, Ann. Cas. 1916C, 863; and Caldwell v. Caldwell, 192 Iowa, 1157, 186 N. W. 58.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

115 Cal.App. 353

THEISEN v. KEOUGH.

Civ. 7077.

District Court of Appeal, First District, Division 1, California.
July 7, 1931.

1. Contracts ⟹111.

Contract providing attorney should receive percentage of property awarded to wife for services in investigating conduct of husband and proceeding against him *held* void as contingent divorce contract.

The contract provided, in substance, that in consideration of indebtedness and expenses incurred or advanced and services rendered by attorney for client's account in investigating conduct and actions of husband, and procuring evidence thereof and proceedings against him by reason thereof, client agreed to pay attorney amount of such indebtedness and expenses and 15 per cent. of any money or property that might be awarded or set apart to client in any proceeding, or that might be recovered by client in addition to any amount that might be awarded for costs and attorney's fees.

2. Attorney and client ⟹143.

Contract for attorney's services, void as against public policy, afforded no basis for recovery.

3. Attorney and client ⟹166(3).

Where court is informed of nature and extent of attorney's services, its experience furnishes it with every element necessary to fix value.

4. Attorney and client ⟹141.

Attorney for wife in divorce proceeding, to whom court allowed $100 fee, *held* not entitled to recover additional compensation from wife under implied contract.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by S. Joseph Theisen against Eleanor M. Keough. From a judgment for defendant, plaintiff appeals.

Affirmed.

J. J. Dunne, of San Francisco, for appellant.

Harry I. Stafford, of San Francisco, for respondent.

PARKER, Justice pro tem.

This is an action to recover a certain sum of money alleged to be due plaintiff on account of services performed for the benefit

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the defendant and at her instance and request. The complaint is in two counts. The first count alleges the execution of a contract under which the services were performed and which contract expressly provided the amount and terms of compensation. The second count is on a quantum meruit. After trial, judgment went for the defendant, the lower court finding as to the first count that the contract between the parties was against public policy and unenforceable, and as to the second count that the plaintiff had been paid in full for all services rendered. From this judgment, plaintiff appeals.

The plaintiff is an attorney at law practicing in this state. Some time in August of 1926, the defendant was brought to his office by a relative of defendant, the said relative having had occasion to employ the plaintiff on some former occasion. The defendant, a married woman, was in the midst of marital discord; she suspected her husband of sundry indiscretions, and related to plaintiff that her husband had threatened to leave her within the month. Plaintiff's first inquiry was as to the property rights involved, and the information derived led to defendant being advised to forthwith place a declaration of homestead upon the premises occupied by defendant and her spouse.

Taking now the text of appellant's brief, it reads as follows:

"During the succeeding days, appellant and respondent had further conferences respecting the items comprising the community property and concerning the details of the husband's conduct. From these conferences it developed that the present respondent had no direct evidence of the infidelity of which she was convinced her husband was guilty, and while her husband had committed some acts of cruelty upon her, they were not, in the appellant's opinion, so sufficiently serious as to constitute a particularly aggravated case. The appellant accordingly advised the respondent that if through the assistance of friends or relatives evidence could be procured of the husband's infidelity, the appellant could then through due proceedings obtain for the respondent a substantial share of the community property, and such allowance for maintenance and support of herself and her minor daughter as would be reasonable. In reply to this, the respondent stated that she did not know of any relative or friend that could render her this assistance, and she stated that she had no means with which to employ anyone to render this service or to pay the expenses of the suggested maintenance proceedings against her husband, or to recompense the appellant for his services or outlays in her behalf. These conditions led up to the making of the agreement of August 30, 1926, because upon ascertaining the destitute financial condition of the respondent, the appellant informed her that if he were to undertake to advance for respondent the expense of such investigations and proceeding, which expense was likely to run into a large amount, and render professional services in her behalf, which services, in view of a probable bitter contest, were very likely to occupy considerable time, labor and ability, the appellant should have, as compensation for his advances and services, in addition to any allowances that might be made by the court, a proportion of any money or property which might be recovered by or for the respondent through or by reason of proceedings by him, contingent, of course, upon any recovery being made. In other words, this appellant was to get nothing to recompense him for either advances or services unless the contemplated proceedings against her husband were successful, in which event he was to receive a proportionate amount of the recovery. The respondent agreed to this, and accordingly the contract was entered into." As indicated, the foregoing statement of the case is taken verbatim from the brief of the appellant and does, no doubt, present the appellant's view of the case in the light most favorable to him.

"The agreement referred to as the contract of August 30, 1926, is in words and figures as follows:

"San Francisco, August 30th, 1926.

"Mr. S. Joseph Theisen.

"In consideration of indebtedness and/or expenses incurred and/or advanced and services rendered by you for my account in investigating the conduct and actions of my husband and procuring evidence thereof and proceedings against him by reason thereof, I agree to pay you the amount of such indebtedness and expenses and 15% of any money or property that may be awarded or set apart to me in any such proceeding and/or that may be recovered by me from him, this in addition to any amount that may be awarded for costs and/or attorney's fees, and I assign to you a proportionate interest in such money or property equal to the aggregate of such indebtedness, expenses and percentage.

"Eleanor M. Keough."

As hereinbefore recited the trial court determined that this contract came within the class repugnant to a sound public policy.

In the case of Newman v. Freitas, 129 Cal. 283, 61 P. 907, 910, 50 L. R. A. 548, wherein the facts are similar to the facts in the instant case, and the contract which was involved was in its essentials like the one before us, the court, quoting a Michigan case (Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836), says: "'Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly sever ed, and that families shall not be broken up for inadequate causes or from unworthy motives; and, where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife, by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances, which otherwise would pass unnoticed.' "

In Parsons v. Segno, 187 Cal. 261, 201 P. 580, we find the doctrine stated almost by way of dogma, in this language: "It is not disputed that this contract was void as against public policy, being a contract for a contingent fee in a divorce action."

In the case of Ayres v. Lipschutz, 68 Cal. App. 134, 228 P. 720, 721, the doctrine was reaffirmed by the Supreme Court on a petition for hearing after decision by a District Court of Appeal. The District Court had held the contract in question to be valid, but affirmed the judgment of the lower court upon another ground. The Supreme Court, satisfied with the judgment in as far as the additional ground of support was deemed sufficient, nevertheless was careful to express its views on the contract lest the denial of the petition for a hearing be deemed an affirmance of all that was contained in the opinion of the District Court of Appeal. The language of the Supreme Court was as follows: "We are of the opinion that the contract herein comes within the rule announced and applied in Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L. R. A. 548, and referred to in Parsons v. Segno, 187 Cal. 260, 201 P. 580, for the reason that under it the attorneys were directly and financially interested in preventing a reconciliation, and in bringing about a divorce." And without setting out the details of the contract referred to in this citation, it is sufficient to state that it was in its terms more worthy of approval than the one before us now.

[1] Authorities from almost every jurisdiction support the doctrine as we have announced it. Indeed, appellant seems in harmony with the rule, and offers no authorities in opposition; nor does he question the sufficiency of the reasoning behind the rule. Appellant contends that the contract in question does not come within the rule. He contends first that public policy is an elusive variant and quotes much authority to the effect that courts should hesitate before declaring the terms of any instrument to conflict with a sound public policy. We have little difficulty in adopting the theory advanced in this respect. The appellant urges that every contract should be so construed with reference to its terms to the end that it might harmonize with such a policy as would permit its enforcement. Within reasonable limits, though not unqualifiedly, we accede to this. Having thus approached the contract before us, appellant contends that there is nothing in the contract that in any way refers to, or that can be construed as referring to, a divorce action, and that from the terms of the contract it may be reasonably inferred that the purport thereof was to bring about an amicable adjustment of property rights between the spouses. And in this connection it is urged that the term "proceeding" as used in the contract refers to, or at least includes, any form of proceeding by or through which an adjustment of property rights might be effected, as, for instance, a voluntary conveyance.

Through some manner of twisted reasoning, appellant urges that this court in construing the instrument must take up the contract "by all fours." When we do this we find nothing more than the ordinary contingent divorce contract condemned in the cited cases. From the presentation of the facts as made by appellant, hereinbefore quoted, we more clearly see the intent of the contemplated arrangement. Under what possible theory of amicable proceeding could the fidelity, or lack thereof, of either spouse become the object of inquiry? We cannot readily cite any controversy between spouses wherein evidence of adultery on the part of either would be competent or material other than in actions for divorce or separate maintenance. Surely, as far as human experience has shown, where one spouse requires evidence of the other's infidelity to enforce a settlement of property rights, the resultant adjustment cannot be classed as amicable.

We are satisfied that the appellant's own statement of the case discloses that the true and intended meaning and effect of the contract was that appellant undertook to furnish evidence of the husband's infidelity or such other conduct as would authorize and warrant a divorce and distribution of the community property, and from that portion of said property which might be awarded to the wife the appellant was to share, contingent upon his success in procuring the necessary evidence.

Appellant cites an abundance of authority to the end that husband and wife may properly agree between themselves as to the division of their property providing that divorce is not facilitated, and that collusion is not shown. Such cases have no application to the question under discussion. The rule we have discussed deals only with the activities of an interloper who might, by reason of a separate and individual interest in the proceeds of the community, be tempted to widen the breach between the spouses.

We conclude that the contract before us contravenes a sound public policy and is not enforceable, and to this extent we affirm the conclusion of the court below.

We come now to the question of the reasonable value of the services actually rendered. For the purposes hereof it is unnecessary to pass upon the point as to whether or not quantum meruit may be invoked.

There appears some conflict in the testimony regarding the services actually rendered. Appellant's testimony is to the effect that the services embraced numerous and lengthy consultations with respondent and with her husband and the latter's counsel; that it involved an intricate examination into property titles, and the preparation and filing of two complaints, and a hearing on the return of an order to show cause relative to alimony and counsel fees. Respondent, on the other hand, testifies that the interviews were few in number and covering not more than one-half hour at any one time.

Appellant was first consulted about August 25th, and the first complaint was filed on September 15th of the same year. An amended complaint was filed enlarging upon the grounds for divorce, it being the explanation of appellant that he made the charges in the original complaint somewhat mild in order to avoid scandalous litigation and more in the nature of a warning to the husband to the end that the latter might secure counsel with whom appellant might negotiate toward a property settlement. An amended complaint was filed on October 22d of the same year, and thereafter the trial court upon and after a hearing awarded to the plaintiff therein, respondent here, the sum of $100 as and for counsel fees, which said amount was received by the appellant. No services appear to have been rendered subsequent to this, and within a few days thereafter appellant was dismissed and his services terminated. From the foregoing facts, the court below in the instant case found that appellant had been fully paid for all services that he rendered; in other words, that the services rendered by appellant were reasonably worth the sum of $100 and no more.

[2] In approaching a determination of the question involved, we may note preliminarily certain general principles applicable. Any recovery by appellant cannot arise out of the contract either through the express terms thereof or by way of reasonable value for services rendered. Again quoting from the opinion of the Supreme Court on application for hearing in the case of Ayres v. Lipschutz, supra: "The contract, being void as against public policy afforded no basis for a recovery which could have been had only upon a quantum meruit." So, therefore, we must eliminate once and for all any consideration of the terms of the contract. We therefore find the parties with no agreement or contract regulating the compensation to be paid; the attorney proceeding with the cause under the implied contract that he will be compensated in a reasonable amount for services performed.

[3, 4] Let us turn then to the original complaint prepared by the appellant herein. We find this allegation: "That the plaintiff has not sufficient means to enable her to support herself or said minor child during the pendency of the action or to pay her counsel herein." The said complaint was duly verified. Upon this allegation, the order to show cause was issued directing the defendant husband to appear and show cause why an order should not be made directing him to pay counsel fees and alimony pendente lite. Between the date of the order to show cause and the date of hearing thereon, the amended complaint had been filed so that on the date of the hearing all services for which compensation is claimed had been rendered. The amended complaint contained the same allegation as to the wife's inability to pay counsel fees or costs.

From the time of the Sharon Case, 75 Cal. 1, 16 P. 345, running through all of the subsequent decisions on the point, it has been conceded that the power of the court to allow counsel fees to a wife in an action for divorce should only be invoked in cases where, without such allowance, she would be unable to prosecute her cause. And if, whether she be with or without funds, counsel is engaged by her upon her own credit or through some agreement for future payment resting upon her credit, or where counsel undertakes to carry on her suit through philanthropic or humane motives, a showing of that fact will determine the court's action in the matter of allowance of counsel fees. And it would seem but just to conclude that where, as here, counsel urges upon the trial court the poverty of the wife and her inability as a result of such poverty to pay for the aid of counsel in prosecuting her cause, and thereafter the court after a full hearing finds the amount necessary and reasonable in view of all of the circumstances of the case to compensate such required service, the order thus made should not be wholly ignored. In the divorce case there was such a hearing, and the court, fully advised through its own records and such testimony as may have been received, determined that $100 was reasonably sufficient for the services rendered or to be rendered at that stage of the proceeding.

Appellant here interposes the contention that such allowance did not embrace past services, but was solely to enable the wife to further prosecute her action, and cites authorities in support of his point. The authorities cited do not support the contention made. While it is true that the court will not order an award or allowance for costs already paid or even counsel fees theretofore compensated, there is no holding called to our attention where a court has refused to make its order providing compensation for counsel who has instituted a divorce proceeding for a wife without funds or credit. If appellant's contention were sound, it would result in a destitute wife being unable to ever get before a court to present her petition for funds with which to prosecute her cause. There may be certain conditions wherein appears fraud or concealment that would warrant the holding of a separate and individual liability, but such is not the case before us.

There must be a more or less open relationship between court and counsel in this class of cases, to the end that full disclosure be made of all of the facts surrounding each case. And where an attorney represents to the court that he looks entirely to the court for his compensation, and through such representation invokes the court's award and accepts and retains the sum awarded, it would seem that a decent respect for the ethics of the profession would demand that such attorney be not permitted to repudiate his position and maintain his separate action based upon the theory of employment by the wife under an implied or express contract, whereby liability rested upon her for payment. In any event, the determination of the court on the order to show cause, presumably made after a full and fair inquiry into the facts of the case, stands as some evidence of the value of the services. And at the trial of the instant case, the court below determined likewise that the sum allowed was sufficient to compensate the appellant for the services he rendered. The only evidence adduced other than the records of the divorce case and the testimony herein noted was the opinion of the appellant that the services were reasonably worth the sum of $3,000.

It is too well settled to require citation that the value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the nature and extent of such services, its own experience furnishes it with every element necessary to fix their value. Spencer v. Collins, 156 Cal. 298, at page 307, 104 P. 320, 20 Ann. Cas. 49.

While the allowance of counsel fees is perhaps less than we would have allowed under the same circumstances, in view of the very wide discretion vested in the trial court, we are not prepared to disturb it.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

115 Cal.App. 434

YELLEN v. FIDELITY & CASUALTY CO. OF NEW YORK.

Civ. 6605.

District Court of Appeal, Second District, Division 1, California.
July 10, 1931.

Rehearing Denied July 24, 1931.

1. Injunction 🔑150.

Nomenclature used does not determine whether order is preliminary injunction or restraining order.

2. Injunction 🔑148(1).

Undertaking is not required on issuance of temporary restraining order.

3. Injunction 🔑132.

Order, made some six weeks after institution of action, restraining influence of which was to continue until determination of suit, *held* preliminary injunction.

4. Injunction 🔑239.

Where surety on injunction bond knew of pendency of action, surety *held* chargeable with knowledge of nature of order requiring bond.

5. Injunction 🔑239.

Injunction bond which stated that surety promises that plaintiff will pay to parties enjoined such damages as such parties may sustain, imposed legal obligation on surety (Code Civ. Proc. § 529).

6. Injunction 🔑244.

In so far as delay caused by injunction reduced security below power to satisfy indebtedness, grantee in trust deed suffered damages recoverable on injunction bond without first securing deficiency judgment against debtor.

7. Injunction 🔑252(5).

Measure of damages resulting from depreciation of security during delay caused by injunction was difference between what creditor would have received at sale which was enjoined and what he actually received.

8. Trial ⚷395(1).

Findings as to reasonable "value" of security when injunction was granted and when dissolved *held* insufficient basis for judgment on undertaking.

Such findings were insufficient basis for judgment on undertaking for damages suffered by grantee in trust deed, since by "value" the finding as to reasonable value at time injunction was granted was understood as meaning "market value" and by market value is meant not what the owner could realize at a forced sale, but the price he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make sale of like property.

[Ed. Note.—For other definitions of "Market Value," "Reasonable Value" and "Value," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Sam Yellen, doing business under the fictitious firm name and style of S. Yellen & Co., against the Fidelity & Casualty Company of New York. From the judgment for sum less than amount demanded, plaintiff appeals.

Reversed for new trial.

A. Lewis Silk and Nathaniel Halpern, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The plaintiff, believing that the judgment in his favor was for an inadequate sum, appealed, presenting as the record on appeal the judgment roll alone. From the findings of fact we learn that the plaintiff was the holder of a note executed by J. S. and Della Jones in the amount of $1,385. A trust deed secured this note, the trust deed being, by its terms, subject to a prior mortgage, which secured an indebtedness of $2,500. The Joneses brought an action to have the note held by plaintiff canceled and to have the property relieved of the threat of the trust deed. While this action was pending, the plaintiff directed that the property covered by the trust deed be sold under its provisions, as the Joneses were delinquent in their payments. This move was countered by another suit on behalf of the Joneses, in which they secured a preliminary injunction prohibiting the sale under the trust deed, which was already advertised; the sale being suspended until the prior suit to cancel the note and trust deed could be decided. As a condition to the granting of this injunction, the court required an undertaking in the sum of $1,500. It is on this undertaking, executed by the defendant, that this action is based. In due time the action to set aside the note and trust deed was determined adversely to the Joneses, and a motion to dissolve the injunction, made by the plaintiff in this action, met with success. This suit to recover the damages suffered by the injunction followed.

Damages of two kinds were sought by the plaintiff. First, he asked for and obtained judgment for the attorney fees required to obtain the order dissolving the injunction. No question is before us touching this part of the judgment. In addition, he claimed some $1,600, lost, he argued, because the property which secured his indebtedness depreciated in value while the prior incumbrance appreciated in amount, during the blight of the injunction, with the result that, when sold, the property failed, by the amount sought as damages, to realize for plaintiff the full debt due him. To this the trial court made answer by a finding that the plaintiff had not yet pursued the Joneses with a deficiency judgment. This, the defendant argues to us, is a good and sufficient answer. It urges, furthermore, that in executing the undertaking sued upon it contracted no liability whatever. We are of the opinion that a liability was created and that the plaintiff is entitled to a greater judgment.

[1-4] We have spoken of the issuance of a "preliminary injunction." This term we have employed in spite of the fact that the findings, which follow the pleadings in this regard, call it a "restraining order," and the undertaking terms it a "temporary restraining order." The nomenclature used does not determine its character (Neumann v. Moretti [1905] 146 Cal. 31, 79 P. 512; Maier v. Luce [1923] 61 Cal. App. 552, 215 P. 399), but its character may be of importance when we come to consider the defendant's claim that no liability was contracted, for the law does not require an undertaking upon the issuance of a temporary restraining order (Biasca v. Superior Court [1924] 194 Cal. 366, 228 P. 861), but does upon the granting of a preliminary injunction (section 529, Code Civ. Proc.; Neumann v. Moretti, supra; Maier v. Luce, supra). The order under consideration was made some six weeks after the institution of the action, and its restraining influence was by its terms to continue until the determination of the suit to cancel the note and trust deed. When that action was determined, the order was dissolved. Plainly this was neither a temporary restraining order nor a permanent injunction, but a preliminary injunction (Neumann v. Moretti, supra), and, as we have noted, an undertaking was required by law and by the court's order. The surety knew of the pendency of the action, as appears from the undertaking, so was bound to know the nature of the order made. Lambert v. Haskell (1889) 80 Cal. 611, 22 P. 327.

[5] The undertaking given was entitled in the injunction action, and read, in part, in these words: "Whereas, the above-named plaintiffs * * * is about to apply for a temporary restraining order in said action, * * * Now, therefore, the Fidelity and Casualty Company of New York * * * in consideration of the premises and of the issuing of said temporary restraining order undertakes in the sum of fifteen hundred and no/100 ($1500.00) dollars and promises to the effect that in case said temporary restraining order shall issue, *the said plaintiffs will pay* to the said parties so enjoined such damages, not exceeding the sum of fifteen hundred and no/100 dollars as such parties may sustain by reason of said temporary restraining order if the said superior court finally decide that the said plaintiffs were not entitled thereto." The emphasis in the quotation is that placed by the defendant. The promise and undertaking is that the plaintiff will pay, the defendant points out, not that it will, and it therefore is under no legal obligation to pay. Its inspiration for this defense is San Luis Obispo v. Ryal (1917) 175 Cal. 34, 165 P. 1, 2, where our Supreme Court found insufficient a bond, given pursuant to sections 1273, 1279, and 1292, of the Penal Code, wherein the sureties undertook that the defendant, not they, would pay. In these sections, aided, doubtless, by the reference to article 2 (sections 1277–1281a), which prescribes the form of bail bonds, our Supreme Court found that "one of the conditions provided by the Code to be inserted in such a bond * * * is that, in the event that the defendant * * * fails to do or perform any of the things provided therein * * * the sureties will pay * * * a sum particularly specified. * * *" It was because this requirement of the Penal Code (section 1278) was not complied with that the bond was found to be insufficient. No such condition is required by the terms of section 529, Code of Civil Procedure. The requirement there expressed is: "On granting an injunction, the court or judge must require * * * a written undertaking on the part of the applicant, with sufficient sureties, to the effect that he will pay to the party enjoined such damages not exceeding an amount to be specified, as such party may sustain by reason of the injunction. * * *" This section and similar sections requiring an undertaking that the applicant or appellant or some one other than the surety will pay, have been satisfied by instruments, such as that sued on here, declaring that the surety undertakes that the applicant or other person will pay. Language is but the vehicle by which an idea is conveyed, and in the following cases undertakings worded as ours is worded have been held to so convey the idea that the surety had contracted a liability that judgment went against him: Curtis v. Richards (1858) 9 Cal. 34; Tissot v. Darling (1858) 9 Cal. 278; Murdock v. Brooks (1869) 38 Cal. 596; Lambert v. Haskell (1889) 80 Cal. 611, 22 P. 327; Rice v. Cook (1891) 92 Cal. 144, 28 P. 219; Asevado v. Orr (1893) 100 Cal. 293, 34 P. 777; Moore v. Maryland Casualty Co. (1929) 100 Cal. App. 658, 280 P. 1008 (hearing in Supreme Court denied). We are of the opinion, therefore, that the defendant in this case incurred a legal obligation.

[6] Is it necessary that the plaintiff exhaust his remedies against the makers of the note before he can recover on the undertaking? This is the remaining question of importance in this action. There is no clear answer given in any case decided by an appellate court of this state so far as counsel's research and our search has revealed. We have reached the conclusion, however, that, in so far as the delay caused by the injunction has reduced plaintiff's security below its power to satisfy, he has an immediate damage which the surety has undertaken to make good, and that the plaintiff does not have to secure a deficiency judgment with execution returned unsatisfied before he can show that he has suffered damage and recover its amount.

We have come to this conclusion, first, because we are persuaded that injury to security which so affects it as to make it in whole or in part inadequate gives the creditor an immediate action for damages without first determining whether or not the debtor is insolvent. Oddly, the leading case is one where it appeared that the debtor was insolvent. This case is Van Pelt v. McGraw (1850) 4 N. Y. 110. Others, where the insolvency of the debtor was not shown, but where tacitly or avowedly the court concluded that this made no difference, but that he whose security had been destroyed was damaged and could sue, are Turrell v. Jackson (1877) 39 N. J. Law, 329; Chouteau v. Boughton (1890) 100 Mo. 406, 13 S.W. 877; Stevens v. Smathers (1899) 124 N. C. 571, 32 S. E. 959; Arnold v. Broad (1900) 15 Colo. App. 389, 62 P. 577; Jackson v. Brandon Realty Co. (Sup. 1906) 100 N. Y. S. 1005. In Turrell v. Jackson, supra, the court said: "It certainly is not just, and cannot be lawful, to leave a mortgagee without redress for the destruction of that substantial security upon the strength of which he loaned his money, because he is unable to show the present insufficiency of that wavering staff, the solvency of his debtor, upon which he never expected to rely." The value of thought thus expressed is not destroyed by the subsequent conclusion of the court that insolvency had been shown.

An early case in this state can fairly be interpreted as supporting this principle. In Robinson v. Russell (1864) 24 Cal. 467, an injunction was sought to prevent the dissipation of certain security. The injunction was denied because irreparable injury was not shown, in that it did not appear that the defendants (who were not the debtors) were insolvent, and therefore an action for damages would be adequate. With reference to the right of action, the court said: "There can be no doubt but that an action can be maintained by the mortgagee for injuries of the character set forth in the complaint in this case, when it appears that by the acts complained of the mortgage security is impaired. * * * Van Pelt v. McGraw." If a mortgagee has an action against one whose tort impaired the security, without being required first to take recourse against other property of the debtor, we believe one who was kept from a full use of his security because of an injunction can recover without first following what may prove to be a will-o'-the-wisp, the debtor's ability to pay.

Directly to the point, counsel have cited no case, and we have found none, holding that the surety is not to be held until all efforts to have the original debtor meet his obligations prove fruitless. There are, however, a number of cases holding the contrary. Kennedy's Administratrix v. Hammond & Hall (1852) 16 Mo. 341; Hunt v. Burton (1856) 18 Ark. 188; Dangel v. Levy (1878) 1 Idaho, 722. To these authorities there should be added those where recovery was allowed without insolvency being shown or a deficiency judgment first found futile, but where the propriety of the order of procedure was assumed and not discussed. Rubon v. Stephan (1852) 25 Miss. 253; Gibson v. Reed (1898) 54 Neb. 309, 75 N. W. 1085; Stull v. Beddeo (1907) 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507; Kitsap County Bank v. U. S. F. & G. Co. (1916) 90 Wash. 12, 155 P. 411; Fidelity & Deposit Co. of Md. v. West Blocton Sav. Bank (1927) 216 Ala. 465, 113 So. 489; Gruber v. Ewbanks (1930) 199 N. C. 335, 154 S. E. 318, 321. In the case last cited the creditor had failed to avail himself of an opportunity in the injunction action to obtain judgment for the unpaid balance due on his notes. On the question of damages resulting from the injunction, the court said: "The only interest which the creditor has in the property is its preservation as security for his debt, undiminished in value. It is this interest only which the debtor, who procures an order restraining the creditor from enforcing his security by the sale of the property, is required to protect by a bond or undertaking. * * * If the property depreciates in value during the time the injunction is in force, and the creditor for that reason fails to collect his debt, interest and costs, the amount of such depreciation is ordinarily the measure of his damages. * * * The creditor is entitled to the same security at the date of the dissolution of the injunction that he had at the date of its issuance—no more, and no less." We conclude, therefore, that this action was not brought prematurely, but that the damage has accrued for which the bond was given and that plaintiff is entitled to have the damages fixed without first securing a deficiency judgment.

[7, 8] There is no basis in the findings as they now appear by which the amount of damages can be determined. Following the language of the complaint, the findings declare that at the time of the injunction the property which secured the trust deed and mortgage "was worth and was of the reasonable value of $4200, or more." When the injunction was dissolved "said property was of the reasonable value and sold to the highest bidder * * * (for) the sum of $3,200." If plaintiff suffered damage due to depreciation, it would be measured by the difference between what he received and what he would have received at the sale which was enjoined. We do not have this latter essential figure. By "value," the first finding must be understood as meaning "market value." Dean v. Hawes (1916) 29 Cal. App. 689, 693, 157 P. 558. By market value "is undoubtedly meant, not what the owner could realize at a forced sale, but 'the price he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make sale of like property.'" San Diego Land, etc., Co. v. Neale (1888) 78 Cal. 63, 68, 20 P. 372, 374, 3 L. R. A. 83, and Santa Ana v. Harlin (1893) 99 Cal. 538, 542, 34 P. 224. The sale which was enjoined was a forced sale, and, while it might, it would probably not, have resulted in producing $4,200. At any rate, a finding that the property was worth that is not a sufficient foundation on which to erect a judgment. We cannot, therefore, direct a judgment to be entered, but must leave its amount to be determined on a retrial.

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

115 Cal.App. 512

PEOPLE v. McCLAIN.

Cr. 2074.

District Court of Appeal, Second District, Division 1, California.

July 17, 1931.

1. Burglary ⚿42(3).

Evidence *held* sufficient to sustain conviction of burglary, where defendant several times refused to explain his recent possession of part of stolen goods.

2. Receiving stolen goods ⚿8(3).

Evidence *held* sufficient to sustain conviction of receiving stolen property (Pen. Code, § 496).

3. Receiving stolen goods ⚿3.

Under statute penalizing receipt of personal property with knowledge that it has been stolen, knowledge need not be actual and positive, but may be circumstantial and deductive (Pen. Code, § 496).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Clarence James McClain was convicted of burglary and receiving stolen property, and he appeals.

Affirmed.

Guy Lewis and Orville A. Rogers, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

Defendant appeals to this court from a judgment of conviction of each of the crimes of burglary and receiving stolen property, as well as from an order by which his motion for a new trial was denied.

[1] As to the charge of burglary, it is not contended that the corpus delicti was not established; but appellant urges that the evidence was "insufficient to sustain the verdict" that he was guilty of having committed the offense.

Aside from such testimony as appeared to favor the innocence of defendant, the incriminatory evidence against him included the facts that within a few days after the burglary was committed a part of the stolen goods was found in an automobile which was his property, and that on two or three occasions, when requested by police officers to explain such possession, defendant refused to do so. However, on one occasion defendant stated to an officer, "I know that stuff is hot and I'll admit I took a little of it, but the rest of it is all a pack of lies." Later, when asked by an officer whether a certain named individual had accompanied him at the time the burglary was committed, defendant replied, "No—that he always worked alone." Furthermore, the evidence shows that in a conversation which took place in the presence of three police officers, defendant, and two other persons who at that time were under arrest charged with the commission of the crime of which defendant stands convicted, certain statements in their nature accusatory of defendant were made, none of which was either denied or apparently resented by defendant. A part of such conversation between one of the police officers and one of the accused was as follows:

"Q. Where did you get that bronze jewel box with the amethyst stones? A. I saw that the first time in Clarence McClain's (defendant's) possession.

"Q. And the silver, where did you first see that? A. It was there in the house next door to 4449 Turquoise street when I first saw it.

"Q. Do you know who brought it there? A. No, I don't.

"Q. Who claimed ownership of it? A. I understand that Clarence (defendant) and his family claimed it. Clarence said it was his."

A few days after the commission of the crime defendant removed from the place of his then residence and at his new address gave his name, not as McClain, but as "John Hagerman."

Without here attempting to review the facts set forth in the case of People v. Lang, 142 Cal. 482, 76 P. 232, 233, it may suffice to state that the opinion therein, based upon a situation somewhat resembling that presented in the instant case, in principle contains a complete refutation of the contention of appellant herein regarding the point that the evidence was insufficient to support the judgment. In part, it is there said:

"While possession of the stolen property is not, of itself, sufficient evidence of the guilt of the party in whose possession it is found, still the recent possession, unexplained, is a very strong circumstance, when taken in connection with other circumstances that point to guilt. The fictitious name given at the loan office, the pawning of the coat on the very day it was lost, and the denying of the signature on the books of the loan office are potent facts which are sufficient to justify the inference of guilt. The authorities hold that where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained." (Citing authorities.)

In the instant case, as far as the charge of burglary is concerned, it follows that the evidence adduced on the trial of the action was sufficient to support the judgment.

[2] With reference to the contention by appellant that the evidence was insufficient to support the judgment which was founded on the verdict of the jury returned against defendant on the charge of receiving stolen property, it appears beyond question that the property was stolen, and that it consisted of a watch which was engraved on its back with the name of the owner thereof; that five days after it was stolen it was found where it had been secreted in a "crack" behind a wash basin in a room which at that time was rented by defendant and his wife; that, on the day following the larceny of the watch, defendant was arrested, and that thereafter he refused to make a written statement to police officers regarding the manner in which the watch came into his possession; but on one occasion did make an oral statement to an officer, in substance, that on the day when the property was stolen he traded an automobile for certain personal property, including the watch. A part of the testimony given by the officer was: "I asked the defendant when he sold the car to Young, and he said 'that night we all left over there' (which was either on the same night that the property was stolen or on the day following). I said 'what did you get for it?' He says 'I got a watch and a diamond ring, and a nickel-plated flashlight.' I asked him if that was an Elgin watch, gold wrist watch with the name of Margaret Dorey on the back, and he said it was. I asked the defendant if he knew it was stolen and he said 'Yes,' and pointed to the gun and said he just brought it in."

As hereinbefore set forth, in another conversation which took place between defendant and a different officer at a time not more than six days after the property was stolen, defendant made the statement, "I know that stuff is hot," etc. Another incriminatory circumstance against defendant was that, on the day when he removed from the place where he had been living and took up his abode in a rented apartment, he gave a fictitious name to the man who owned the property.

Section 496 of the Penal Code, which relates to the crime of receiving stolen goods, in part provides that:

"Every person who for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen; * * * is punishable by imprisonment in the state prison not exceeding five years. * * *"

[3] The particular point presented by appellant is that in substance the words of the statute, "knowing the same to have been stolen," relate to the time when the stolen property comes into the possession of the person who receives it; and that since no direct evidence was presented on the trial of defendant to the effect that at the time the stolen watch came into his possession he then knew that it had been stolen—the evidence was insufficient to support the verdict. But considering the facts with reference to the matter, it is but a fair inference that at the time he acquired the watch he knew that it was stolen property. It is not essential that such knowledge be actual and positive; it may be circumstantial and deductive. People v. Mercado, 59 Cal. App. 69, 72, 209 P. 1035. Considering what may be termed the flight of defendant, his use of a fictitious name, the possession of the watch by him and its concealment in a "crack" back of the wash basin at his new place of residence, that he was arrested and placed in jail on the day after the watch was stolen, and that five days thereafter, while still in jail, where he had been continuously confined after his arrest, according to his own admission he knew the "stuff was hot," and two days following such admission, in like circumstances, in connection with the story that he had traded an automobile for certain personal property, which included the watch in question, he made the direct statement that he "knew it (the watch) was stolen"—it is clear that the jury was justified in inferring that at the time he acquired the watch he knew it was stolen property. It therefore becomes plain that the second point presented by appellant cannot be sustained.

The judgment and the order are affirmed.

I concur: CONREY, P. J.

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115 Cal.App. 460

EVERHARDY v. UNION FINANCE CO.

Civ. 493.

District Court of Appeal, Fourth District, California.

July 13, 1931.

1. Money received ⚷11.

Recovery of money paid under contract for purchase of personal property cannot be had without mutual rescission, where allegations of complaint are laid under common count for money had and received.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. Accord and satisfaction 🔑**26(3).**

Evidence *held* to sustain finding of accord and satisfaction in respect to claim for money paid on stock subscription contract and embezzled by agent (Civ. Code, §§ 1521, 1523).

3. Appeal and error 🔑**1010(1).**

Conclusion of trial court, amply supported by evidence, cannot be disturbed on appeal.

4. Accord and satisfaction 🔑**10(1).**

Fact that dispute as to claim was in good faith was sufficient, as respects accord and satisfaction (Civ. Code, §§ 1521, 1523).

5. Accord and satisfaction 🔑**26(3).**

Evidence supported finding that subscriber for stock paying money which was embezzled by agent intended to accept shares thereafter delivered as complete accord and satisfaction (Civ. Code, §§ 1521, 1523).

6. Accord and satisfaction 🔑**27.**

Question whether agreement amounts to accord and satisfaction is one of fact.

Appeal from Superior Court, Los Angeles County; H. C. Lucas, Judge.

Action by Anna H. Everhardy against the Union Finance Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

Harold A. Fendler, of Los Angeles, for respondent.

MARKS, J.

Appellant filed her complaint against respondent, and under the allegations contained in two separate causes of action sought the recovery of $4,000. The allegations of the first cause of action were laid under a common count for money had and received. The allegations of the second cause of action were based upon the conversion of her money. Respondent filed an answer denying the material allegations of her complaint and as a separate defense alleged an accord and satisfaction. The trial court in its findings resolved all issues against appellant and in favor of respondent. From the judgment thereafter entered, appellant has prosecuted this appeal.

The record discloses that on or about December 29, 1923, appellant, through one McCloskey, who was acting as sales agent for respondent, subscribed for 400 shares of its capital stock of the par value of $10 per share, for which she agreed to pay the sum of $4,000. She delivered to McCloskey a mortgage and note in the sum of $4,000, which he negotiated for its face value and which sum he embezzled. Respondent was not informed of this subscription nor of the embezzlement until some time after its occurrence, when appellant requested the issuance of the 400 shares of stock to her. Respondent referred the matter of its liability to its attorney, who advised it that under the circumstances of the case no liability to plaintiff had accrued. This resulted in numerous visits on the part of appellant to various officers of respondent, all of which resulted in her demand that the stock be issued to her in accordance with the subscription.

Shortly after the embezzlement was discovered and upon the request of respondent, its permit to sell its capital stock was revoked by the commissioner of corporations. During the month of November, 1926, appellant's demands for the stock were coupled with a threat to file suit against respondent to compel its issuance. This resulted in an apparent compromise of the dispute between the parties. On December 19, 1926, respondent issued to appellant 25 shares of its common stock and 75 shares of its preferred stock, together with the following certificate:

"Los Angeles, California,
December 18th, 1926.

"This is to certify that Anna H. Everhardy is entitled to One Hundred Twenty-five (125) shares of the preferred capital stock of the Union Finance Company and One Hundred Seventy-five (175) shares of the common stock of said company. Said stock will be issued as soon as same is available.

"Union Finance Company

"By David E. Fulwider, President.
"By C. S. Newberry, Secretary.
"[Corporate Seal.]"

Notation in pencil:

"Issued December 18th, 1926
25 common par 10.00 250.00
75 Preff " 10.00 750.00
$1,000.00

"To be issued
125 Common
175 Preferred
300
10
$3,000."

The stock and this certificate were delivered to appellant by mail. Under date of January 2, 1927, appellant wrote the president of respondent in part as follows: "I received the certificate of stock and statement securing the remainder of my $4,000 subscription for which I thank you most sincerely." At some undisclosed date after December 18, 1926, and before June, 1927, appellant had a conversation with the secretary of respondent concerning this transaction in which he told her that as soon as the 300 shares of stock due her were available they would be issued to her, to which statement she replied, "That was all she wanted."

In June or July, 1927, she demanded the return of the $4,000 from respondent without offering to return the stock issued to her or the agreement to issue the additional 300 shares. Her complaint in this action was filed on December 9, 1927. At no time has she returned or offered to return to respondent the 100 shares of stock, or the agreement to issue the additional 300 shares.

At the trial respondent produced 125 shares of its preferred stock and 175 shares of its common stock issued in the name of appellant and tendered them to her, which tender was refused. In its judgment the trial court ordered the certificates for this stock delivered to her.

[1] Where there is a contract for the purchase and sale of personal property, the plaintiff cannot recover the money paid under the terms thereof without a mutual rescission of the contract where the allegations of the complaint to recover the money are laid under the common count for money had and received. Tomboy, etc., Co. v. Marks, 185 Cal. 336, 197 P. 94; Cincotta v. Catania, 61 Cal. App. 38, 214 P. 451.

Section 1521 of the Civil Code defines an accord as follows: "An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled."

Section 1523 of the same Code defines satisfaction as follows: "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction."

In the case of Silvers v. Grossman, 183 Cal. 696, 192 P. 534, 536, it was held as follows: "The terms of the accord may provide either for the performance of an act or the giving of a promise as the consideration for the extinction of the existing obligation. In the latter case, the giving and acceptance of the promise is the execution of the accord."

Appellant seeks to escape the effect of these rules of law upon the grounds, first, that the claim of respondent that it was not legally liable to issue the 400 shares of its stock to her was not well founded in law; and, second, that the record does not contain sufficient evidence to support the contention that appellant intended to accept the stock issued to her and the agreement by which respondent promised the later issuance of 300 shares of its stock as a satisfaction of her prior contract.

Her first contention is disposed of by the cases of Berger v. Lane, 190 Cal. 443, 213 P. 45, and B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 P. 624, 626. In the latter case the court held as follows:

> "The phrase 'accord and satisfaction' as it is known and applied in the law means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. More minutely defined, an agreement of accord and satisfaction is one whereby one of two parties, having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might be recovered upon the original obligation. Civ. Code, § 1521. The effect of such agreement when executed is to extinguish the antecedent liability. Civ. Code, § 1523. As a matter of course an agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the pre-existing agreement; and it may be conceded to be the law, as counsel for the plaintiff contends, that, before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, it must be shown that such dispute was bona fide. * * * The rule in this behalf is clearly and concisely stated in the case of Simons v. American Legion of Honor, 178 N. Y. 263, 70 N. E. 776, where it is said that: 'If a debt or claim be disputed at the time of payment, the payment, when accepted, of a part of the whole debt, is good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such cases is: Was the dispute honest or fraudulent? If honest, it affords a basis for an accord between the parties, which the law favors, and the execution of which is the satisfaction.'
>
> "It will thus be seen that, in so far as the defense of an executed accord and satisfaction was concerned, the trial court was not called upon to decide the question as to whether or not the covenant of the contract in controversy covering the cost of the work to be performed thereunder was fairly susceptible of the construction contended for by Beam. Upon this phase of the case the only question to be considered was whether or not there was in fact at the time of the acceptance and retention of the check in question a bona fide dispute concerning the sum due under the contract. This primarily was a question of fact to be determined by the trial court from all of the circumstances of the transaction (Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 134 P. 989); and in the determination of that question the mere fact that it might have been held, in an action involving the construction of the original contract, that plaintiff's assignor could not have been compelled to relinquish any portion of its

original claim, was of no consequence in the face of the established fact that it did actually and knowingly accept a lesser amount in full satisfaction and settlement of its claim. Taylor v. Nussbaum, 9 N. Y. Super. Ct. 302; Roach v. Gilmer, 3 Utah, 389, 4 P. 221. In other words, where the parties to an executed agreement of accord and satisfaction have met upon equal terms, and without fraud, misrepresentation, or mistake have adjusted existing differences concerning their relative rights and obligations arising out of a valid, pre-existing agreement, it is neither necessary nor permissible to go behind a settlement actually made for the purpose of ascertaining which of the parties was right in the controversy which preceded and constituted the basis of such settlement. Farmers' Bank, etc., v. Blair, 44 Barb. (N. Y.) 641, 652; Minor v. Fike, 77 Kan. 806, 93 P. 264; Kiler v. Wohletz, 79 Kan. 716, 101 P. 474 [L. R. A. 1915B, 11]; 1 Page on Contracts, 321."

[2-4] It will not be necessary for us to consider or pass upon the merits of the original claim of respondent that it was not legally liable to deliver to appellant the 400 shares of its capital stock for which she subscribed. The trial court as a necessary implication from its findings has held that this claim of nonliability was made in good faith and that there was an honest dispute between the parties as to its liability to issue this stock. The evidence amply justifies this conclusion, which, therefore, we cannot disturb. As is clearly set forth in the decisions which we have cited, it is not necessary that respondent's refusal to issue the stock be founded upon a legal right not to do so. The fact that it was asserting its rights in good faith and that there was an honest dispute between the parties is sufficient.

[5, 6] The intent of the appellant in accepting and keeping the stock and the agreement of December 18, 1926, was a question of fact primarily addressed to the trial court. The fact that she received and retained these documents for a number of months without objection, that she thanked the president of respondent for their issuance and delivery to her, together with the fact that she told the secretary of respondent that the issuance of the stock to her was all that she wanted, is amply sufficient to support the finding of the trial court that she intended to accept the 100 shares of stock delivered to her and the agreement to issue to her 300 additional shares of stock as a complete accord and satisfaction of her former demand for the issuance of 400 shares of the capital stock of respondent to her and as a complete substitute for the former contract. Murphy v. White, 101 Cal. App. 719, 282 P. 427. "The question whether an agreement amounts to an accord and satisfaction is, within the rules of law governing the subject, a question of the intention of the parties and is, therefore, a question of fact, and unless there is want of evidence to sustain the finding of the trial court, it will not be reversed on appeal. More specifically it has been said that whether there was a dispute as to the sum due and whether a tender was on condition that acceptance would be in full satisfaction are primarily questions of fact for the trial court." 1 Cal. Jur. 136. The findings of the trial court to the effect that appellant intended to accept the stock and the new contract as a complete accord and satisfaction between the parties cannot be disturbed here.

Judgment affirmed.

We concur: BARNARD, P. J.; GRIFFIN, Justice pro tem.

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115 Cal.App. 553

CONNER v. PACIFIC READY CUT HOMES, Inc.

Civ. 7680.

District Court of Appeal, First District, Division 1, California.

July 20, 1931.

1. Appeal and error ⚿931(1).

Reviewing court will adopt such logical inferences from evidence as tend to support judgment, if different inferences or conflicting conclusions are possible.

2. Mechanics' liens ⚿260(1).

Owner and contractor, from whom materialman secured affidavits that work was continuing, with knowledge of their falsity, *held* not estopped to assert that lien was barred by limitations.

3. Estoppel ⚿52.

Underlying principle of estoppel is to prevent wrong, not to destroy legal rights for individual gain.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by James Conner against the Pacific Ready Cut Homes, Inc., doing business under the fictitious firm name and style of the Construction Supply Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Glen Behymer, of Los Angeles, and G. H. Wende, of Glendale, for respondent.

PARKER, Justice pro tem.

The case above entitled was consolidated for trial with some twenty-five other cases involving the same property and the same questions. Pursuant to the stipulation of counsel, the determination of this case concludes the others. In some of the cases the defendant above named was the plaintiff, with some of the individual plaintiffs in the remaining cases made defendants. The cases wherein the status of the present defendant and appellant was defendant were in the nature of actions to quiet title; the cases wherein the present defendant appeared as plaintiff were actions to foreclose liens upon the respective parcels of property described.

In all of the actions, however, as far as this appellant is concerned, the main question was the validity of the asserted claim of lien. We may remark, in passing, that the record comes before us in a most unsatisfactory manner. Appellant presents but one question, namely, the claim of estoppel as against the original owner and contractor; yet the findings disclose that the trial court made several general findings, unquestioned here, which might support the judgment even though it be found that the court was in error on the only point presented to us for determination. However, as it will hereinafter appear, it is not necessary to catalog the findings or detail the extent thereof. We will confine ourselves to the one point urged, and, if an examination thereinto discloses that the trial court was not in error, appellant concedes that the judgment should be affirmed. Yet, by way of forewarning, in case sufficient has not already been said by all of the appellate courts and by the Supreme Court on the subject, it may be well to call the attention of the bar to the fact that the mere mechanical perfecting of an appeal is not all that is required in order that the reviewing court may examine carefully into extended volumes of clerks' and reporters' transcripts.

[1] Coming directly to the controversy before us, a brief summary of the facts will better serve to illustrate the claims made. Milton Hesse was a contractor and builder in the county of Los Angeles. His activities encompassed many projects and covered a variety of enterprises, though mostly confined to the building and selling of residences. For some time prior to the transaction under discussion he had dealt with the appellant, procuring from the latter building materials and supplies for use in his various projects. In the summer of 1926 he began the construction of the houses on the properties here involved. The record before us falters somewhat, in the presentation of the actual facts at this point. Some doubt is cast upon the claim that materials were delivered to the properties. It is shown that a considerable quantity of lumber was delivered to one of the lots of the tract, but likewise is there evidence to the effect that some of this was carted away to distant work and the general finding that all of this material was not used in the buildings seems to have support in the evidence. For the purposes of the appeal it is admitted that all work ceased on the buildings, as far as Hesse was concerned, on or about the 2d of November, 1926, and that the finding to the effect that the work was at that time abandoned is not without sufficient evidence for its support. It is further admitted that the claim of lien was filed at a period subsequent thereto and at a time when the claim of lien was barred by limitation, unless preserved as hereinafter contended. No notice of completion was ever filed. And here it might be noted that, while Milton Hesse was the owner of the property, he did, for the purpose of becoming the contractor, make and execute a deed of the premises to Nettie Lee Hesse, his sister-in-law, which deed all parties admit to have been merely by way of convenience. To repeat, appellant concedes that its claim of lien was filed too late to entitle it to foreclosure if the defense of limitation were open to respondent. But, contends appellant, the Hesses, both Milton and Nettie Lee, and the respondent claiming under them, are estopped to set up this defense. This contention is based upon the conduct of the Hesses. It is appellant's claim that by a course of conduct, planned to that end, Milton Hesse and Nettie Lee Hesse lulled appellant into a sense of security by representing the continuation of the work and the progress thereon to the end that appellant forbear its lien rights under the belief that no time limitation was operating against it. While there is a semblance of conflict in the evidence on the point of representations made by the Hesse group, we may concede that this conflict is more apparent than real, and that, if no other question were to be solved save that of representations, it could readily be determined that such representations as claimed were made. However, the circumstances under which the same were made would have a controlling bearing upon the case. And here we may stop to note that the limits of investigation permissible to a trial court are not always confined to the exact words of testimony as adduced. The trial court may draw from the evidence the natural inferences of which the evidence is susceptible, and, if more than one inference may be drawn or if conflicting conclusions may result, a reviewing court will adopt such logical inferences as tend to support the judgment.

[2] Coming back to the facts, it has already been noted that there had been and were at the times under examination other business dealings between Hesse and appellant, as a result of which Hesse stood indebted to appellant on obligations other than those resulting from the transaction with which we deal. The record discloses negotiations toward a settlement between them. The buildings and premises against which the claim of lien is

here asserted were progressing slowly on account of lack of finances and, uncompleted, were not attractive for sale or security upon which funds could be obtained. There is abundant evidence to indicate that appellant was anxious to secure payment of the sums due without risking the delay or panic incident to legal proceedings. The evidence further discloses that the representative of appellant, a Mr. Power, admitted to be the one to whom the entire matter had been intrusted, was at all times in the closest touch with all operations. Without detailing the same, there is more than sufficient evidence to have convinced the trial court, and, as that court found, that Power knew exactly what was taking place on the premises and what work was being done and when it stopped. Although he was in this almost continuous contact, appellant claims that he did not believe what he saw, but relied upon what he was told by the Hesses. While the progress of the work was thus being noted by appellant, it became apparent that the lien rights were being jeopardized. And, with the condition well known, appellant exacted a statement from Hesse to the effect that there was not a cessation or abandonment and that there would not be a discontinuance of the work. Hesse promised or assured appellant that he would carry on sufficient to keep the lien rights alive. Then appellant secured from both Milton Hesse and Nettie Lee Hesse an affidavit to the effect that the work was continuing sufficient to keep alive the liens.

The specific and controlling finding of the trial court is that the appellant had full knowledge of the conditions existing and was in no wise misled or deceived by the statements of either Hesse or the statements of both of them; that the actions of the appellant were with full and independent knowledge on its part; that, if any representations were made by the Hesses concerning the continuation of the work on the premises (as alleged by the appellant in the court below), the appellant knew the same to be false; further, in the same finding, that appellants had equal or superior knowledge and means of knowledge of the facts, as to the cessation of labor, as was had by Milton or Nettie Lee Hesse. As stated hereinbefore, the evidence amply supports this finding. The transcript of testimony before us, scantily referred to by appellant, contains some thirteen hundred pages of testimony in addition to a clerk's transcript of almost four hundred pages. Though we have carefully read the transcript, we regard it as wholly unnecessary to detail this mass of evidence in an attempt to demonstrate the correctness of the conclusion reached by the trial court. From the finding as made, the court below held that no estoppel existed, and this was the only conclusion that the finding would support.

The law of the case is not in dispute. Appellant, in its brief, concedes that among the essentials necessary to the creation of an estoppel are the following: Namely, the statements must have been made with the intention that the other party should act upon them; the party to whom they were made must have been ignorant of the truth of the matter; he must have been induced to act upon them to his detriment. These principles of estoppel were announced in the ancient case of Biddle Boggs v. Merced Mining Co., 14 Cal. 279, and have been consistently adhered to throughout a long line of decisions. The subject is fully discussed and the authorities cited in California Jurisprudence, volume 10, beginning at page 627. The authorities there cited support the text, which reads as follows: "It is an essential element of an estoppel by conduct that the party asserting it must be ignorant of the true state of facts, and should have relied upon the representation or admission of the adverse party." 10 Cal. Jur. 636, 637.

[3] In the case before us it is manifest that appellant was endeavoring to make the best of a rather bad situation. It was doubtful whether or not all of the material furnished was used in the buildings upon which lien was claimed; there was continuing hope that the indebtedness existing could and would be adjusted in other ways and by means of loans which it would have been impossible to secure after a lien filed. Even when the conditions were apparent, from which it appeared that the claim of lien was being jeopardized, appellant still remained with the hope of satisfactory and full adjustment, but, in order to meet any possible hitch in the plan, prepared statements showing a condition of construction already known to be untrue and procured the affidavits of the Hesses thereto solely for the purpose of establishing an estoppel against a defense which appellant had knowingly permitted to arise. The underlying principle of estoppel, in all of its varieties, is to prevent a wrong being inflicted. This is something quite different from the creation of a situation whereby the law may be distorted to the end that all legal rights may be swept aside to permit individual gain.

It is our opinion that the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

115 Cal.App. 372

IRWIN v. PICKWICK STAGES SYSTEM, Inc., et al.

Civ. 7819.

District Court of Appeal, Second District, Division 2, California.

July 7, 1931.

Appeal and error 🔑701(1).

Appellant, complaining that instruction given is erroneous, need not print in brief all evidence supporting instruction (Code Civ. Proc. § 953c; Rules of Supreme Court and District Courts of Appeal, rule No. 8).

In such case, if instruction shows possible error on its face, appellant may rely thereon as a matter of law.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by William Richard Irwin against the Pickwick Stages System, Inc., and another. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Motion denied.

B. P. Gibbs and George P. Kinkle, both of Los Angeles, for appellants.

Earl Newmire and George Appell, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Motion by respondent for an order dismissing the appeal on the ground that appellants have failed to comply with the provisions of section 953c, Code of Civil Procedure, and rule 8 of the Rules of the Supreme Court and District Courts of Appeal.

Appellants' opening brief, the only one on file, sets out three points of alleged error. Point I is that the verdict is contrary to the evidence, point II the giving of certain instructions by the court relative to the ownership of the bus in question and agency between its driver and Pickwick Greyhound Lines of California (not a party to the action), and point III the giving of an instruction involving the doctrine of res ipsa loquitur.

Respondent in his motion to dismiss contends that as to point I appellants have failed to refer parenthetically to the line and page of the typewritten record; that only a small part of the evidence has been printed, and only that favorable to appellant, and that the testimony so printed is insufficient to justify a reversal. As to point II the contention is that all the evidence is not printed, nor is any reference made to any documentary evidence which would support the instructions so attacked; and, as to point III, that no evidence is set forth concerning the facts surrounding the happening of the accident which is the basis of the action.

As to respondent's contention regarding point II, we do not understand rule 8 to mean that, where one complains that an instruction given to the jury is erroneous, all the evidence supporting the same is required to be printed in the brief. It would seem on principle that, if the instruction shows possible error on its face, one could rely upon that as a matter of law, in which case it would undoubtedly be presumed there was evidence in the record supporting it, in the absence of a showing to the contrary. The rule does require that "all other instructions given bearing upon that subject must be printed in full in appellant's brief," but no other instructions are set out in the brief bearing upon the asserted agency between the parties mentioned, and an examination of the instructions given discloses no other upon that subject. As to such point we are of the opinion that the brief discloses a sufficient argument so that the appeal should be decided on the merits, regardless of whether points I and III sufficiently comply with rule 8 or not.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

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115 Cal.App. 766

Betty B. IRWIN, a Minor, by Annie A. Irwin, her Guardian ad Litem, Plaintiff and Respondent, v. PICKWICK STAGES SYSTEM, Incorporated (a Corporation), and R. I. Bailey, Defendants and Appellants.

Civ. 7820.

District Court of Appeal, Second District, Division 2, California.

July 7, 1931.

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Los Angeles County, Warren V. Tryon, Judge, in an action for damages for personal injuries. Motion denied.

B. P. Gibbs and George P. Kinkle, both of Los Angeles, for appellants.

Earl Newmire and George Appell, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Motion by respondent for an order dismissing the appeal on the ground that appellants have failed to comply with the provisions of section 953c, Code of Civil Procedure, and rule 8 of the Rules of the Supreme Court and District Courts of Appeal.

This case grew out of the same occurrence as that involved in William Richard Irwin v. Pickwick Stages System, Incorporated, and R. I. Bailey (Cal. App.) 1 P.(2d) 1030, motion to dismiss appeal in which has been this day denied. The questions raised on the present motion and the points of law involved are in all material respects the same as those in that action, and in consequence the decision there governs this case.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

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115 Cal.App. 767

Florence B. IRWIN, a Minor, by Annie A. Irwin, her Guardian ad Litem, Plaintiff and Respondent, v. PICKWICK STAGES SYSTEM, Incorporated (a Corporation), and R. I. BAILEY, Defendants and Appellants.

Civ. 7821.

District Court of Appeal, Second District, Division 2, California.

July 7, 1931.

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Los Angeles County, Warren V. Tryon, Judge, in an action for damages for personal injuries. Motion denied.

B. P. Gibbs and George P. Kinkle, both of Los Angeles, for appellants.

Earl Newmire and George Appell, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Motion by respondent for an order dismissing the appeal on the ground that appellants have failed to comply with the provisions of section 953c, Code of Civil Procedure, and rule 8 of the Rules of the Supreme Court and District Courts of Appeal.

This case grew out of the same occurrence as that involved in William Richard Irwin v. Pickwick Stages System, Incorporated, and R. I. Bailey (Cal. App.) 1 P.(2d) 1030, motion to dismiss appeal in which has been this day denied. The questions raised on the present motion and the points of law involved are in all material respects the same as those in that action, and in consequence the decision there governs this case.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

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115 Cal.App. 768

Annie A. IRWIN, Plaintiff and Respondent, v. PICKWICK STAGES SYSTEM, Incorporated (a Corporation), and R. I. BAILEY, Defendants and Appellants.

Civ. 7822.

District Court of Appeal, Second District, Division 2, California.

July 7, 1931.

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Los Angeles County, Warren V. Tryon, Judge, in an action for damages for personal injuries. Motion denied.

B. P. Gibbs and George P. Kinkle, both of Los Angeles, for appellants.

Earl Newmire and George Appell, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Motion by respondent for an order dismissing the appeal on the ground that appellants have failed to comply with the provisions of section 953c, Code of Civil Procedure, and rule 8 of the Rules of the Supreme Court and District Courts of Appeal.

This case grew out of the same occurrence as that involved in William Richard Irwin v. Pickwick Stages System, Incorporated, and R. I. Bailey (Cal. App.) 1 P.(2d) 1030, motion to dismiss appeal in which has been this day denied. The questions raised on the present motion and the points of law involved are in all material respects the same as those in that action, and in consequence the decision there governs this case.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

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115 Cal.App. 472

HOLLAND v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N.

Civ. 858.

District Court of Appeal, Fourth District, California.

July 13, 1931.

1. Trusts 🔑358(1).

Beneficiary, in order to recover trust fund, must trace fund into some particular fund or property.

2. Trusts 🔑372(3).

Evidence *held* insufficient to sustain finding that money claimed as trust fund came into hands of executor, so as to authorize recovery thereof.

3. Trusts 🔑372(1).

Money alleged to have been intrusted to deceased may not be reclaimed as trust fund, in absence of evidence that it came into hands of executor.

4. Trusts 🔑44(3).

To establish trust requires clear and convincing evidence.

5. Witnesses 🔑144(7).

Testimony of claimant, respecting transactions with deceased, was admissible in action to establish trust (Code Civ. Proc. § 1880).

6. Judgment 🔑256(1).

Judgment for recovery of money against executor as such *held* not to follow findings as to establishment of trust.

Judgment was against executor as such, and not as trustee, and provided that it should be payable in course of administration, whereas if trust was established as evidenced by finding and traced into hands of executor, then the trust fund was no part of estate.

7. Executors and administrators 🔑221(6).

Evidence in action to recover moneys alleged to have been intrusted to deceased *held* insufficient to warrant appellate court in finding that loan of money was established.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by John L. Holland against the Bank of Italy National Trust & Savings Association, executor of the estate of Marie Bruton Teeter, deceased. Judgment for plaintiff, and defendant appeals.

Reversed and remanded for a new trial.

John V. Morris and Hooper & Miller, all of Los Angeles, for appellant.

George Baltimore, Mark F. Jones, and Goodwin J. Oppegard, all of Los Angeles, for respondent.

BARNARD, P. J.

In this action, the plaintiff seeks to recover $11,500 which he claims Marie Bruton Teeter was holding in trust for him. The plaintiff claims that he lived with Mrs. Teeter for some five years before her death, although they were never married, and that in September, 1927, he handed her $11,500 to keep for him. For some considerable time before her death, Mrs. Teeter was running three hotels in Los Angeles. She went to a hospital for an operation in April, 1928, and died a few days later. Prior to going to the hospital, she assigned certain insurance policies to the plaintiff, made her will, and purchased a cashier's check for $8,000 at the Bank of Italy, which was made payable to the plaintiff or to herself, which check was found after her death in her safety deposit box in that bank, to which box the plaintiff had no access. After the defendant was appointed executor of her last will, the plaintiff filed his claim against the estate for $11,500 for money loaned to the deceased in her lifetime. The claim having been rejected, this action was filed. The complaint set up a first cause of action for $11,500 loaned to Marie Bruton Teeter at her special instance and request, and a second cause of action for $164 alleged to have been advanced to pay certain nurses during her last illness. Subsequently, an amended complaint was filed setting up the same two causes of action and adding a third, in which it is alleged that "on or about September 17, 1927, one Marie Bruton Teeter became indebted to plaintiff in the sum of $11,500 for money deposited with and paid over to said Marie Bruton Teeter by plaintiff to hold in trust for him; that at the times that the aforesaid moneys were deposited with said Marie Bruton Teeter, it was agreed between her and plaintiff that she would hold said money in trust for said plaintiff and pay and redeliver the same unto him upon demand, at his option." It is then alleged that no part of said sum has been repaid; that the defendant has been appointed executor of Mrs. Teeter's estate; and "that subsequent to the death of said Marie Bruton Teeter said trust fund came into the possession of said defendant who now holds and is in possession of same."

The plaintiff was not present at the trial, but his deposition was offered. Objection having been made that the plaintiff could not testify under subdivision 3 of section 1880 of the Code of Civil Procedure, the objection was sustained as to the first two causes of action, and the deposition was admitted as applying to the third cause of action. Through this deposition, the plaintiff testified as follows:

"Q. On the 17th day of September, 1927, did you have any business transaction with her? A. Yes.

"Q. What was that transaction? A. It was $11,500 that she had taken for safekeeping for me. It involved that money.

"Q. And did you turn that money over to her? A. Positively yes.

"Q. Now, Mr. Holland, did Mrs. Teeter agree to give you back that money? A. Positively yes.

"Q. And when did she agree to give it back to you? A. No particular time.

"Q. Did she agree to pay it to you on your demand? A. Yes.

"Q. Did she agree to hold it for you? A. Yes."

He further testified that while she was in the hospital she said to him: "'In case I don't get over this or don't get well or get out of it,' or something of that sort, 'you are protected by the check at the Bank of Italy.'"

On cross-examination, he testified that he had won the money gambling, and that he handed the money to her that night at the apartment when no one else was present; that she told him he had better let her take it because he might gamble it all back and lose it; and that he gave it to her in paper money, but he could not remember what the denominations were. He then testified:

"Q. Did she give you a receipt for the money? A. She did not.

"Q. Did you ever ask her for a receipt for the money? A. No.

"Q. At the time you say you gave her this money at the apartment house on the night you have already testified to, did you tell her when you wanted the money back? A. No, I did not.

"Q. Did you tell her you ever wanted the money back? A. I just gave it to her and she kept the money. It was natural for me to figure that I would get it back whenever I wanted it."

Immediately following this, he was asked if anything had been said between them as to when the money was to be returned. A motion to strike his answer was made at the time the deposition was taken, and, at the trial, was granted by the court. Following the making of the motion the witness answered "All right. I will say that she told me 'I will give it to you whenever you need it.'" He was then asked: "Was there ever anything said as to whether or not it was to be returned at all?" The witness was instructed not to answer the question, and did not. The deposition shows that the witness was instructed by his counsel not to answer more than thirty questions, practically all of which were material, and the objections to which were later overruled by the court, but no answers had been made. Among these, he refused to answer whether he knew what she had done with the money. He did, however, testify that he did not deposit it in her bank account for her, and that he did not know whether or not it was ever deposited.

The only other evidence offered by the plaintiff was the testimony of a life insurance agent, and of a trust officer of the Bank of Italy. The life insurance agent testified that while collecting some premiums from Mrs. Teeter in the latter part of March, 1928, she requested him to change the beneficiary in certain policies, naming Jack Howard as the new beneficiary, and also told him that this party was known as John L. Holland, and was going under the name of Jack Howard. In order to ascertain the insurable interest, he asked her why she wanted to do this, and "she replied she was holding over $11,000 for him and wanted to protect him in the event of her death. I immediately canvassed her for more insurance, thinking I might write more to cover up the difference and she replied that she had made—was going to make arrangements at the bank to take care of the balance." He further testified that Mrs. Teeter signed the change of beneficiary at that time, that it was forwarded to the company, and that later, Mr. Holland received $2,250 from the insurance company on these policies. The trust officer of the bank testified that, a few days after Mrs. Teeter's death, he examined her safety deposit box and found therein a check for $8,000 payable to the plaintiff or to Mrs. Teeter, and that the check had been held by the executor and never paid.

As a witness for the defendant, the trust officer testified that on April 19, 1928, the morning Mrs. Teeter died, the plaintiff came to the bank and asked him about Mrs. Teeter's will telling him that his name was Jack Howard, that he was Mrs. Teeter's husband, that she was dead, and that he wanted to get such of her possessions as the bank had. Also, that he said he understood they had a will there. That he also spoke about a check "which she said she had willed to him," and he wanted to know if he could get that from her box. That about ten days after Mrs. Teeter's death, he returned and asked for the insurance policies. When the trust officer asked him as to his insurable interest, he replied that the policies were assigned to him for money he had given to Mrs. Teeter, that he had given her the money at odd times and in small amounts, and did not know the total sum. The trust officer also testified that on April 4, 1928, Mrs. Teeter gave him the data for preparing her will. When he asked her as to whether she had any debts, she told him that she had taken care of a debt she owed by means of insurance policies which she had. She told him that she was going to a hospital for an operation, and stated that she wanted to make a bequest to a male friend, but did not want her relatives in the east to know about this, as they wouldn't understand. He told her that such a clause in the will could not be kept secret. In reply to her questions as to whether he knew of any other way in which it could be taken care of, he said he knew of none except to give him the money before her death. The trust officer also testified: "When she came back to me later in the afternoon she said she had made arrangements to take care of the bequest she had asked if she could make secretly in her will." He further testified that on May 19, 1928, the insurance agent above referred to called on him and asked for the insurance policies, showing him an assignment signed by Mrs. Teeter, stating that the same had been on file with his company, and that Mr. Howard had an insurable interest in the policies through an indebtedness. When asked where he had obtained this information, he replied that "he had gotten it directly from Mrs. Teeter; that he had called upon her to collect some insurance premiums and that at that time she had requested that he change or have changed the beneficiaries of the policies and that he had inquired with reference to the insurable interest which the new beneficiary was to have and that she had replied it was to pay him what she owed him. I inquired further from Mr. Pries as to the full amount of the note, and he stated that she hadn't told him that, that he presumed it was in full or payment in full.

"Q. Did he mention any indebtedness of $11,500? A. He did not." The record of Mrs. Teeter's account with the bank was put in evidence, covering a period of about two years prior to her death. This shows deposits in varying small amounts, made from ten to fifteen different times a month, and made with about the same frequency prior to September 17, 1927, as from that date until the time of her death. Most of the deposits after September 17, 1927, were under $300, but a few were around $400 and $500, and one on April 9, 1928, was for $700. The record shows no deposit of $11,500 or of any other sum in excess of $700. The only assets of Mrs. Teeter coming into the hands of this defendant as executor, as shown by the record, are her bank account in the Bank of Italy, about $50 in money, and some small personal articles found in her room. The trust officer of the bank testified that he had made inquiries of all other banks in Los Angeles, asking if they had any account, any safety deposit boxes, or any record of business with the deceased, and that he had received a negative reply from each one.

The court found that on September 17, 1927, the plaintiff deposited $11,500 in cash with Mrs. Teeter at her request, upon the express agreement that she would hold such funds in trust for the plaintiff, and that she would repay or return said funds to the plaintiff on demand; that these parties had been living together for about five years as common-law husband and wife; that Mrs. Teeter died on April 19, 1928, and the defendant is the executor of her estate; that prior to her death no part of said funds had been returned by her to the plaintiff; that on March 27, 1928, in order to secure the return of part of said funds to the plaintiff, Mrs. Teeter had made the plaintiff the beneficiary in certain insurance policies, from which source the plaintiff has received $2,250; that on April 3, 1928, Mrs. Teeter purchased from the defendant bank a cashier's check for $8,000, made payable to herself or to this plaintiff, and that she deposited said check in her own private safety deposit box in said bank, where it was found after her death; that said sum of $11,500 was so intermingled with the assets of Mrs. Teeter that the said identical trust fund cannot be traced, and that all of the assets of Mrs. Teeter are now in possession of said bank as executor of her estate; that the plaintiff has demanded the cashier's check for $8,000 but delivery of the same has been refused; that the plaintiff presented to the executor of Mrs. Teeter's estate a verified claim for the obligation herein sued on; that the same was rejected on May 14, 1928; that no part of the said claim of $11,500 has been paid, except the sum of $2,250, and there remains "a balance due, owing and unpaid from the estate of Marie Bruton Teeter to the plaintiff herein in the sum of $9,250"; that the estate of Mrs. Teeter is solvent; and that the plaintiff John L. Holland is one and the same person as Jack Howard. A judgment for $9,250, with interest from the date of the presentation of the claim to the executor, followed, it being also ordered that this amount be paid to the plaintiff by the defendant "in the due course of the administration" of the estate of said deceased. From this judgment, the defendant has appealed.

This appeal is argued by both parties almost entirely upon the question of the validity of the judgment, with respect to the third cause of action. It is appellant's contention that neither the pleadings, evidence, findings, or judgment are sufficient to sustain a recovery upon the trust fund theory. It is argued that the evidence is not sufficiently convincing to establish a trust and, further, if the trust fund existed, it has not been traced into the hands of the executor of this estate. If we assume that a trust was here established, the main question presented would be the same as that in Byrne v. McGrath, 130 Cal. 316, 62 P. 559, 560, 80 Am. St. Rep. 127, namely, whether the plaintiff has " 'followed the trust fund in its mutations, and have sufficiently identified it to avoid the rule laid down in Lathrop v. Bampton, 31 Cal. 17 [89 Am. Dec. 141], which places the beneficiary who is unable so to follow the trust funds in the position of a general creditor of the estate.' " In Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141, the court said: "Neither the trust fund, nor any substitute for it, which can be identified as such, has come into the hands of the defendant. On the contrary, the trust estate is gone, or, which amounts to the same thing, its identity is entirely lost, for it is not shown to be in the hands of the defendant in its primary condition, or that it was converted by the defendant's testator into the property or any part of it now in the defendant's possession as executor."

In Roncelli v. Fugazi, 44 Cal. App. 249, 186 P. 373, 374, in which it was sought to recover from an administrator a sum of money claimed to have been given to the deceased in trust for the benefit of the plaintiff's intestate, the court said: "In order that the suit might be regarded as one in equity to recover a specific trust fund, it was necessary for the plaintiff to have alleged that the identical trust property, or its substituted new form, was traceable into the estate of Fugazi, and thus into the possession of his representatives. McGrath v. Carroll, 110 Cal. 79, 42 P. 466; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141. The complaint fails to meet this requirement. As stated in Orcutt v. Gould, 117 Cal. 315, 49 P. 188: 'To justify a recovery a beneficiary must be able to follow and identify the property, either in its original or substituted form.' And in the case of Lathrop v. Bampton, supra, in speaking of a money trust fund, the court said: 'The identity of a trust fund consisting of money may be preserved so long as it can be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value, readily distinguishable from all other funds.'

"Where a beneficiary is unable to identify a trust fund, or to follow it through its mutations, he is placed in the position of a general creditor. Byrne v. Byrne, 113 Cal. 294, 45 P. 536; Orcutt v. Gould, supra."

In Estate of Arms, 186 Cal. 554, 199 P. 1053, 1055, the court said: "Where property, with the consent of the trustor, has been in that manner commingled with the property of the trustee, so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor. 'The right of pursuing it fails when the means of ascertainment fails. This is always the case where the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description.' Where the identity cannot be traced the trustor 'is forced to rely upon the personal liability of the trustee. * * * He has no special lien upon the general estate of the trustee which is superior to that of any other creditor,' and his only remedy is a personal action for damages or for money had and received. Lathrop v. Bampton, 31 Cal. 23, 89 Am. Dec. 141. There are many other cases to the same effect. [Citing cases.] The case is different, of course, where the money or property of the trustor can be traced into a particular fund or deposit, where it still remains, though mingled with other money, or where it is used to establish a particular business which was continued in existence and is carried on by the trustee or some one taking from him with knowledge of the trust."

In Newport v. Hatton, 195 Cal. 132, 231 P. 987, 993, in which the plaintiff sought to recover the value of land obtained by fraud and sold, and in which the proceeds had already been distributed in the estate of the wrongdoer, the court said: "It is well settled, however, that one who claims as his own, adversely to an estate, specific property held and claimed by an estate, cannot be called a creditor of the estate within the meaning of the probate law, and is not required to present a claim. Estate of Dutard, 147 Cal. 253, 256, 81 P. 519. Therefore, unless it can be said that the complaint here shows on its face that the identical trust property, or its product in a new form, cannot be traced by the plaintiffs, the contention of the respondents must fail. When the money or property of the trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may seek to follow the specific personal property and enforce the trust. Though the identical pieces of coin cannot be ascertained, yet if there is so much belonging to the trust in a general heap of private and trust funds, the cestui que trust is entitled to take so much out. Elizalde v. Elizalde, 137 Cal. 634, 641, 66 P. 369, 70 P. 861; Estate of Arms, 186 Cal. 554, 560, 199 P. 1053."

[1-3] While conceding these general rules, the respondent relies upon the case of Noble v. Noble, 198 Cal. 129, 243 P. 439, 442, 43 A. L. R. 1235, as conclusive upon this appeal. We do not so regard that case. In that action, the defendants were sued as trustees, and not as executors, for the purpose of recovering the proceeds of trust property which had been deposited in a bank. Certain real property had been conveyed in trust by a sister to her brother. With the sister's consent, this land was later exchanged for another parcel of realty. Later, that land was sold by the brother without the consent of the sister, and the proceeds of that sale were deposited in the brother's personal account in a bank. The action was brought after the brother's death, and the facts above given were found by the trial court. On appeal, all of the evidence not being before the court, the findings of the trial court were taken as controlling. In effect, the court held that this trustee could not, by the mere process of converting the trust property into money and depositing this in his personal account in a bank, relegate his trustor to the position of a general creditor of himself or of his solvent estate. In that case, the trust was established and the trust property, in its substituted form, was traced into a definite fund which actually came into the hands of the defendants. The court refused to hold that such a deposit of money in the personal account of a trustee in a bank would constitute such an intermingling of the trust funds as to obliterate the corpus of the trust, and quoted with approval from Newport v. Hatton, supra, as follows: " 'when the money or property of the trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may seek to follow the specific personal property and en-

force the trust. Though the identical pieces of coin cannot be ascertained, yet if there is so much belonging to the trust in a general heap of private and trust funds, the cestui que trust is entitled to take so much out.'" But we see in the Noble Case no authority for the proposition that such an alleged trust fund need not be traced into some particular fund or property, or, in any event, traced into the hands of the defendant in some form. While it is not necessary to identify the identical coins in a mixed fund in a bank, it is as necessary to show that the trust fund has come into the possession of the defendant, as it is to establish that a trust originally existed. The complaint in the case before us recognizes such a necessity, and alleges "that subsequent to the death of said Marie Bruton Teeter said trust fund came into the possession of said defendant who now holds and is in possession of same." The trial court found that this $11,500 "was so intermingled with the assets of Mrs. Teeter that the said identical trust fund cannot be traced," and further found that "all of the assets" of Mrs. Teeter, upon her death, came into the possession of the defendant bank as the executor of her estate. If these two findings be considered as a finding that the $11,500 came into the hands of the executor, along with the assets of Mrs. Teeter, it is not supported by the evidence. The record is devoid of any evidence that the money in question was intermingled with any of her assets. The plaintiff testified that he did not know whether it was ever deposited in the bank, and he refused to answer the question whether he knew what she had done with it. There is no evidence that it was deposited in the bank, and the complete statement of her bank account indicates that it never was. Aside from a small amount of personal property in her apartment and about $50 in cash, it appears that the only property coming into the possession of her executor consisted of the deposits in the Bank of Italy and the check found in her safety deposit box. It might be said here, as was said in Gillespie v. Winn, 65 Cal. 429, 4 P. 411, 412: "Nor is it shown that the money which she received * * * ever came into the hands of defendant as such administrator, or otherwise. On the other hand, the only evidence introduced on the trial tends to prove the exact reverse." There is absolutely no evidence of any intermingling of the $11,500 with any fund she had, and none that it came into the possession of the executor in any form. The record is barren of any evidence as to what she did with that sum, if, in fact, she ever received it. She may have placed it where it has not been found by her executor, she may have given it away, or she may have lost it in the manner in which the respondent acquired it. But in the absence of any evidence that it came into the hands of the appellant, it may not be reclaimed as a trust fund. In this case, as in the case of Lathrop v. Bampton, supra, the trust fund "is not shown to be in the hands of the defendant in its primary condition, or that it was converted by the defendant's testator into the property or any part of it now in the defendant's possession as executor."

[4, 5] To establish a trust requires clear and convincing evidence. Austin v. Wilcoxson, 149 Cal. 24, 84 P. 417; Moulton v. Moulton, 182 Cal. 185, 187 P. 421. While considerable latitude must be given to a trial court in deciding such a question of fact, we hesitate to say that this requirement has been met in this case. The language used by the plaintiff in relating his version of what occurred when he handed her the money, and the meager and unsatisfactory evidence of an admission claimed to have been made by the deceased to the insurance agent, seem far from convincing. This is especially true in view of the contradictory statements made by the plaintiff, the contradictory statements made by the insurance agent, the latest statement made by the deceased to the effect that she had paid her debt by the assignment of an insurance policy, and the circumstances in connection with the $8,000 check. Plaintiff's refusal to answer questions upon the taking of his deposition, and his absence from the trial making an adequate cross-examination impossible, are more than ordinarily to be regretted in a case of this character, where the lips of the other party to the alleged agreement are sealed by death. While the testimony of the respondent was admissible, in spite of section 1880 of the Code of Civil Procedure, in an action to establish a trust, this is but an added reason why the usual rules for establishing a trust should be fully applied. Nor do we read the Noble Case as doing away with such general rules. To hold that it is not necessary to identify particular coins in a composite bank account, when a trust is established and its proceeds are traced into such an account, is far from holding that clear and convincing evidence is not necessary to establish a trust, and that it is not necessary to trace the trust funds into some fund or property which has come into the hands of a defendant.

[6] Not only do we think the findings in this case are not supported by the evidence, but the judgment does not follow the findings as to the establishment of a trust. The judgment is against the executor as such, and not as a trustee, and it further provides that it shall be payable in the course of administration. If a trust was established and traced into the hands of the defendant, then the trust fund is no part of the estate. And the conclusions of law, after stating that the claim was presented to the executor and rejected, are to the effect that the estate is "indebted" to the plaintiff, and that the plaintiff is entitled to a judgment against the defendant "as executor

of the estate of Marie Bruton Teeter, deceased," with interest from date of presentation of the claim; and that the amount "so found due to the plaintiff herein as aforesaid" be paid to the plaintiff by the defendant in the due course of the administration of said estate.

[7] Respondent argues that, even though it be held that the evidence and findings are not sufficient to establish a trust as alleged in the third cause of action, they are sufficient to establish a loan as alleged in the first cause of action. While it is conceded that the plaintiff's testimony may not be considered in that connection, it is contended that the testimony of the insurance agent as to the statement made to him by the deceased, together with the assignment of the insurance policies and the finding of the cashier's check in the safety deposit box, is sufficient to make out a prima facie case on the first cause of action. Opposed to this is the other evidence, that on September 17, 1927, Mrs. Teeter had about $11,000 in her savings account, indicating no need for a loan; that she tried to find a way to make a bequest to a male friend in a manner that should not become known; that she secured a cashier's check payable either to herself or to the respondent, and retained this in her possession; that the insurance agent's first statement to the banker was that she had told him that the assignment of the insurance policies was to pay what she owed to the new beneficiary; that the respondent told the banker that the insurance policies were assigned to him for money he had given her at odd times in small amounts, the total of which was unknown to him; and that she told the banker, when making her will, that she had taken care of her debt by means of her insurance policies. Under the circumstances, it would be a close question, at best, whether the evidence is sufficient to sustain such a finding had it been made. But the fact remains that the court made no such finding. There is no finding that any money was loaned to her, and no finding that the estate is indebted to the plaintiff. The conclusion of law that the estate is indebted to the plaintiff is drawn from the findings which, though somewhat uncertain, purport only to find that the money was delivered to Mrs. Teeter in trust. Nor would we care to make such a finding when the evidence is so close, and when, as we think, the preponderance thereof is the other way. Viewed from the standpoint of either cause of action, we think this case should go back for a new trial.

While it is settled that section 1880 of the Code of Civil Procedure has no application where a trust is sought to be established, and while equity may give relief in a proper case, the claim of a trust fund should not be allowed merely for the purpose of circumventing the provisions of section 1880, nor unless a case is presented which clearly comes within the established rules.

The judgment is reversed, and the case remanded for a new trial.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

BOYCE v. SAN DIEGO UNION HIGH SCHOOL DIST. OF SAN DIEGO COUNTY et al.*

Civ. 401.

District Court of Appeal, Fourth District, California.

July 2, 1931.

Rehearing Denied July 27, 1931. Hearing Granted by Supreme Court Aug. 31, 1931.

1. Municipal corporations 🔑724.

At common law, municipal corporation is not liable for negligence in exercise of governmental functions.

2. Schools and school districts 🔑89.

As regards liability for negligence, usual and ordinary use of school district's auditorium for school purposes was exercise of "governmental function" (St. 1923, p. 675).

[Ed. Note.—For other definitions of "Governmental Function," see Words and Phrases.]

3. Municipal corporations 🔑734.

Public building may be used by political subdivision in governmental and proprietary capacity.

4. Schools and school districts 🔑89.

Liability for injury to man in school district's auditorium when used in governmental capacity *held* liability, if any, for negligence in exercise of governmental function, though building was sometimes leased for private purposes (St. 1923, p. 675).

5. Appeal and error 🔑172(2).

In action by alleged invitee for injury sustained when falling into pit in school district auditorium basement, appellate court could not consider negligence of employee, not alleged (St. 1923, p. 675, §§ 1, 2).

Since liability for negligence of school district's agent or employee in exercise of governmental function must be based upon St. 1923, p. 675, § 1, and it was not alleged in complaint nor was any attempt

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*For subsequent opinion see 10 P.2d 62.

made at trial to bring case within provisions of such section, appellate court, in considering sufficiency of evidence, had to conclude that injuries resulted solely from dangerous or defective condition of air duct in which pit into which alleged invitee fell was constructed, and could not consider possible negligence of district's electrical superintendent in not warning invitee of dangers ahead, or possible negligence of any employees of district in so adjusting light switches that electric light near one door of air corridor was not illuminated when superintendent threw switch at head of stairs.

6. **Schools and school districts** ⚿115.

One suing school district for injuries when district exercised governmental function could predicate action only upon statutory grounds (St. 1923, p. 675, §§ 1, 2).

7. **Schools and school districts** ⚿121.

Burden of proving dangerous or defective condition of premises *held* upon one suing school district for injuries (St. 1923, p. 675, §§ 1, 2).

8. **Schools and school districts** ⚿121.

Evidence *held* not to show dangerous or defective condition of school auditorium air duct containing pit into which plaintiff fell while inspecting duct (St. 1923, p. 675, §§ 1, 2).

9. **Schools and school districts** ⚿89.

That lights illuminating air duct which injured plaintiff was inspecting had been turned off, not having been brought to attention of those in authority, *held* not to render school authorities liable (St. 1923, p. 675, §§ 1, 2).

Negligence of school district's employees was not involved in case, plaintiff having sought to recover only on theory of defective condition of premises.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by William M. Boyce against the San Diego Union High School District of the County of San Diego and others. From a judgment in favor of plaintiff, defendants appeal.

Reversed.

Stearns, Luce & Forward, of San Diego, for appellants.

Arthur F. H. Wright and E. V. Winnek, both of San Diego, for respondent.

MARKS, J.

This is an appeal from a judgment entered upon the verdict of the jury in an action for damages for personal injuries suffered by respondent from a fall into a pit in a duct or air conduit in the basement of the Russ Auditorium, one of the buildings belonging to the San Diego High School district and used by it for school purposes, and under the control of its board of trustees. The jury returned a verdict in the sum of $5,000, which was reduced to $3,500 at the time of the hearing of appellants' motion for new trial.

The evidence discloses that respondent was a member of a copartnership dealing in and installing electrical motors and other electrical appliances. Harry C. Bertolucci was the electrical superintendent for the San Diego High School district and in charge of the operation and maintenance of the electrical equipment in and upon the high school buildings and grounds.

The Russ Auditorium was erected in the year 1925, and was used for assemblies, programs and other school activities. It was occasionally rented by the district for private use.

In October, 1928, the school employees found that the heating and ventilating system in the Russ Auditorium was not functioning to their satisfaction. When in operation, the rear of the auditorium was overheated and little, if any, heat reached the stage. A few days before the 22d of October, 1928, Bertolucci communicated with respondent and asked him to look at the motor which operated a blower in the heating and ventilating system to see if the fault lay in this machine. It is admitted that respondent hoped that, as one of the results of his tour of inspection he might sell to the high school district a new motor in the place of the one which he was to examine.

On October 22, 1928, respondent, with Herbert Cordes, the San Diego manager of a corporation selling electrical equipment, went to the Russ Auditorium to inspect the motor in question. Bertolucci met them at the entrance of the auditorium and conducted them into the basement, where the heating apparatus was situated. The door leading to the basement was kept securely locked. On the day in question Bertolucci unlocked the door and proceeded with his two companions into the basement and into the fan room, in which the motor and blower were situated in a pit, the bottom of which was several feet below the floor of the balance of the room. Respondent descended into this pit and inspected the motor and blower, which he found sufficient and suitable for the work required of them. He told Bertolucci that the trouble was not with this part of the heating apparatus, but that it was probably with the ducts used to conduct the hot air from the blower and the electrically heated coils in front of it, to the various parts of the auditorium. It was then suggested that they examine the air ducts to see if they were in any manner defective and responsible for the uneven distribution of the heat.

The main air duct or air corridor, which extended nearly across the building in a northerly and southerly direction, was in the same end of the basement as the blower and was separated from the blower room and storage rooms by a concrete wall extending entirely across the basement. This wall was pierced by two doors, which were kept closed by mechanical devices and securely fastened by iron latches, but were not locked. The only other opening from the blower room and the adjoining rooms to the main air duct or corridor was an opening for the passage of air leading through this wall from the fan and blower pit to a pit on the opposite side of the wall. Extending along this wall and to within a few feet of each exterior foundation wall of the auditorium was this main air duct or corridor or passageway used for the distribution of the hot air into three air ducts extending longitudinally to or nearly to the opposite or stage end of the auditorium. For lack of a better name, we will refer to this main air duct or passageway first mentioned as the air corridor. In the center of this air corridor was a cement-lined pit which was more than eight feet long, about five and one-half feet deep, and which occupied the entire width of the corridor. In each end of this pit was a five-rung ladder extending from its top to its bottom. The bottom of this pit was slightly higher than the floor of the pit in the fan room, where the motor and blower were situated. The air corridor was lighted with two electric lights situated near the doors leading into it, each of them being fifteen feet or more from the ends of the pit.

On October 22, 1928, when Bertolucci, respondent, and Cordes decided to inspect the air distributing system and air ducts, Bertolucci led respondent and Cordes from the fan and blower room to the southerly storage room and then to the door at the northerly end of this room, which led into the air corridor. He opened this door and found the air corridor in darkness except for the light that came in through the open door. He told his companions to wait until he turned on the lights. Respondent stood in or just inside the doorway and Cordes held the door open. Bertolucci went up a flight of stairs to a panel board controlling the lights and threw an electrical switch illuminating the northerly light in the air corridor, this light being approximately forty feet from the door in which respondent was standing. When this light came on respondent started into the air corridor and proceeded northerly therein for a distance of about eight feet, when he fell into the pit which we have described and was seriously injured. He called to Cordes not to follow him, as he had fallen into a hole. As soon as Bertolucci came down the stairs, Cordes told him what respondent had said and Bertolucci turned a switch near the door through which they had entered and illuminated the southerly light. This light was sufficient to show the southerly edge of the pit and with both illuminated the entire pit was plainly visible. It is not disputed that with only the northerly light in the corridor illuminated the southerly edge of the pit was in darkness and could not easily be seen by one walking northerly in the corridor from the door through which respondent had entered.

On this state of facts appellants seriously urge that the evidence is not sufficient to support the judgment. They urge various other specifications of error, which can all be included under this one head.

[1] It is well settled that at common law a municipal corporation or other political subdivision exercising governmental functions is not liable for damages resulting from the negligence of its officers, agents, and employees in the use or exercise of these governmental functions. As was said in the case of Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505, 506: "It is thoroughly settled in this state that, in the absence of a statute imposing the liability, a municipality is not liable on account of acts such as those here complained of, unless the negligence was in the matter of the exercise of functions private and proprietary in their nature as distinguished from functions purely governmental in nature."

What are governmental functions is defined in the case of Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, 674, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, as follows: "Nor is it difficult to set forth the definition of governmental functions as applied to a city. Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young. And in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle. City of Kokomo v. Loy, 185 Ind. 18, 112 N. E. 994."

[2-4] It cannot be disputed that in the usual and ordinary use of the Russ Auditorium for school purposes appellants were exercising a governmental function, and that therefore the San Diego High School district can only be held for damages, if at all, under the provisions of an act of the Legislature approved June 13, 1923 (Stats. 1923, p. 675). Respondent seeks to escape the rigors of this rule on the ground that the auditorium was occasionally rented by appellants for private use.

He urges that, because it was occasionally rented, its use came under the proprietary instead of the governmental functions of the San Diego High School district, and that the district would therefore be liable for damages resulting from the negligence of the district or any of its officers, servants, agents, or employees acting within the scope of their employment.

It is well settled by a long line of decisions that a public building may be used by a political subdivision in both its governmental and proprietary capacity. The rule measuring its liability under such circumstances is stated in 19 Ruling Case Law, page 1112, as follows: "A municipal corporation is not liable merely because it derives an income from a purely governmental work rather than suffer waste, if the income is purely incidental to the main purpose of the work, but if it devotes property acquired for governmental purposes to private purposes for revenue, when not needed for the use for which it was required, it subjects itself to the danger of common law liability *while the private use continues.* Such liability does not, however, pervade once and for all the entire municipal department which derives the revenue, but extends merely to the building used or individuals working for profit *while so used or working.*" (Italics ours.)

The fact that such a building as the Russ Auditorium belonging to a political subdivision was occasionally rented for private use does not change the general fact of its usual use for governmental purposes. It may be true that, if at the time of the accident in question the auditorium had been rented for a private entertainment and respondent had been injured while attending such entertainment and his injuries caused by the negligence of appellants or their representatives, a judgment in his favor might be sustained, because, for the time being and during the time the auditorium was so rented, a liability might attach under the responsibility of a political subdivision acting in a proprietary and not a governmental capacity. However, such are not the facts in the instant case. The injury to respondent occurred when the building was not leased for private purposes, but when it was being used by the high school district in its governmental capacity.

It has been repeatedly held in California that the collection of rent or revenue by a political subdivision in connection with the use of its property owned, possessed, and used by it in its governmental capacity will not of itself render such political subdivision liable for damages in its proprietary capacity. As was said in the case of Manning v. City of Pasadena, 58 Cal. App. 666, 209 P. 253, 254:

"As we understand the appellant, its position is that, without regard to what may be the rule in other states, the facts of this case do not show that at the time of the accident the city of Pasadena was engaged in the garbage business for profit, and therefore the respondent did not bring himself within any exception to the above rule that cities, as subordinate agencies of the state, are intrusted with the exercise of limited governmental powers for the benefit of the local public in the performance of which, in this state, there being no statutory provision to the contrary [this case was decided prior to 1923], they are not liable for the negligence of their officers, agents and servants through whom they act. The most that can be said in favor of the respondent's position is that the evidence before the trial court showed that in collecting the garbage the city of Pasadena did not lose every dollar it expended, but that it recouped some of its expenses by virtue of its sales. The fact that it collected some moneys to cover expenses did not ipso facto render the city liable to the same rules that would apply to private individuals. In performing the function of collecting garbage and disposing of the same in a sanitary method, and in enacting the ordinance above mentioned and enforcing its provisions, the city was acting within its police powers. In re Zhizhuzza, 147 Cal. 328, 81 P. 955. Conceding, without deciding, that when thereafter, at the incinerator and after the garbage had been gathered together, the city offered the same for sale and did sell the same, that therein and thereby it was performing a purely private business function; it suffices to point out that the accident in question did not arise in the performance of this last-mentioned function, but did arise in the performance of the above-mentioned function of gathering the garbage together. The fact that the city of Pasadena sold the garbage after it had been collected did not operate to convert a governmental function into a proprietary function. The question involved in this case in this state is not an open one.

* * *

"Any doubt that may exist on the subject seems to be entirely removed by the case entitled Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505. The city of Los Angeles had purchased and was maintaining in the San Bernardino mountains a park—'for the purpose of giving any children of said city, at certain prescribed charges to be paid by said children to said city, a vacation, with care, board, and lodging at said camp.' The plaintiff had gone to the camp under an agreement by which, in consideration of $3.75 per week to be paid by him, he was to be received and cared for, boarded, and lodged for two consecutive weeks. While there he accidently fell and broke his arm. The alleged negligence was the failure to provide the necessary care and attention, in view of his injury, occasioning very serious results. There, as here, it was contended that the defendant was engaged in a business enterprise. The court held otherwise. It held that the city was in the due exercise of one of its governmental powers; and regarding the recoupment of expenses the court said (179 Cal. at page 610, 178 P. 507): 'That a small charge is made upon those children going to and staying at the camp, for the purpose of assisting in defraying the cost of maintenance of such children while at the camp, does not change the situation.' "

It seems clear, therefore, that the liability of the appellants, if any, to respondent for damages for the injuries suffered by him must be found in the statute creating such responsibility. Stats. 1923, p. 675. Section 2 of this act is as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[5] Under the provisions of this section the appellants incur no liability from the negligence of any of their agents or employees, since such a liability must be based upon the first section of the act which we have cited. It was not alleged in the complaint, nor was any attempt made at the trial to bring the case within the provisions of said section 1. Therefore, to sustain the judgment we must conclude that the injuries to respondent resulted solely from the dangerous or defective condition of the air corridor in which was constructed the pit into which he fell. We cannot consider any possible negligence on the part of Bertolucci in not warning respondent of the dangers ahead of him or in the possible negligence of any of the employees of the appellants in so adjusting the light switches that the electric light near the southerly door of the air corridor was not illuminated when Bertolucci threw the switch at the head of the stairs and illuminated the northerly light in this air corridor. We must conclude that the air corridor itself, as it was maintained, was in a dangerous or defective condition, which condition alone was the proximate cause of the injuries to respondent.

[6-9] In considering this phase of the case we will make the following assumptions which must be resolved in favor of respondent to enable him to recover: First, that respondent was an invitee of the appellants on the premises at the time of the accident. Second, that the members of the board of education of the San Diego High School district had knowledge and notice of the condition of the pit and the air corridor in which the accident happened, except that they had no notice that one of the lights was not illuminated at the time of the accident. Third, that for a reasonable time after such notice the board of trustees neglected to remedy such condition, without conceding that there was a dangerous or defective condition therein. Fourth, that the injuries to respondent were proximately caused by his fall into the pit in the air corridor. Fifth, that respondent was not guilty of any negligence that contributed in any manner to his injury.

We make these assumptions, not because we are convinced that all, or any of them, are justified and supported by the evidence, but by assuming their correctness, and because of the view we take of the case, it will be unnecessary to consider them further.

This leaves the sole question to be considered by us as follows: Was the air corridor in a dangerous or defective condition at the time of the accident, within the meaning of the statute?

In answering this question, we cannot overlook the fact that the air corridor was constructed and maintained for the purpose of conducting air to various parts of the auditorium and not as a walk or passageway for human beings.

We conclude that the intended use of the air corridor is the controlling factor of this case. What would be a dangerous condition in a sidewalk, road, or other place intended for vehicular traffic or the passage of individuals, would not be a dangerous or defective condition when intended for the purpose of conveying air. This same question was considered in the case of Beeson v. City of Los Angeles (Cal. App.) 300 P. 993, where it was said: "In all of the cases thus far decided the injured party was using the street in which he was injured, or the property which caused the injury, in the usual and ordinary manner in which it was contemplated that the street or property would be used. We are of the opinion that in passing and adopting section two of the act approved June 13, 1923, the Legislature intended to limit the liability of the city for damages resulting from defective streets, works, or property to damages suffered in the ordinary, usual, and customary use thereof. As was said in the case of Commonwealth v. Allen, 148 Pa. 358, 23 A. 1115, 1117, 16 L. R. A. 148, 33 Am. St. Rep. 830: 'As a general rule, highways and bridges are constructed for ordinary use, in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed or by the passing of a very large and unusual weight. A township is not bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them.'"

As we have observed before, the Russ Auditorium was constructed in 1925. As far as appears from the record, no changes were made in the lighting, heating, or ventilating systems between that time and the time of the accident in question. Therefore, if the air corridor was in a dangerous or defective condition at the time of the injury of respondent, exclusive of the question of one light not being illuminated therein, this condition dates back to the construction of the building, and saying that it was then in such a condition is synonymous with saying that the details of construction of the air corridor were dangerous and defective.

Respondent can only predicate his action upon the grounds of suit given by the statute. The burden of proving a dangerous or defective condition, which in this case must amount to a dangerous or defective design of construction, rests upon him. In order to sustain his right of action the jurors, as ordinarily intelligent persons, must have had before them evidence from which they might have drawn the reasonable conclusion that the air corridor was so constructed that reasonable precautions were omitted for the safety of the very inconsiderable number of humans which might be expected to use it as a way for their passage.

There is no conflict in the evidence as to the details of the construction of the air corridor and its exact condition at the time respondent fell into the pit. Two lights were provided in it, and when they were both illuminated the pit was clearly visible to a person using the corridor.

If both the lights had been illuminated when respondent went into the air corridor he could have seen the pit and the danger. The evidence is clear and uncontradicted upon this point. Therefore, if the safeguards provided by appellants for the benefit of one using the air corridor had been in working order and in use at the time, respondent could have seen the pit and would not have fallen into it if he had employed his sense of vision and been reasonably diligent for his own safety.

Omitting from consideration any question of contributory negligence in walking into an insufficiently lighted corridor that was constructed to convey air and not primarily as a passageway for human beings, it seems clear from the evidence that the dangerous or defective condition of the air corridor, if there was such a condition, was caused, not by the lack of safety appliances, in this case lights, but in the failure to use them, or, in other words, to have both lights in such condition that they would be illuminated simultaneously.

The lights were evidently controlled by the main switch at the top of the stairs and also by individual switches near each of them. Some one had so manipulated the southerly switch that the light controlled by it was not illuminated when the main switch was thrown on. This was an act of an individual and not a fault of construction, unless it can be said that there should have been but one control switch for both lights, which we think too far-fetched to need consideration.

Under the provisions of section 2 of the act, which we have quoted, it is necessary that the dangerous and defective condition be brought to the attention of those in authority for a sufficient time prior to the accident to have enabled them to have it corrected. None of the trustees, nor their responsible representatives, had any intimation that this light had been turned off. The discovery of this fact was almost simultaneous with the injury to respondent. Therefore, if this fact rendered the condition of the air corridor defective or dangerous, it was not brought to the attention of those in authority and having power to remedy it before the accident, and therefore no responsibility attaches to appellants by reason of the injuries to respondent resulting therefrom.

This is not an action for damages against any of the employees of the San Diego High School district. The negligence of any of them is not involved here. While such negligence might have been the proximate cause of the injuries to respondent, he has not sought to recover from those employees who might have been guilty of such negligence, but from the high school district, which is not responsible.

Judgment reversed.

We concur: BARNARD, P. J.; GRIFFIN, Justice pro tem.

115 Cal.App. 333

HARVEY v. ACEVES.

Civ. 163.

District Court of Appeal, Fourth District, California.

July 6, 1931.

Rehearing Denied July 27, 1931. Hearing Denied by Supreme Court Aug. 31, 1931.

1. Negligence 🔑136(8).

Contributory negligence becomes question of law only when facts are undisputed and only one conclusion can be drawn.

2. Automobiles 🔑220(3).

Passenger alighting from street car could reasonably expect no other automobile would suddenly come up, and pass automobile which had stopped (St. 1923, p. 560, § 134).

3. Automobiles 🔑245(76).

Whether passenger, struck by automobile while alighting from street car, was contributorily negligent *held* for jury (St. 1923, p. 560, § 134).

4. Trial 🔑253(1).

"Formula instruction" must contain all conditions necessary to verdict.

"Formula instruction" is instruction intended to be complete statement of law upon which jury may base verdict.

5. Trial 🔑234(4).

Instruction on burden of proof respecting contributory negligence, not purporting to state law upon which plaintiff might or might not recover, *held* not "formula instruction."

6. Trial 🔑296(7).

Instruction that defendant must show contributory negligence was "the" proximate cause of plaintiff's injury *held* cured by instructions correctly stating law.

Not only was matter complained of covered in other instructions, but correct rule of law was so specifically stated and restated to jury that it would be unreasonable to hold that verdict arrived at could have been based upon mistaken use of "the" instead of "a" in portion of instruction complained of, especially since it was surrounded and covered with other correct expressions.

7. Trial 🔑295(7).

All instructions upon contributory negligence should be taken together.

8. Release 🔑13(1), 24(2).

Payment of $100 to injured party, by motorist under suspended sentence for reckless driving conditioned upon motorist's payment thereof, *held* not "compromise" or "settlement" of civil action, nor was tender or return of money necessary to maintain action (Pen. Code, §§ 1377–1379).

Circumstances disclosed that, following defendant motorist's collision with plaintiff pedestrian, defendant was charged before justice of peace and found guilty of reckless driving in connection with accident. Justice, having learned that family of pedestrian was in want, gave defendant suspended sentence upon condition that she contribute something to well-being of pedestrian's family "for the present time," which amount was later paid in defendant's behalf. Evidence showed that Pen. Code, §§ 1377–1379, respecting compromises of offenses, were not complied with, and there was no agreement that pedestrian accepted money as satisfaction for his injury.

[Ed. Note.—For other definitions of "Compromise" and "Settle; Settlement," see Words and Phrases.]

9. Judgment 🔑875.

Payment to injured pedestrian in motorist's behalf, made to satisfy condition of suspended sentence for temporary relief of distress, *held* not to be credited upon civil judgment for pedestrian.

10. Appeal and error 🔑932(1).

Matter of payment to injured pedestrian having been presented to jury, defendant not having asked for credit, and pleadings not having been called to appellate court's attention, court assumed that judgment covered only damages shown to have been suffered by pedestrian irrespective of such payment.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Samuel Harvey against Edythe L. Aceves. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Edward J. Kelly, of San Diego, for appellant.

Adam Thompson, Renwick Thompson, and Gordon Thompson, all of San Diego, for respondent.

BARNARD, P. J.

This is an appeal from a judgment in favor of the plaintiff based upon the verdict of a jury, in an action for damages for personal injuries. The plaintiff was struck by an automobile driven by the defendant, at a street intersection in the city of San Diego, just after he had alighted from a street car in which he had been a passenger. He had taken but one or two steps away from the street car toward the curb, when the automobile struck him, knocking him from 10 to 15 feet and seriously injuring him. The automobile proceeded across the street intersection, up over the curb, across the sidewalk, and crashed through the front porch of a house, where it came to a stop, approximately 99 feet from where the plaintiff lay.

[1] The first point urged by appellant, as a reason for reversal, is that it conclusively appears that the respondent was guilty of contributory negligence. This contention is based in part upon certain statements made by the respondent to the effect that when the door of the car was opened, he got off and was struck when he was taking the second step; that he did not see the automobile driven by appellant at any time before it struck him; that the automobile was going so fast he couldn't tell much about it; that before he stepped off the street car he looked toward the rear to see if there were any automobiles approaching; that he saw only one which had stopped behind the car; that he stepped off frontwards; that he looked around to see if there was anything coming before he got off; and that before he got off the street car and after the door was opened, he looked with his head outside the door but did not see any automobile approaching until he was struck. In addition, appellant relies upon certain testimony to the effect that as she approached the intersection in question, she was traveling parallel to the street car, about five feet on the right-hand side thereof; that as she approached the intersection the street car kept on as though no stop was intended, and actually passed over the pedestrian lane before it stopped; that when she first noticed the street car slowing down its front was about at the prolongation of the nearest curb line of the cross street, at which time she was traveling about twelve miles per hour; and that as the street car passed over the pedestrian path she was driving about opposite the center of the street car. From this evidence it is argued that respondent either did not look at all or, if he did, did not look with sufficient caution. It is further argued that he is presumed to have seen what he could or should have seen; that there is no evidence of excessive speed on the part of appellant; and that the automobile must have been very close to him and plainly visible when he stepped from the street car. It is earnestly insisted that these facts disclose contributory negligence on the part of the respondent, as a matter of law. In support of this contention appellant cites the following cases: Lord v. Stacy, 68 Cal. App. 517, 229 P. 874; Barnett v. Railroad Co., 99 Cal. App. 310, 278 P. 443; Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788; Young v. Railroad Co., 208 Cal. 568, 283 P. 61; Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 P. 185; Davis v. Breuner Co., 167 Cal. 683, 140 P. 586; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493. We think, however, that none of these cases are controlling under the facts before us. Under well-established rules the question of contributory negligence becomes one of law rather than one of fact, only when the facts are undisputed and when they are such that only one conclusion on the issue of plaintiff's negligence can be drawn therefrom by reasonable minds. As was said in the case of White v. Davis, 103 Cal. App. 531, 284 P. 1086, 1091: "Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

[2, 3] While appellant testified that the street car had passed its usual stopping place and stopped suddenly near the center of the intersection, when a man swung off the car directly into her path, there was abundant testimony by other witnesses, most of them disinterested, that several passengers had signaled their desire to alight at this street; that the street car stopped at the usual stopping place in the pedestrian lane; that it came to a stop gradually; that the street car doors, which were at the front end of the car, were not opened until the car had stopped; and that the plaintiff looked and saw one automobile stopped behind the street car, but saw no other automobile approaching. The driver of the automobile which had stopped behind the street car testified that he saw the street car was stopping and stopped about ten feet behind it, and that while so stopped, the appellant's car passed him at a rate of speed which he estimated at between 25 and 30 miles an hour. The appellant testified on cross-examination that shortly after the accident she signed a statement in which she said she saw the street car was going to stop and speeded up to pass it, and that just before she speeded up she was going about 20 miles an hour. There was evidence that her automobile completely tore a porch away from a house, ninety-nine feet beyond the point where the respondent was knocked, leaving the porch column hanging. The evidence is sufficient to show that the intersection is what is known as a blind corner, within the meaning of the California Vehicle Act, there being a business building on the corner which interfered with the vision of the appellant, as

she approached. As in force at the time of this accident, section 134 of the California Vehicle Act (St. 1923, p. 560) read in part as follows: "In passing any railroad, interurban or street car while passengers are alighting from or boarding the same, vehicles shall be operated or driven on the right-hand side of such cars and at a rate of speed not exceeding ten miles an hour and no portion thereof or of any load thereon shall come within six feet of the running board or steps of such cars, and shall at all times be operated with due care and caution so that the safety of such passengers shall be assured. * * *"

There was evidence that there were no safety zones or police officers or traffic signals at the corner in question. Not only was the evidence sufficient, as admitted by appellant, to show negligence upon her part, but it is of such a nature as to make the question of contributory negligence on the part of the respondent rather clearly one of fact, and not one of law. The evidence is conflicting. The respondent took some precaution for his own safety. It by no means appears that reasonable minds could only draw the conclusion that the plaintiff was negligent, especially in view of the duty imposed upon the appellant by law, not to pass that intersection at an excessive rate of speed, and, in passing the street car while passengers were alighting therefrom, to operate her automobile "with due care and caution so that the safety of such passengers shall be assured." The evidence warrants the assumption that the appellant, at a rapid rate of speed, passed another automobile the driver of which had observed that the street car was stopping, and who had stopped ten feet behind it, and then passed the standing street car. The inference might reasonably be drawn that when the plaintiff looked and saw the other automobile stopped behind the street car, the machine driven by the appellant was some distance back, and it may even have been sufficiently to the rear of the street car to have been not visible. In any event, respondent could reasonably have expected that no other automobile would suddenly come up and pass the automobile he saw standing there, and rapidly pass the street car while he was alighting therefrom. Under the evidence and the reasonable inferences that could be drawn therefrom, it cannot be said that the plaintiff was guilty of contributory negligence as a matter of law. See Mann v. Scott, 180 Cal. 550, 182 P. 281; Bolles v. Boone, 66 Cal. App. 238, 225 P. 775; Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078; Koehl v. Carpenter, 47 Cal. App. 642, 191 P. 43. Under such circumstances, we think the issue of the contributory negligence of the respondent was properly submitted to the jury.

[4-7] Appellant also contends that, assuming the issue of contributory negligence was properly left to the jury, the court committed reversible error in instructing the jury as follows: "You are further instructed that, where contributory negligence is pleaded as a defense to an action, the burden of proof of such contributory negligence, as alleged in this case,—is on the defendant; and contributory negligence cannot be presumed,—but must be proved by the party alleging it. Contributory negligence is an affirmative defense to be established by the defendant, and such contributory negligence as alleged by said defendant herein, *must be shown by a preponderance of the evidence to have been the proximate cause of the plaintiff's injury.*"

The portion shown in italics is the part criticized. It is argued that this, in connection with the correct definition of proximate cause given by the court, in effect instructed the jury that in order to sustain her defense of contributory negligence, it was necessary for appellant to establish that the negligence of the plaintiff was the sole and only cause of the injuries of which he complains. While it is admitted that the jury was elsewhere correctly instructed as to the law governing the issue of contributory negligence, it is argued that this does not cure the error for the reason that the instruction complained of is what is known as a "formula" instruction. It is of course true that a formula instruction, that is, one intended to be a complete statement of the law upon which the jury may base a verdict, must contain all of the conditions which are necessary to such a verdict. Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, 238. In that case the instruction complained of left out of consideration the subject of contributory negligence and proximate cause, although the instruction told the jury that its verdict should be in favor of the plaintiff, if they should find certain things to be true. The court held that it was intended as an instruction only upon one branch of the case and did not purport to be a complete statement of the law upon which the plaintiffs might recover. In commenting thereon, the court said: "We are not prepared to say, however, that said instruction was given to, or accepted by, the jury as a 'formula' instruction." In the case of Saltzen v. Associated Oil Co., 198 Cal. 157, 244 P. 338, 339, it was claimed that a second instruction upon the subject of burden of proof was contradictory to a prior instruction on the same subject, in connection with contributory negligence. The court said: "In said first given instruction the court was dealing specifically, expressly, and only with the subject of contributory negligence, and the jury could not have misunderstood its plain and explicit terms. In the second of said instructions the subject of contributory negligence was not mentioned, and it is difficult to see how its generalities, however inapt, could have wrought confusion in the minds of the jurors upon that subject. The older rule that injury was to be presumed from error has not obtained in this court since the decision of the case of Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 P. 238, and the cases which the appellant J. D. Saltzen cites as upholding his above contention do not, when examined, sustain it. In the case of Rathbun v. White, 157 Cal. 248, 107 P. 309, there was a specific instruction which was erroneous and highly prejudicial, and this court held that the error created thereby would not be cured by a merely general instruction correctly stating the rule but giving it no specific application. The reverse of that situation is presented here wherein we find that the specific instruction correctly sets forth the rule as to where the burden of showing contributory negligence lies, and the utmost that the appellant J. D. Saltzen can claim is that its effect has been destroyed by the later giving of a general instruction which, however erroneous, does not purport to cover the subject to which the correct and specific instruction relates."

In Alloggi v. Southern Pacific Co., 37 Cal. App. 72, 173 P. 1117, 1119, the court said: "We are not unmindful of the rule that conflicting and contradictory instructions upon a material phase of the case require a reversal where it cannot be ascertained from the record before us which instruction prevailed or was likely to prevail with the jury. While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instructions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law was so specifically stated and restated to the jury that we feel that the idea in the several correct instructions must have preponderated in the considerations of the jury, and that as a consequence the erroneous instruction neither contributed to nor controlled the verdict."

In Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391, 392, the court said: "The court, after charging as to the duty of the driver of an overtaking vehicle to sound an audible signal before passing a vehicle proceeding in the same direction, and after instructing the jury that if plaintiff was under such a duty and failed to sound his horn he was guilty of negligence, continued to the effect that if such negligence was found to be 'the proximate cause' of the injury, the verdict should be against the plaintiff. Appellants insist that the use of the article 'the' instead of the article 'a' before the words 'proximate cause' constituted reversible error. The sentence containing the objectionable words is immediately preceded by a sentence requiring the jury to determine whether plaintiff's negligence, if any, was 'a proximate cause' of the injuries received by him. Moreover, the jury was elsewhere fully and correctly instructed on the law of contributory negligence. Considering the instructions as a whole, we consider the possibility that the jury could have been misled by the error complained of so remote as to be altogether unworthy of serious consideration."

In Straten v. Spencer, 52 Cal. App. 98, 197 P. 540, 543, the court said:

"The instructions, as modified, amount to this: That if plaintiff was guilty of negligence and that negligence was the sole cause of the injury, then he could not recover. Of course, that is true, but defendants desired to have the court instruct the jury that, if plaintiff's negligence contributed to and was therefore a proximate cause of the injury, he could not recover. True, the court did not use the definite article, but to declare negligence to be 'proximate cause' necessarily implies that it is the only proximate cause.

"The question then arises whether this action of the court constituted prejudicial error. The answer manifestly depends upon whether the principle was covered by other instructions."

In applying these rules to the case before us, we are of the opinion that the portion of the instructions which is complained of by appellant, and which is above set forth, cannot be considered a formula instruction, and that the same does not purport to be a complete statement of the law upon which the plaintiff might or might not recover. And that it did not purport to be a complete statement of the law upon the issue raised by the appellant's plea of contributory negligence. It was, in fact, only a portion of the law given upon the subject of contributory negligence and related only to the burden of proof in that regard. This case is before us upon a bill of exceptions, which sets forth all of the instructions given, in a body, without distinguishing which were separate instructions. Other portions of the instructions which covered the subject of contributory negligence both preceded and followed the portion complained of. Several times before, and at least once following this portion, the court used such language as the following: "Guilty of negligence directly contributing to his injury," "which negligence proximately contributed to the injury," "that his negligence proximately contributed to the injuries of which he complains," "you are not to concern yourself with the question as to whether the plaintiff's contributory negligence was equal to or greater than or less than that of the defendant's negligence," and "or that the negligence, if any, of Samuel Harvey was in whole or in part the proximate cause of his injury." Upon the question of contributory negligence the court elsewhere instructed the jury as follows:

"You are instructed that when the plaintiff was alighting from the street car upon which he had been riding it was his duty under the law to have looked in the direction in which he intended to move and to have looked in the direction from which motor traffic might ordinarily have been expected to advance, before attempting to cross from the street car to the sidewalk; and if he failed to do so and you find and believe from the evidence herein that by doing so he would have seen the defendant's car and could have stopped and thus avoided injury, then he was guilty of negligence directly contributing to his injury and he cannot recover herein and your verdict must be in favor of the defendant and against the plaintiff notwithstanding the fact, if it be a fact, that the defendant may have been guilty of negligence as charged by the plaintiff."

"You are instructed that if you find that there was negligence on the part of the defendant in the manner in which she drove and operated her automobile, and that the plaintiff was injured, still the defendant is not liable, if, by using ordinary care, the plaintiff might have avoided the automobile and the collision and the injury. If you find that on the occasion in question the plaintiff did not use ordinary care or was himself guilty of negligence,—which negligence proximately contributed to the injury,—then the plaintiff cannot recover in this case; that, to entitle the plaintiff to recover damages for the injuries sustained by reason of the accident in question, he must show the injuries to have been proximately attributable to the misconduct of the defendant. In determining either the negligence of the defendant or the contributory negligence of the plaintiff, the test is: What would an ordinarily prudent man have done under the existing circumstances?"

"You are instructed that the law does not concern itself with the relative degree of negligence of the plaintiff and the defendant. Thus, if you find that the defendant was negligent and that her negligence proximately caused the injury of which the plaintiff complains, and you further find that the plaintiff himself was negligent, and that his negligence proximately contributed to the injuries of which he complains, you are not to concern yourself with the question as to whether the plaintiff's contributory negligence was equal to or greater than or less than that of the defendant's negligence. Contributory negligence is an absolute bar to the plaintiff's recovery regardless of its relative degree."

"You are further instructed that the law of contributory negligence in the State of California is so well settled that it may be briefly summarized. Contributory negligence is a matter of defense, and the burden of proving it rests upon the defendant. Therefore, it is not incumbent upon the plaintiff to establish affirmatively that Samuel Harvey, the plaintiff herein, was free from negligence. It is incumbent upon the defendant to establish affirmatively the existence of contributory negligence on the part of Samuel Harvey or that the negligence, if any, of Samuel Harvey was in whole or in part the proximate cause of his injury, or that it contributed to his injury. Again, the question of whether or not a party has been guilty of contributory negligence is usually one of fact for the jury's verdict; and it is only where no fact is held in doubt and no deduction or inference other than negligence can be drawn by the jury from the evidence that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury."

Not only was the matter complained of covered in these other instructions, but it can also be here said that "the correct rule of law was so specifically stated and restated to the jury" that it would be unreasonable to hold that the verdict arrived at could have been based upon the mistaken use of "the" instead of "a" in the portion of the instruction complained of, especially where it was so surrounded and covered with other correct expressions, as here appears. All of the instructions upon the subject of contributory negligence should be taken together, and, so taken, it seems apparent that they could not have misled the jury. It also appears that the portion complained of is, in fact, a general instruction. Although the court refers to the fact that contributory negligence was pleaded in this case, it is fully apparent that the court was attempting only to give a general instruction upon the subject of burden of proof, in connection with the general subject of contributory negligence. On the other hand, several of the other instructions upon contributory negligence were much more specific, the last, in particular, referring to the plaintiff by name, and specifically telling the jury that if the negligence, if any, of Samuel Harvey was in whole or in part the proximate cause of his injury or if it contributed to his injury, he could not recover. In our opinion such express instruction on the very point in issue, so frequently repeated, should not be held to be overcome by such an error as here appears in a more general instruction.

[8] The other point raised by appellant is that respondent's claim had been fully compromised and settled by the payment of $100 to him. It appears that the appellant, following the collision out of which this action arose, was arrested and charged with reckless driving in connection with this particular incident. After a plea of not guilty she was tried before a justice of the peace and found guilty. Sentence was deferred until the next day and the justice of the

peace, having learned that the family of this respondent was in want, gave the defendant a suspended sentence upon the condition that she should contribute something to the well-being of this respondent's family "for the present time." She was given thirty days within which to pay the sum of $100 for that purpose and, later, that amount was paid in her behalf. Appellant maintains that this constituted a complete compromise and settlement of respondent's claim, under the terms of sections 1377, 1378, and 1379 of the Penal Code. Our attention is called to the fact that the justice of the peace testified that "the misdemeanor charge was compromised." It is argued that irrespective of any understanding on the part of this respondent, the justice of the peace was, in fact, the agent of this respondent and therefore the understanding between the justice of the peace and this appellant is conclusive and binding upon this respondent. And that since the $100 was not returned or tendered prior to the trial of this action, under the authority of Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708, the respondent herein could not recover. It is conceded that at the time these events took place the justice of the peace did not have these sections of the Penal Code in mind. It is argued that whether he intended to or not, he followed them, and that this constituted a full settlement of the civil claims of this respondent as well. It fully appears from the evidence that these sections of the Penal Code were not complied with, in that the injured party never did appear before the court and did not at any time acknowledge that he had received satisfaction for his injury and nothing was done in the premises before the trial. It also appears that the defendant in the criminal proceeding was not discharged therefrom but was found guilty, and sentence was imposed, and this sentence was suspended upon the condition that the defendant contribute $100 toward the relief of the immediate needs of the family of the injured party. Not only did the respondent not agree to accept this money as satisfaction for his injuries, but if it should be conceded that the justice of the peace was acting as his agent, no such agreement appears between such agent and the appellant. By no stretch of the imagination can it be said that there was a meeting of the minds of the parties upon a settlement of respondent's claims. The justice of the peace testified that he was requested by appellant's representative to take the check "out to the Harvey family" and that when he delivered the check "Mr. Harvey asked me if this was in settlement for anything, or had anything to do with any damages. I told him no,—that it was merely a matter that had been worked out in the Police Court to render him some assistance." He further testified that the arrangement between himself and the appellant was that the sentence, either a fine or a jail sentence, would be suspended "on the condition that she afford them some relief." He further testified: "I had in mind that Miss Aceves was civilly liable for the damage done to Harvey. I didn't delve into that, I didn't go into that. I was simply trying to figure out the best way in which the criminal matter could be disposed of." And also: "Just before this check was received by me and paid over, I did not have any conversation with Miss Aceves as to paying it for her in settlement of all claims of any kind with Mr. Harvey. I never saw Miss Aceves from the time that I pronounced the sentence until I met her yesterday in the courtroom. I didn't have any talk with anyone on her behalf that this would be a payment or satisfaction of any damages that might be due Harvey." The respondent testified that when the justice of the peace brought the check to his house "we asked Judge Kelly if receiving this check would, in any way, hurt us, and he says not; that it was intended for our immediate uses. He said he was bringing the check because we were in need of groceries,—something to eat." Respondent's wife testified: "Judge Kelly said the check was for our needs. It was not to settle any claim for damages." The justice of the peace also testified: "The condition of the family was pathetic. Mr. Harvey was unable to carry on a conversation. He seemed to be in a dazed condition. He did not know whether he was going to get well or not. His wife was very much concerned, and the great concern of the family seemed to be whether or not Mr. Harvey was going to get well." He also testified that when he suggested suspending the sentence and this money being paid, "the defendant then asked whether or not that would interfere with their collection of the insurance. Mr. Beck, the city prosecutor, said that it in no way involved any settlement." In our opinion these circumstances entirely fail to show any compromise or settlement of the civil action now before us. Nor do we think any return of the money or tender thereof was necessary in order to maintain this action.

[9, 10] Although no such question has been raised by appellant, whether the $100 which was thus paid by another on her behalf should be credited upon the amount of the judgment, might present a somewhat closer question. However, the evidence sustains the conclusion that the money paid was in the nature of a contribution for the purpose of temporarily relieving a condition of distress. Although it was a forced contribution, it was gladly made in pursuance of another object and purpose which were most important to the defendant in the criminal proceedings. So far as she is concerned, she is actually entitled to no more credit than she would have been, had the contribution been to any form of charity. The paying of the money was

more in the nature of doing penance than a payment upon an obligation. Not having been made for the purpose of covering any of the claims involved herein, the payment is in fact not involved in this action. See Dalton v. Pacific Electric Co., 7 Cal. App. 510, 94 P. 868. In any event, the entire matter was presented to the jury, and appellant not having asked for such a credit and the pleadings not having been called to our attention, it may be assumed, all intendments being in favor of the judgment, that the judgment covers only damages actually shown to have been suffered by the respondent, irrespective of any such payment or donation. Whether or not the action of the justice of the peace in the criminal proceeding was strictly legal is not involved here, although it may be said that the circumstances show that his action had much to commend it.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

LORANGER v. NADEAU. *

Civ. 7762.

District Court of Appeal, First District, Division 2, California.

July 2, 1931.

Rehearing Denied August 1, 1931. Hearing Granted by Supreme Court Aug. 31, 1931.

1. Torts ⚷2.

Substantive law defining one's rights regarding torts is law of state where tort occurs.

2. Venue ⚷8.

Tort is transitory action and under certain circumstances may be tried in any court which obtains jurisdiction of parties.

3. Evidence ⚷29.

Automobile guest suing host for injuries *held* not required to plead law of state where automobile accident occurred (Code Civ. Proc. § 1875, as amended by St. 1927, p. 110).

> Under Code Civ. Proc. § 1875, as amended by St. 1927, p. 110, courts will take judicial notice of the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states.

4. Evidence ⚷5(2).

It is common knowledge that nearly every automobile operator carries insurance.

5. Courts ⚷8.

California court did not have jurisdiction of automobile guest's common-law action against host for injuries in Oklahoma accident, since Oklahoma law allowing such action was contrary to moral standards fixed by California law (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, provides that automobile guest shall have no right of recovery against owner or driver or person responsible for operation of automobile for injury sustained, except in cases of gross negligence. The amendment to the statute was adopted for the purpose of preventing certain immoral or fraudulent practices, it being claimed that in certain instances the operator of the automobile and the passenger riding with him had entered into collusive agreements for the purpose of compelling the insurance company to pay for damages.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Guy D. Loranger, an infant, by Annette Lambert, his guardian ad litem, against Hubert J. Nadeau. From the judgment, defendant appeals.

Reversed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Vincent W. Hallinan, Dan Malloy, and James J. Roach, all of San Francisco, for respondent.

STURTEVANT, J.

Prior to the summer and autumn of 1929, the defendant had been residing in San Francisco. He was assisting his father in the latter's business. In the early part of the year, the defendant, his mother and sister entered the automobile owned by the defendant and went to Montreal on a visit. When they started to return, the plaintiff joined them as a guest, and the party started for California. They had arrived in the state of Oklahoma and at about half past four in the afternoon of November 15, 1929, while pursuing their journey west, an accident happened. At that time, the defendant was driving the automobile and the plaintiff was seated at his right. They were traveling along the right-hand side of the highway, which at that point was running down hill toward a gully where the highway turned to the left and then started up hill. At a point one hundred feet or more from the gully, another automo-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 10 P.2d 63.

bile, which was immediately ahead, slowed down or stopped. The defendant feared that he would hit that automobile and, therefore, pulled to the left. As he did so, another automobile approaching from the opposite direction came into view and came forward at a high rate of speed. Before the defendant could stop his car, the two cars met in a head-on collision. In that collision, the plaintiff was injured, and after he recovered he commenced this action against the defendant to recover damages. In his complaint he pleaded the fact of the date and place of the accident, and he also alleged: "* * * That said defendant H. J. Nadeau so carelessly and negligently operated and drove said automobile as to cause the same to collide and strike with great force and violence the automobile being driven and operated by said first Doe. * * *" Plaintiff's complaint contains no allegation purporting to plead the laws of Oklahoma.

[1-3] The defendant appeared and filed a demurrer in which, among other things, he claimed that the complaint did not state facts sufficient, and also that the trial court had no jurisdiction of the subject-matter of the action. He cites section 141¾ of the California Vehicle Act (St. 1929, p. 1580). That section provides: "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. * * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the * * * gross negligence of such owner, driver or person responsible for the operation of such vehicle. * * *" Thereupon the defendant contends that the complaint did not state facts sufficient, because it did not show on its face that the accident was brought about by defendant's gross negligence. The point is without merit, because the complaint showed on its face that the accident occurred in Oklahoma, and it is settled that the substantive law defining one's rights with reference to torts is to be found in the laws of the state where the alleged tort occurs. 12 C. J. 452. The claim that the superior court of the state of California in and for the city and county of San Francisco had no jurisdiction of the subject-matter rests on the fact that the accident occurred in Oklahoma and the contention that the action should be tried in that state. However, a tort is a transitory action, and, under certain circumstances, may be tried in any court which obtains jurisdiction of the parties. Panama Electric Ry. Co. v. Moyers (C. C. A.) 249 F. 19, 20. The defendant contends that the plaintiff should have pleaded the law of Oklahoma, and in this connection he makes a number of points, all of which are but different methods of expressing the same contention. It was formerly the law that courts would not take judicial notice of the laws of other states or courts. 1 Chitty on Pleading, p. 216. When such was the rule, the law of the sister state should be pleaded and proved like any other fact. Holmes v. Broughton, 10 Wend. (N. Y.) 76, 25 Am. Dec. 536. The rule as stated in that case was adopted in this state in an earlier decision. Thompson v. Monrow, 2 Cal. 99, 100, 56 Am. Dec. 318. However, in 1927, our statute was amended (St. 1927, p. 110) and at the present time the courts will take judicial notice of "the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states." Code Civ. Proc. § 1875. It has frequently been held that whenever the courts have the power to take judicial notice of certain facts the party relying thereon need not plead nor prove such facts. French v. Senate, 146 Cal. 604, 607, 80 P. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756. In some of the states it has been the law for many years that courts will take judicial notice of the laws of the sister states. In those particular states, the decisions have uniformly held that it was not necessary to plead or prove the laws of a sister state. 2 Wharton on Conflict of Laws, 1533. Therefore there is no merit in the point regarding the plaintiff's alleged failure to plead the laws of the state of Oklahoma.

[4, 5] Again pointing to section 141¾ of the California Vehicle Act, the defendant asserts that under the doctrine of comity the courts of this state will not take jurisdiction of a common-law action such as pleaded in plaintiff's complaint, because to do so would operate to give this plaintiff an advantage that our statute has withdrawn from persons injured in the state of California, and will place the defendant, a citizen of this state, in a more disadvantageous position than he would be in had the accident occurred in the state of California. He cites and relies on our decision in the case entitled Hudson v. Von Hamm, 85 Cal. App. 323, 259 P. 374. In that case, the plaintiff pleaded a statute of Hawaii which authorized actions against the parents for torts committed by a minor child. The decision points out that we have no such statute, and that the law of this state on that subject is the common law. In the instant case, the accident occurred in the state of Oklahoma, where the common law obtains. In this state, the law on the subject is contained in section 141¾ of the California Vehicle Act. That section came into our law by the amendments to the California Vehicle Act which were recently adopted (Stats. 1929, chap. 787, p. 1580). Commencing with 1850, the common law has been the basic law of this state, ex-

cept as modified by the Constitution and the statutes. The rules of the common law regarding the award of damages to a servant when injured in the course of his employment was abrogated by statute, but at the same time a more just and efficacious remedy was given. Stats. 1913, chap. 176, p. 279. With that single exception we are not aware that any of the common-law remedies have been taken away, except as that has been done by the section 141¾ of the California Vehicle Act. One necessarily pauses to ask the reason for that change. The reason, however, is most apparent. From childhood we were taught never to criticize a host who accidentally did us an injury. Since the advent of automobiles, which are comfortable to ride in and which are generally covered vehicles, it is not an insignificant courtesy when the operator offers a gratuitous ride to one who is walking in the hot sun or facing a storm. If, while so riding, an accident occurs, it is the greatest of ingratitude if the passenger harshly criticizes his host either outside or within the courts. It is a matter of common knowledge that nearly every operator carries insurance. It has been claimed in the courts that in certain instances the operator of the automobile and the passenger riding with him have entered into collusive agreements for the purpose of compelling the insurance company to pay for the damages. Such acts were either grievous fraud or tantamount thereto. It is thus perfectly clear that when the Legislature adopted the amendment to the statute it did so for the purpose of preventing certain immoral or fraudulent practices. In Reynolds v. Day, 79 Wash. 499, 140 P. 681, 683, L. R. A. 1916A, 432, the Supreme Court of Washington said: "Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not *contrary to the public policy* of the state where the action is brought, *nor contrary to abstract justice nor pure morals* nor calculated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions ex contractu and actions ex delicto. In all such cases, the right to recover is governed by the lex loci and not by the lex fori." (Italics ours.) The expressions italicized run through the books. 2 Wharton on Conflict of Laws, sec. 480b; 22 Am. and Eng. Ency. of Law, 1379–1380; 12 C. J. 439; Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 120 N. E. 198; Foss v. Richards, 126 Me. 419, 139 A. 313; Strawn Mercantile Co. v. First Natl. Bank (Tex. Civ. App.) 279 S. W. 473. When the lex loci is contrary to the policy of the lex fori, the courts have ruled each case on liberal rules of interpretation. But there are certain definite bounds. In the case of McManus v. Red Salmon Canning Co., 37 Cal. App. 133, 173 P. 1112, the court was considering a statute in force in Alaska. At page 137 (37 Cal. App., 173 P. 1112, 1114) the court said:

"The creditors and the expenses of administration are to be paid out therefrom, if necessary, the balance going to the heirs, if there are any; and, in default of heirs, the state takes by escheat. We fully agree with counsel for respondent that this right of action, created by section 1185, is contrary to the policy of the laws of California, for our Legislature in creating the action for wrongful death, which was unknown at common law, followed the provisions of Lord Campbell's Act, adopted by Parliament in 1846, and our courts have adopted the construction given that act in Great Britain and in those states which have similar laws, namely: That the action for wrongful death has been created for the benefit of those relatives of the decedent who have the right to look to him for aid and support, and that the damages to be given are limited to the actual pecuniary loss suffered by those relatives by being deprived of such aid.

"Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make a resident of our state pay damages for the death of decedent where no one was shown to have suffered any pecuniary loss thereby."

But counsel do not cite any authorities and we have found none that in actions either ex delicto or ex contractu, when, as in the instant case, the lex loci is contrary to the moral standards fixed by the lex fori, the courts will take jurisdiction. It follows that the defendant's demurrer should have been sustained.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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115 Cal.App. 302

JONES et ux. v. INTERSTATE OIL CORPORATION et al.

Civ. 7696.

District Court of Appeal, First District, Division 1, California.
July 1, 1931.

Rehearing Denied July 31, 1931. Hearing Denied by Supreme Court Aug. 27, 1931.

1. Action 🔑**6.**

Declaratory judgment statute *held* to support judgment requiring lessee to drill oil well to greater depth or permit receiver to do so, although such depth was in excess of that required by lease (Code Civ. Proc. § 1060).

2. Mines and minerals ⟹78(1).

Although lessee had drilled oil well to depth required by oil lease, lessee could be required to drill well to greater depth or permit receiver appointed by court to do so, where necessity required deeper well to protect lessor's rights to oil strata discovered after execution of oil lease.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action for declaratory relief by Jonah Jones and wife against the Interstate Oil Corporation and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Chapman & Chapman, of Los Angeles, for appellants.

Jonah Jones, Jr., and Harry L. Cohn, both of Long Beach, for respondents.

MURPHY, Justice pro tem.

This is an action for declaratory relief with respect to an oil and gas lease in the Signal Hill territory in Los Angeles county.

At the time of the execution of the lease in question, no oil sand was known nor suspected to exist in that area at a greater depth than between four to five thousand feet, and no oil drilling companies had had the courage at that time to make the necessarily large expenditures incident to prospecting below that level.

The lease in question was executed in February, 1923, and provided, among other things: "The party of the second part (appellants) shall, within five days from date hereof resume operations to complete the oil well now on Lot Eighteen (18) Block 'H,' Signal Hill Tract, and will actually start work on said well within said time, and shall continue said operations diligently, continuously and in good faith until an oil well is brought in and is producing in paying quantities as is provided in section 'Fourth' hereof or until a well has been sunk to a depth of four thousand (4000) feet."

Under the lease the appellants proceeded to drill and brought in a producing well at a depth of approximately 4,700 feet, which well has produced between 50 and 100 barrels of oil per day, which amount, however, is not regarded as a valuable producing oil well in that district.

In 1927 a discovery well had been drilled adjacent to this property to a depth below the sands known or suspected to exist at the time this lease was entered into, and it was found, and it was conceded at the trial of this action, that there existed a far more valuable deposit of oil sands at a depth from 5,200 to 7,000 feet than had ever been known to exist in the upper sands. Immediately after this discovery wells were immediately drilled to penetrate the newly discovered and deeper sands, and at the trial of the action there were actually on production a great number of wells which it was known were draining and depleting the oil from the demised premises from the sands that existed at the newly discovered and lower depths.

Under these circumstances, and without any conflict in the evidence, the court made findings with respect to the pertinent issues involved in this case which reflect the situation with greater clarity than any narration of facts that might be made by us. After reciting the fact of the execution of the lease, description of the property and the parties to the lease, the court found as follows with respect to the pertinent issues of this case:

"It is true that within eleven months last past there has been discovered, and there is now known to exist in said oil field, an oil zone which was at the time of the execution of the aforesaid lease unknown and undiscovered, and in fact was undiscovered and unknown until some eleven months ago, said newly discovered zone lying below a depth of approximately 5200 feet and extending to a known depth of some 7400 feet; it is true that this zone is known to be very productive of petroleum, oil and gas, and a number of wells have been brought to production with an initial flow of 2000 to 4500 barrels per day, and some of said wells have already produced as much as 500,000 barrels of oil since being placed on production.

"It is true that said newly discovered zone underlies the property herein described in the same manner and to the same extent as said zone is found in other sections of said oil fields; it is true that said oil zone lying below the depth of 5200 feet and extending to a known depth of 7400 feet, has been known to exist for some eleven months last past; it is true that plaintiffs made repeated demands upon defendants to drill said zone and produce oil therefrom and that defendants failed and refused and still fail and refuse so to do.

"It is true that there now exists between plaintiffs and defendants an actual controversy regarding the legal rights of the plaintiffs and the legal duties of the defendants respectively with respect to said lease and the premises therein demised and that the plaintiffs contend and allege that the defendants are legally bound by the terms of the lease and by the implied covenants hereto appertaining, to drill to said zone and pro-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

duce oil therefrom; the Court further finds that the defendants contend that there is no legal obligation requiring the defendants to so drill and contend that the terms of the lease have been fully complied with, and contend they may hold the property under said lease, without developing or producing oil from said 5200 foot to 7400 foot zone, and there is no obligation on their part to attempt so to do, and defendants have failed, neglected and refused, and still fail, neglect and refuse to drill to said deeper sands and yet prevent the plaintiffs from developing the same.

"It is true that the zone from which the defendants are now producing oil lies about 4500 feet below the surface of the land, and the production which the defendants are procuring from said zone is less than 100 barrels of oil per day; it is true that the property hereinabove described is of sufficient area to permit plaintiffs to erect a derrick and drill a well to the deep sand; it is true that the operations of the defendants in producing from said zone lying above 5200 feet, will not be interfered with by allowing plaintiffs to develop and produce oil from the zone lying below 5200 feet.

"It is true that further drilling operations might be carried on without harm or injury to the present production or harm or injury to the present well now producing above 5200 feet below the surface of the land, or in any way detracting from the present or future production of said well.

"It is true that said newly discovered oil zone lying at the depth of 5200 feet to 7400 feet was unknown to the parties to the lease hereinabove referred to at the time of the execution thereof, and it is true that neither of the parties thereto contemplated the drilling of a well to the deep sand at the time of the execution of the lease hereinabove referred to because of the lack of knowledge of its existence.

"It is true that the substantial rights of the plaintiffs are in jeopardy in permitting further delay on the part of the defendants by not drilling into and producing oil from the zone lying between 5200 to 7400 feet; * * * it is true that substantial justice may be done only by declaring that defendant immediately begin an active, bona fide, properly financed drilling program to tap said deeper sand lying at approximately 5200 feet to 7400 feet within ten days from date hereof.

"The Court finds that there is imperative necessity for the immediate drilling of a well to said deeper sands, * * * and any delay in the drilling of said well would act to the irreparable injury of the plaintiffs. * * * The Court finds that a receiver should be appointed herein to act under the following conditions: In the event that the defendants do not within ten days from July 25th, 1928, commence the construction and installation of a heavy rotary rig upon said premises and/or shall not within ten days thereafter spud in and thereafter continuously and diligently drill to completion said well and/or to meet the expense and requirements thereof in the manner herein stated, then, and in that event the Court finds the receiver shall take over the operation and construction of said well for the use and benefit of the plaintiffs yet as an officer of the Court and without interference on the part of the defendants or any person or persons whomsoever."

In conformity with these findings the court entered judgment, ordering, adjudging, and decreeing "that the defendants are required within ten days from the 25th of July, 1928, to commence the construction of a heavy rotary rig adequately capable of drilling to the deeper sands between the depth of 5200 to 7400 feet below the plaintiffs' land, * * * and thereafter continuously and diligently in a minerlike and approved manner drill said well to the depth of said lower sands, being between the depth of 5200 and 7400 feet below the surface of the above described real property. * * * That * * * in the event defendants shall fail, neglect and/or refuse either (a) within ten days from the 25th day of July, 1928, to commence in good faith the construction and installation of a heavy rotary rig upon said premises hereinafter described in an approved manner, (b) and/or within ten days after the commencement of the construction and installation thereof to spud in and/or thereafter to diligently prosecute the construction of said well in the manner hereinbefore stated and/or to equip the same as hereinbefore stated and/or to meet the expenses thereof in the manner hereinbefore stated at the time and in the manner the same shall fall due, then, and in either event, time being the issue of this judgment, (a) the defendants shall be forever precluded from drilling into said deeper sands and be required to forthwith vacate that portion of said premises conveniently necessary for the drilling of a well by the plaintiffs to the deepest sands, (b) plaintiffs are thereupon hereby permitted to go upon said described premises and to sink and bring in a well or wells from the sands below the sands from which the well of defendants is now producing; which said portion thus to be occupied by plaintiffs shall not interfere with the operation of the defendants' well now in operation upon said premises, nor directly detract therefrom, but that said well thus to be drilled by plaintiffs and all its paraphernalia and equipment as well as all production therefrom shall be the sole and exclusive property of the plaintiffs without right, directly or indirectly, of any kind or character on the part of the defendants. That * * * the present well now located on the above described real property and all its paraphernalia and equipment as well as all production therefrom shall remain the sole and exclusive property of the defendants subject to the payment of the outstanding royalties, as well as all conditions and obligations contained in defendants' lease and now imposed upon said well."

To carry out the purpose of this judgment, the court ordered that D. S. Dickinson be appointed receiver to act under the following conditions: That in the event that the defendants should fail to comply with the order and direction of the court as above stated, "then and in that event said Receiver shall take over the operation and construction of said well for the use and benefit of the plaintiffs yet as an officer of this Court and without interference on the part of the defendants or any person or persons whomsoever, and said Receiver to have such other, further and additional powers as may be from time to time granted by this Court. That all expenses and cost of said Receiver shall be borne and paid by the plaintiffs herein."

It may be summarized from the findings and decree: First, appellant, lessee, has the right and it is his duty to forthwith proceed to develop and extricate oil and gas from the sand strata lying between the 5,200 foot and 7,400 foot level; or, second, if he shall fail so to do, then the respondent lessor may proceed to perform that undertaking.

It may be said in passing that this decree can be justified and sustained solely upon the ground that reasonable prudence or any other degree of human foresight could not have foreseen or provided for the conditions that obtained, as a result of the 1927 developments in the lower strata of the oil field.

Respondents base their cause of action upon their contention that there are certain implied covenants in oil and gas leases owing to the fact that oil deposits are of a fluctuating, uncertain, and fugitive nature, lying at unknown depths and uncertain in the quantity, extent and trend of the flow and base their claim to relief upon broad equitable principles peculiarly applicable to the facts and circumstances disclosed in this controversy. The action is based upon the provisions of section 1060 of the Code of Civil Procedure of the state of California, providing: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract." The section further provides: "He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time."

The trial court adopted the theory of the plaintiffs and granted relief as hereinabove set out. Appellants stand upon the strict letter of the terms of the lease in respect to the depth of drilling required by the contract, and claim that they have fully complied with all its terms, and further contend that the relief awarded is beyond and in excess of the power granted by the Code section above quoted. We are unable to agree with either of these contentions.

[1, 2] The clear language of the statute supports the judgment and conclusion of the trial court so far as exercise of its power is involved. The appellants' argument on this phase of the case is largely that of an assertion, rather than a discussion of the terms of the statutory law. In so far as the equitable principles involved are concerned, there appears to be a wealth of authorities to support the conclusion of the trial court.

Our determination with respect to this issue is strongly confirmed at least by implication by the fact that notwithstanding the painstaking and exhaustive brief filed herein by respondents, the appellants have not seen fit to assist the court in its investigation of this rather novel and intricate problem by favoring us with a reply brief.

Under the decree which is necessarily in the alternative, appellants need not expend one dollar in addition to what they have already expended to retain their present interest upon the leasehold, so far as they are willing to develop it, and in this field their equipment or operations will not be disturbed.

The authorities relied upon by appellants and set out in their opening brief are not applicable to the facts of the instant case, a case, in our opinion, which stands practically alone in the strength of the appeal that it makes for equitable adjudication. The case of Becker v. Submarine Oil Co., 55 Cal. App. 698, 204 P. 245, 247, strongly relied upon by the appellants, bears no similarity, either in the facts of the case or the equitable principles involved. Nevertheless in that case the court significantly used this language: "As a net result of consideration of the cases which hold that, in the absence of express and definite stipulation as to the measure of diligence, an implied covenant exists demanding reasonable diligence in the development of the premises leased, it may be fairly said, in determining whether or not other wells should have been drilled, consideration must be given to a number of facts regarded collectively. Some of these are: The result of oil operations on adjacent premises; the extent of the subterranean oil reservoir; also its character and contour as affecting the question of drainage to and from the property in question; market conditions; the quantity and quality of oil thus far produced; the prospects for further production as indicated, and the knowledge possessed by those expert in locating oil bodies; the demands made upon the lessee in the maintenance of the wells already drilled, and his diligence in operating them to secure the greatest possible production. The record contains no information concerning many of these important considerations."

Such is not the situation in the present litigation. Every element enumerated in the above statement is outstandingly and markedly present in the facts established in this litigation. We have no hesitancy in stating that had the facts of the Becker Case measured up to the undisputed facts of this case an entirely different conclusion would have been reached by the appellate court. In the case of Brewster v. Lanyon Zinc Co. (C. C. A.) reported in 140 F. 801, 813, the court had to say of the case of Colgan v. Forest Oil Co., 194 Pa. 234, 45 A. 119, 75 Am. St. Rep. 695, a case cited by appellants, as follows: "With great deference to the able courts which have adopted this view, we think it is not sound. In the absence of some stipulation to that effect, we think an oil and gas lease cannot be said to make the lessee the arbiter of the extent to which, or the diligence with which, the exploration and development shall proceed. The operations contemplated, in the event oil and gas are found in paying quantities, are not to be likened unto a business into which one puts property, money, and labor exclusively his own, the profits and losses in which are of concern only to him, and the conduct of which may be according to his own judgment, however erroneous it may be. By reason of the conditions on which the lease is granted the lessor retains at least a contingent interest in the oil and gas, to the profitable extraction of which the operations are directed. This interest in the subject of the lease, and the fact that the substantial consideration for the grant lies in the provisions for the payment of royalties in kind and in money on the oil and gas extracted, make the extent to which and the diligence with which the operations are prosecuted of immediate concern to the lessor. If they do not proceed with reasonable diligence, and by reason thereof the oil and gas are diminished or exhausted through the operation of wells on adjoining lands, the lessor loses, not only royalties to which he would otherwise be entitled, but also his contingent interest in the oil and gas which thus passes into the control of others. The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule in respect of all other contracts where the time, mode, or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases. There can, therefore, be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith."

In the case of Acme Oil & Mining Co. v. Williams, decided in 140 Cal. 681, 74 P. 296, 297, the court says: "Covenants may be implied, as well as express; and in oil leases, and others of that particular character, where the consideration for the lease is solely the payment of royalties, there is an implied covenant not only that the wells will be sunk, but that, if oil is produced in paying quantities, they will be diligently operated for the best advantage and benefit of the lessee and lessor. The sole consideration usually moving the lessor in extending oil leases, and the only consideration for the particular lease involved here, was the royalties the lessor would receive from proper and continuous pumping of oil, after it had been developed in paying quantities. These leases are only valuable on development, and are then only valuable to both parties to the extent that the product may be secured and disposed of; and when the only consideration for the lease is the share which the lessor will obtain of what is produced, there is always an implied covenant that diligence will be used toward such production."

It may be stated in passing that, of course, there is no question in the instant litigation but that the full consideration to the lessor is, as it was in the case from which quotation has just been made, the royalties provided in the lease.

In Acme Oil & Mining Co. v. Williams, supra, the court further says: "Hence it is that ever since the discovery of petroleum in this country leases of oil lands, with royalty the the lessor on the product, have contained provisions not only for the immediate sinking of wells and their number, but for diligent operation after oil has been struck; and where such leases do not contain express provisions to this effect, and the only consideration for their execution is the share in the product which the lessor, either in kind or as a royalty, is to receive, it is necessarily implied, as of the essence of the contract, that the lessee shall work the wells with reasonable despatch for their mutual advantage. It is not necessary that technical words should be inserted in such a lease in order to raise the condition."

In the Acme Case the court further states: "While the general rule is that forfeitures are discountenanced in law, there are occasions when the only protection a landlord has is through the exercise of this reserved right, and the case at bar presents one of those occasions. If the right of forfeiture could not be exercised under such circumstances, a lessor would be at the mercy of his lessee. His land would be burdened by a lease which, while it could and should be made profitable through the diligence contemplated, would in fact be profitless through neglect. The lessor could not make other arrangements for the development of his property and his interest in the fee in the oil district might consist of a small holding, surrounding which numerous other operators would be successfully working, drawing off the oil to his irreparable injury. These are some of the peculiar circumstances surrounding leases of this character which favor the right of re-entry for condition broken."

In the case of Monarch Oil, Gas & Coal Co. v. Richardson, 124 Ky. 602, 99 S. W. 668, 669, a Kentucky case, the general principle involved in the Acme Case is clearly expressed: "The fluctuating and uncertain character and value of this class of property renders it necessary for the protection of the lessor that the properties leased should be developed as speedily as possible, and the lessee will not be permitted to hold the land for speculative or other purposes an unreasonable length of time for a mere nominal rent, when a royalty on the product is the chief object of the execution of the lease."

In Thornton's Law of Oil and Gas, volume 1, § 58 (a), we find the following with respect to the principles involved in this discussion: "But upon finding oil it is the duty of the lessee to continue to develop the premises. 'A failure to use proper diligence in the production of minerals after discovery, is a breach of a condition subsequent in the ordinary mineral lease, where the obligation to continue production is merely implied, for which breach the lease becomes subject to forfeiture.'" (Citing many cases.)

The same author states, volume 1, § 98: "As has been said elsewhere, there is not only a covenant on the part of the lessee that he will fully develop the leased premises, but that he will do so with diligence. There is also an implied covenant on the part of the lessee that he will put down enough wells to protect the leased premises from being drained by wells on adjacent territory."

In Wilson v. Reserve Gas Co., 78 W. Va. 329, 88 S. E. 1075, 1077, the court says: "The lessee cannot hold the leased land indefinitely without exploring the land and producing oil or gas. There is nothing in the contract to deny the lessors the right to terminate the lease upon reasonable notice. They have not shorn themselves of that power."

We might quote innumerable cases declaring this general equitable principle, but will content ourselves by quoting from Barnsdall v. Boley (C. C.) 119 F. 191, 200, where an oil lessee attempted to stand upon the express provision of the lease, that but one well was to be drilled: "In determining this question he must exercise sound discretion, such as prudent business men would ordinarily exercise in the management of their business; but this discretion, when exercised by him, must be a discretion in good faith, not an arbitrary one upon his part It must be a discretion based upon the product of the well, which alone can demonstrate whether it is a paying well. Is the lessor to be deprived of his rights in having his property developed when wells may be and are sunk all around his property, because the lessee may claim the right to develop the property when it suits him? Having drilled but one well on the leased premises, and because the lease only provided for one well to be drilled upon it, and failing to further develop the property, it would seem to be the duty of a court of equity to interfere, and redress the rights of a lessor under such circumstances. If the lessee had within the period of five years drilled other wells on the leased premises, and showed a disposition to develop it, a court of equity, under such circumstances, would be justified in holding that such action was a compliance with the terms of the lease."

It follows that the judgment of the superior court should be and is, therefore, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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115 Cal.App. 363

LIPPMAN v. SUBWAY TERMINAL CORPORATION.

Civ. 6696.

District Court of Appeal, Second District, Division 2, California.

July 7, 1931.

Rehearing Denied August 4, 1931. Hearing Denied by Supreme Court Aug. 31, 1931.

1. Landlord and tenant ⚷167(7).

Landlord who leases entire premises is not liable for negligent operation thereof by lessee.

2. Landlord and tenant ⚷167(7).

Owner of building, wherein portion of ground floor was leased, *held* liable for injuries to pedestrian resulting from negligence of subtenant in operating sidewalk freight elevator.

Lease of part of ground floor of building authorized lessee to use sidewalk freight elevator in common with other tenants and occupants of building, but lease provided that elevator "shall be operated by your own employees, at your own risk, on your own responsibility and without liability to this company (lessor)." Lessee sublet portion of leased premises. Elevator, at time pedestrian sustained injuries complained of, was being operated by subtenant. Evidence established that subtenant had permissive use of elevator.

3. Landlord and tenant 🔑169(5).

In pedestrian's action for injuries sustained through operation of sidewalk freight elevator, admitting ordinances relating to guards at opening in sidewalk *held* error, where ordinance had been complied with.

Ordinances of city, in substance, required opening for sidewalk freight elevator to be protected by metal guards. It was shown that such ordinances had, in substance, been complied with by placing metal guards between upright sides of each wing of trapdoor, which opened against sidewalk traffic and protected opening in each direction.

4. Appeal and error 🔑1052(7).

Error in admitting ordinances relating to guards when using sidewalk freight elevator *held* not prejudicial, where findings otherwise supported judgment for pedestrian.

Court made finding that injuries sustained by pedestrian were proximate result of negligence of defendant in permitting sidewalk freight elevator and trapdoor to be operated without taking any precaution for safety of pedestrians. Court further found that defendant was negligent in failing to comply with applicable ordinances of city, but in view of preceding finding it was not necessary to support judgment, and therefore immaterial, although not supported by evidence, evidence showing compliance with ordinances.

5. Appeal and error 🔑1052(7).

Error, if any, in admitting ordinance and safety orders of Industrial Accident Commission applicable to sidewalk elevators *held* not prejudicial, in view of findings otherwise supporting judgment.

Ordinance and elevator safety orders of Industrial Accident Commission were introduced in evidence over the defendant's objections. There was a finding to effect that operation of sidewalk freight elevators was negligent, in that no person was stationed at doors to warn pedestrians that doors were about to open, and in that no precautions whatever were taken to avoid injuries to pedestrian.

6. Appeal and error 🔑1058(1).

Error, if any, in excluding testimony of defendant's expert witness *held* not prejudicial, where substance thereof was otherwise admitted.

7. Appeal and error 🔑1011(1).

It is province of trial judge to weigh evidence and decide conflict therein.

8. Damages 🔑130(3).

$1,750 for injuries to waitress, including injury to back and left leg which impaired health and necessitated long period of treatment, *held* not excessive.

Testimony disclosed that accident occurred on April 19, and that plaintiff did not go to work until middle of June, but subsequently had to lay off because of severe pains in her head and back; that she had only been able to work off and on since; that she had severe pains in her head and back and was very nervous; that her health was perfect before accident, and that she had been under the doctor's care for almost two years since.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Caroline Lippman against the Subway Terminal Corporation and others. From a judgment against it only in favor of plaintiff, defendant named appeals.

Judgment affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Kirtland I. Perky, of Colton, and Ralph W. Eckhardt, of San Bernardino, for respondent.

ARCHBALD, Justice pro tem.

Appeal by the defendant from a judgment in favor of plaintiff for damages alleged to have been sustained by her in the raising of a sidewalk freight elevator maintained in the basement of a building owned and operated by the corporation. There is no conflict in the evidence as to how the accident occurred, although there is as to the extent of the injuries.

Defendant leased to the Louis K. Liggett Company a portion of the ground floor of its building located on the west side of Hill street between Fourth and Fifth streets in the city of Los Angeles, with right to sublease any portion thereof except that described as "the drugstore space." Concurrently with the execution of said lease, a supplemental agreement was entered into between the parties thereto with regard to the use of the sidewalk elevator above mentioned, the material portion of which reads as follows: "In common with other tenants and occupants of the building and this corporation, you are to have free use of the sidewalk freight elevator on Hill street when the same is completed and accepted by us; when used for your purposes the elevator shall be operated by your own employees, at your own risk, on your own responsibility and without liability to this company." Subsequently, the lessee company sublet a portion of the leased premises to the Subway Electric Company. At the top of the elevator shaft, trapdoors were constructed in the sidewalk which were flush with the sidewalk when closed, but which automatically opened with the raising of the elevator. Walking on the sidewalk above, plaintiff stepped on the doors at the time when an employee of said Subway Electric Company was raising the elevator, by reason whereof plaintiff alleges she was caused to fall, resulting in the injuries for which she brought action, naming several defendants. Judgment, however, ran against the defendant Subway Terminal Corporation alone.

Appellant contends: (1) That the evidence is insufficient to sustain the findings and judgment, for the reason that it shows without contradiction that an employee of the Subway Electric Company operated the elevator at the time, for which appellant cannot be held responsible; (2) that the trial court erred in the admission of certain evidence over defendants' objections, and in rejecting evidence offered by defendants; and (3) that the damages awarded are excessive.

Unquestionably, the proximate cause of the accident was the negligent operation of the elevator, and not any defect in its construction.

[1, 2] The elevator was not leased to said Liggett Company, and control of the same was retained by appellant. The latter's engineer had charge of the machinery used in connection with the building, including "one piece of equipment known as the sidewalk elevator on Hill street." The engineer testified that the Subway Electric Company "had space in there and used this elevator." * * * "I have seen them several times." Asked if the Subway Terminal Company ever operated the elevator, the witness said: "No, sir.

"Q. It was operated by the people who were moving the goods up and down? A. Yes, sir." So it would seem not only was the right to sublease a portion of the premises given to the Liggett Company and permission given to said company "in common with other tenants and occupants of the building" to use said elevator, but that its subtenant, an occupant of the building, was using the elevator with the knowledge of the employee of the Subway Terminal Corporation in charge thereof. There would therefore appear to be no question but that such subtenant had permissive use of the elevator at the time of the accident. It also appears that at and prior to the time of the accident appellant kept a sign posted in the elevator reading as follows: "Those using this elevator assume all risk and responsibility in doing so. Be sure you take all necessary measures to protect people using sidewalk above elevator." Under such circumstances, is the owner liable for the negligence of such operator?

An interesting case is that of Bardel v. Standard Oil Company, 218 App. Div. 145, 218 N. Y. S. 36, 37, where the owner had instructed the tenants not to operate the elevator without first notifying the fireman of defendant, who would then station a man on the sidewalk to warn pedestrians, the court saying: "Since the defendant remained in control of the building and the elevator in question, the duty devolved upon it to see that they were operated without negligence. If the defendant had relinquished all control over the elevator, a different question would arise. As long, however, as the defendant chose to remain in control of the elevator, so that the same could be used in common by the tenants, the defendant took with this control the obligation to see that the elevator was operated without negligence, and no arrangement made by the defendant with a third party could relieve it from this obligation. In other words, the defendant turned the elevator over to be operated by the tenants in common, accompanied by directions to operate it in a particular manner with reference to safeguarding the opening in the sidewalk. A disregard of the instructions still left the operation of the elevator within the power of the tenants, pursuant to the permission of the defendant, and made the defendant liable for injuries due to negligent operation with reference to said opening. The duty to uncover the sidewalk with due regard to the safety of pedestrians the defendant could not escape by an attempted delegation, while the elevator at the same time was operated with its permission. * * * The respondent relies on a number of cases which are claimed to absolve it from liability upon the ground that at the time of the accident the defendant was not in actual control of the elevator, since it was being operated by the tenant. The respondent overlooks the fact that the defendant was still in general control, so that its permission to all its tenants to make common use of the elevator would be valid, and that the tenant was operating the elevator through the respondent's permission, though disregarding one of the directions in connection with such operation. The important fact in the case is the retention by the defendant of the control of the elevator for the common use of the tenants. The respondent quotes from Scott v. Curtis, 195 N. Y. 424, 88 N. E.

794, 133 Am. St. Rep. 811, 40 L. R. A. (N. S.) 1147, as follows: 'When the removal of a cover from a coal hole by the owner's permission creates danger to persons passing along a sidewalk the owner is liable for any negligence in failing to see that proper safeguards or warnings are provided to reasonably protect the public from such danger. Weber v. Buffalo Railway Co., 20 App. Div. 292, 47 N. Y. S. 7; Mullins v. Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112.' The respondent italicizes 'by the owner's permission,' apparently with the thought that the case at bar is distinguished, in that the elevator was used without the defendant's permission. It appears, however, that the defendant's permission was present in the case at bar, provided the tenants safeguarded the opening. This duty of safeguarding the opening, however, the defendant, as noted above, could not delegate to the tenant."

The tenant in that case, as in this, opened the elevator shaft without placing a man on guard. It also appears in the Bardel Case that there was a warning bell which was supposed to ring when the elevator was raised, but which was out of repair and did not operate at the time in question. The court does not allude to this claimed defect in its reasoning, but fixes the liability on the broad ground of the retained control. And well it might, as it would seem that a bell under the sidewalk, which rang only as the elevator was raised, was not such a piece of equipment the lack of which could possibly be a proximate cause of the accident, which must have occurred simultaneously with the warning the bell was supposed to give.

Under the authorities, it would seem that it is not so much ownership as control of property that creates legal liability for its negligent use, for where the landlord leases the premises in their entirety he is not liable for the negligent operation thereof by the lessee. Rider v. Clark, 132 Cal. 382, 64 P. 564. The authorities cited seem to support the judgment in this case as well as to show that the conditions imposed by the owner in the permission given to use the elevator, as well as in the notice posted therein, are of no avail so far as avoiding liability to one properly using the sidewalk who is injured by the negligence of an operator using such elevator with the owner's consent. Appellant urges that the evidence shows no such consent, but in our opinion it supports such inference.

[3, 4] (2) Over appellant's objection, the court permitted the plaintiff to introduce ordinance No. 20449, as amended by ordinance No. 31469, both new series, of the city of Los Angeles. Such ordinances, in substance, make it unlawful to construct or maintain any permanent opening in any sidewalk, unless such opening is covered with metal trapdoors, the side or ends of such doors nearest the curb to be not less than four feet from the outer edge thereof, and provided also with metal guards the height of such doors when opened, specifying how such guards shall be constructed. It is also provided by the amendment that it is unlawful "to open any such doors, or to cause or permit the same to be opened or remain open, unless such a metal guard is placed along the edge of and on each side of such opening and so maintained during such time as such door shall remain open; provided, however, that such metal guard need not be placed or maintained along the side of such opening on which goods, wares, merchandise or other articles are being removed from or taken into the space beneath such opening, if a person is stationed on such side of such opening for the purpose of warning passers-by and of preventing accidents," penalties being provided for a violation of such ordinance. It is respondent's theory, apparently, that the ordinance requires placing such metal guards on the four sides of such opening before raising the doors. The trapdoors referred to opened against the sidewalk traffic and protected the opening in those directions, and the owner had two metal guards which were to be used in closing the openings between the upright sides of the two doors. In our opinion, that is all the ordinance requires. It would seem that with the hinged doors in place there could only be two sides of the opening exposed when they are raised, and such doors as the owner had provided in this case, when placed, would be along the edge of and on each side of the opening. The proviso above quoted specifies that on the side of the opening through which goods or other articles *"are being removed"* such metal guard need not be placed or maintained, if some person be stationed on such side to give warning. In other words, it would seem to be for the purpose of protecting the *opening* and not to prevent the doors from doing possible injury that the ordinance was adopted; and while it would seem that under such circumstances the ordinance so introduced was not material, we do not see that the error was prejudicial, as the finding of the court was that the injuries sustained by plaintiff were the proximate result of the negligence of appellant "in permitting said sidewalk elevator and said doors to be operated without taking any precautions for the safety of pedestrians," even though it also added "and in failing to see that the provisions of the ordinances of the city of Los Angeles were fulfilled." The evidence in our opinion supports the first part of the finding, which in turn supports the judgment rendered, even though the additional finding is without such support.

[5] Ordinance No. 33512 (new series) and the elevator safety orders of the Industrial Accident Commission of the state were also introduced in evidence over appellant's objection. Section 332 of such ordinance pro-

vides, in substance, that every elevator for the carriage of freight or passengers shall be constructed and maintained in accordance with the provisions of such ordinance and in accordance with the elevator safety orders referred to, and the orders in effect at the time provides that "any person, firm or corporation operating a sidewalk elevator must not open the sidewalk doors thereof without first posting a responsible person on the sidewalk at the said doors." The finding of fact made in connection with such ordinance and orders was "that at the time of the accident in question the sidewalk doors were opened without first posting a responsible person on the sidewalk at the said doors." There was also a finding to the effect "that the operation of said elevator by said person last mentioned was negligent in that no person was stationed at said doors to warn pedestrians that said doors were about to open, and in that no precautions whatever were taken to avoid injury to pedestrians"; so it would seem that, regardless of such ordinance and orders and the finding thereon, there is evidence and a finding which support the judgment. Assuming, then, although not deciding, that the orders of the commission are not properly in evidence in this case, we fail to see that any prejudice resulted from the ordinance and orders having been so introduced.

[6] An objection by plaintiff to a question asked by counsel for appellant of an expert witness who had examined plaintiff physically, as to whether such expert saw anything "that would indicate she could not have pursued her vocation as a waitress at that time," was sustained by the court. The next question asked such witness was, "What did you find with reference to whether or not she was in a condition to work?" to which the former replied: "Clinically, I could find no evidence of any condition which could have been disabling," following which were other questions, the answers to which covered all the ground included in the question to which objection was sustained. In view of that fact, we fail to see where any prejudice resulted, even assuming, without deciding, that error was committed.

[7, 8] (3) The plaintiff testified that her back was wrenched and her left leg cut in two places to the bone; that she was in bed two weeks, but did not get out of the house, except once for two months after she was hurt. The accident occurred April 19, and she testified that she went to work the middle of June, but had to lay off on account of severe pains in her head and back; that she had only been able to work off and on since; that she had "severe pains" in her head and back and was "very nervous"; that her health was perfect before the accident and that she had been under the doctor's care for almost two years since and was still under it, "but not for anything besides the result of this accident, so far as I know." Her doctor corroborated her testimony as to the injuries, to a large extent. The testimony of the expert produced by appellant is in sharp conflict with that of plaintiff. It was the province of the trial judge to weigh the evidence and decide such conflict. Having resolved the same in favor of plaintiff, we must give to the latter's case every inference that can reasonably be drawn in support of the judgment. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 273, 104 P. 312. Certainly the evidence quoted justifies the inference that plaintiff, as a result of the accident, suffered pains and headaches for a long period of time, to say nothing of her doctor's bill and loss of time. Under the circumstances, we cannot say that the judgment rendered, $1,750 damages and $48.50 costs, is excessive.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

114 Cal.App. 152

TRANSPORT OIL CO. v. BUSH.

Civ. 4273.

District Court of Appeal, Third District, California.

May 15, 1931.*

1. Mines and minerals 🔑73.

Lessee's covenant to pay taxes on oil, etc., "or other * * * assets of lessee," *held* not limited to latter's assets.

2. Mines and minerals 🔑55(2).

Deed requiring grantee to comply with federal regulations required payment of taxes on oil, etc., as covenanted in subsequent lease from United States.

The deed required grantee to comply with federal laws and departmental regulations to end that all rights for production of oil, etc., thereunder, "and particularly under" certain prospecting permit and "any oil lease executed * * * pursuant thereto," may be fully observed.

3. Mines and minerals 🔑55(2).

Grantee, required by deed to extract oil at his expense and sell it at highest price obtainable, *held* not chargeable with expense of cracking emulsion, unless necessary to obtain such price.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Dismissed after judgment pursuant to stipulation of parties.

4. Action ⚷6.

Statute authorizing actions to construe contracts refers only to written contracts (Code Civ. Proc. §§ 1060–1062).

Code Civ. Proc. § 1060 provides that "any person interested under a deed, will, or other written instrument, or under a contract," may bring action to have such instrument, contract or deed construed; section 1061 provides that court may refuse to exercise such power when not necessary or proper; and section 1062 preserves other remedies.

5. Mines and minerals ⚷55(2).

Deed requiring payments to grantor for oil, without deducting expenses of selling, handling or "otherwise" did not extend parties' rights or duties beyond similar actions.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by the Transport Oil Company, a corporation, against George B. Bush, who filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Philip C. Farman, of Los Angeles, and George B. Bush, in pro. per., for appellant.

Joe Crail, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by the defendant from a judgment rendered in the trial court, construing and declaring the rights and duties of the parties to this action, as set forth in and dependent upon an instrument of conveyance executed by the defendant and his wife, and delivered to the plaintiff on the 11th day of May, 1923. The last amended complaint, filed by the plaintiff in its action seeking declaratory relief, sets forth that a controversy has arisen and exists between the plaintiff and the defendant relative to the duties of the respective parties to pay whatever taxes are levied upon the properties referred to in the instrument of conveyance just mentioned.

On the part of the plaintiff, it is contended that the respective parties to this action owned certain interests in the property referred to in the instrument of conveyance, and that under the instrument of conveyance each party should pay whatever taxes were assessed thereon, in proportion to their respective interests. On the part of the defendant, it is contended that by reason of certain language contained in an instrument of lease entered into between the United States government and the plaintiff, whereby the plaintiff was granted certain rights and privileges relative to the extraction of oil and other minerals from the premises hereinafter described, the plaintiff should pay all of the taxes levied upon the property hereinafter described, irrespective of the interest or ownership of the parties hereto, therein.

By way of cross-complaint, the defendant asked judgment against the plaintiff for and on account of certain charges paid by the defendant to the plaintiff on account of the cleaning of the oil extracted from the premises. On the part of the plaintiff, it is insisted that an oral contract was entered into between the parties relative to the cleaning or preparing of the oil for market in such manner that a much higher price might and could be obtained therefor. The record shows that, after operations had been carried on upon the premises hereinafter described, the oil became charged with a large quantity of water, which water was not free and would not settle or separate from the oil by force of gravity, but existed in the form of an emulsion composed of oil, gas, and water; that in order to separate the oil and crack or break the emulsion, it was necessary to use a combined process of electrical dehydration, and also a strong chemical substance known as "Tret-o-lite." The record shows that the plaintiff expended the money necessary to install the electrical dehydration plant and make necessary preparation for the cracking of the emulsion, so that the gas and water might be separated from the oil. By means of this process of treatment or cleaning of the oil, a much higher price was obtained for the product than could otherwise be had.

On the part of the plaintiff, it is insisted that an oral contract was entered into relative to paying the costs and expenses of treating or cleaning the oil after the installation of the plant just referred to, and that, by reason of the oral contract, all of the parties interested in the product agreed to pay the expenses of the treatment, in proportion to their respective interests, the cost of installation of the plant being all borne by the plaintiff. On the part of the defendant, while admitting that certain payments have been made by him of his proportionate share of the costs and expenses of treating the oil, that the oral contract referred to, if it ever existed, does not now exist, and the defendant asks for the recovery of moneys in the hands of the plaintiff retained as the defendant's proportionate share of the costs and expenses of cracking the emulsion and cleaning the oil.

The complaint sets forth that on the 11th day of May, 1923, the defendant George B. Bush and his wife, Marion W. Bush, by an instrument of conveyance, conveyed to the plaintiff certain real property situate in Kern county, described as follows, to wit: "All of the southeast quarter of Section 4, Township 11 North, Range 23 West, S.B.B.&M., reserving and excepting therefrom, however, in favor of the grantor George Barnard Bush, the title to, and ownership of an undivided 25 per centum (25%) of all oil, gas and other hydro carbon substances in or under the said land, or which may be extracted from, or produced from, or upon said land, and reserving also, the perpetual right and easement in the grantors, and each of them, his, her, and their respective heirs, executors, administrators, agents and assigns, to enter upon the whole, or any part of the property conveyed by this instrument, for the purpose of inspecting the same, or any part thereof, or any oil well or gas well or other improvement thereon." The deed also, under certain conditions, reserved to the grantors the right to enter upon the premises and exploit the same for oil production purposes. The conveyance to which we have referred also contained the following paragraphs, which are material to be set forth herein, to wit:

"(b) The grantee, its successors and assigns, shall and will, at the sole cost and expense of the grantee, its successors and assigns, respectively, comply diligently and promptly and fully with all United States laws and departmental rules and regulations of the Federal Government thereunder, to the end that all rights for the development and production of oil, gas and other hydrocarbon substances under such laws, rules and regulations, and particularly under prospecting permit Serial No. 033164, United States Land Office, Los Angeles District, California, and under any oil lease executed under or pursuant thereto, or in accordance therewith, may be fully preserved and enjoyed. If the grantee, its successors and assigns, respectively, fail to do or cause to be done all or any of the said acts and things, in this paragraph hereinbefore referred to, within thirty (30) days prior to the time the same are required to be done, then the grantors, and each of them, his, her and their respective executors, administrators, heirs and assigns, shall have the right, in the name of the grantee, its successors and assigns, and at the sole cost and expense of the grantee, its successors and assigns, to do and perform the same, but nothing herein is intended, or shall be construed as requiring the grantors, or either of them, or his, her, or their respective heirs, executors, administrators or assigns, so to do. Provided, further, however, that the doing or performance of such act or thing by the grantors, or either of them, or his, her or their respective executors, administrators, heirs or assigns, shall not relieve the grantee, its successors or assigns, or any of them, from any default hereunder, or from any of the consequences hereunder of any such default.

"(c) The undivided twenty-five per centum of the oil, gas and other hydrocarbon substances in or under the said land or which may be extracted from, or produced from or upon said land herein reserved and excepted in favor of George Barnard Bush, shall be extracted and produced by the grantee and its successors in interest in the property hereby conveyed, at the sole cost and expense of the grantee, and its successors in interest in said property respectively, for and on behalf of, and free of expense to said George Barnard Bush, and his heirs, executors, administrators and assigns, and shall be diligently sold at all times by the said grantee, and its successors in interest in said land, at the highest price reasonably obtainable therefor, but never less than what is known as and called 'the standard oil market price', prevailing during the month the same is produced, for products of like kind and quality, in the field where the land is situated, and payment therefor, without any deduction for expense of selling, handling or otherwise, shall be made monthly at said price on or before the 23d day of each month for all of said products which may be sold during the preceding calendar month, segregated as follows. * * *"

The deed further provided that so much of the production of the oil as should be required to be paid to the United States government should be deducted from the 25 per centum retained by the grantors.

[1] After the execution and delivery of the deed of conveyance by the defendant and his wife to the plaintiff, the plaintiff entered into a lease agreement with the United States government, providing for the payment of five per centum of the gross profits of the oil taken from the premises herein referred to, which lease, among other covenants to be performed by the plaintiff, contained the following: "To pay when due, all taxes lawfully assessed and levied under the laws of the state, upon improvements, oil and gas produced from the lands hereunder, or other rights, property or assets of the lessee."

The controversy arose over the fact that the county of Kern levies and collects taxes upon the oil, minerals, and hydrocarbon products produced from, and contained within, the premises hereinbefore described, as distinct from the surface ownership of the 40-acre tract of land.

The lease executed and delivered by the United States government to the plaintiff authorizing it to extract oil and hydrocarbon substances from the 40 acres of land described makes no reference to the rights or interests of the defendant therein or thereto, but it does contain covenants and conditions necessary to be construed and interpreted in connection with the provisions and conditions of the deed of grant under which the plaintiff is vested with an interest in the oil, minerals, and hydrocarbon products contained in the demised premises. The plaintiff construes the foregoing quoted language from the lease as though it refers only to the assets of the lessee. This, however, we think is an erroneous interpretation. The lease distinctly specifies that the plaintiff is to pay all taxes levied upon oil and gas produced from the premises. All the remainder of the covenant consists of general language relating to such other property rights or assets as might belong to the lessee. In other words, so far as the covenant is concerned affecting the plaintiff, it must be construed as though the language therein contained consisted only of the following: "To pay when due, all taxes lawfully assessed or levied under the laws of the state, upon all oil and gas produced from the lands hereunder." There is no limitation as to the ownership of the oil and gas. It is a direct covenant to pay whatever taxes may be levied upon the product that may be taken from the demised premises. Again, this lease is executed in accordance with the laws of the United States, and the rules and regulations of the federal government.

[2] This brings us back to a consideration of paragraph (b) contained in the deed of conveyance, which reads as follows: "(b) The grantee, its successors and assigns, shall and will, at the sole cost and expense of the grantee, its successors and assigns respectively, comply diligently and promptly and fully with all United States laws and departmental rules and regulations of the federal government thereunder, to the end that all rights for the development and production of oil, gas and other hydro-carbon substances under such laws, rules and regulations, and particularly under Prospecting Permit Serial No. 033164, United States Land Office, Los Angeles District, California, and under any oil lease executed under or pursuant thereto, or in accordance therewith, may be fully observed and enjoyed." The lease to which we have referred, it may be again stated, was executed under and in accordance with the laws of the United States and departmental rules and regulations of the federal government. The rules and regulations of the federal government prescribed that oil leases shall be in a certain form, to wit, in the form executed and delivered to the plaintiff in this action, and that it shall contain certain covenants and conditions to be performed by the lessee, among them being the payment of all taxes levied upon all oil, etc., produced from the leased premises. The condition specified in the paragraph of the grant under which the plaintiff was vested with title provides that the plaintiff shall perform all those conditions at its sole cost and expense. The plaintiff contends that its duty under the lease and the grant to which we have referred binds it only to comply with the rules and regulations, and not to any covenants or conditions contained in the lease. However, it is provided that the lease shall be in a certain form which makes it a part and parcel of the rules and regulations adopted by the federal government, under and by virtue of which the plaintiff is permitted to go upon the premises and extract therefrom oil, gas, and hydrocarbon substances.

Paragraphs B and C of the deed of conveyance relate to entirely different subjects. Everything referred to in paragraph B must be done and performed at the sole cost and expense of the grantee, etc., and from the language found therein, whereby the plaintiff covenants to comply with all the rules and regulations of the federal government which, as we have stated, includes the lease, binds it to do and perform all those acts at his own cost and expense. Paragraph C of the lease has only to do with the expenses of extracting the oil and marketing the same. That a certain percentage of the oil remains the property of the defendant, and upon which he would otherwise be compelled to pay taxes, is wholly immaterial, because in the insertion of paragraph B into the grant of conveyance, it must be held that the parties intended that everything required to be done and performed by the rules and regulations of the federal government, and the covenants and conditions contained in the lease under which the plaintiff would be authorized to enter upon the premises, were fully taken into consideration, and language used which would cover all and every of the conditions, and then it is provided that such acts shall be at the sole cost and expense of the grantee. There is nothing in paragraph B relating to the cost and expense of extracting the oil or of marketing the same. It is expressly directed to the performance of all the acts required to be performed under the rules and regulations of the federal government permit and lease secured from the federal government. Paragraph B of the deed of conveyance requires that the plaintiff shall protect all the rights of the parties in this action secured by the lease, and his rights cannot be protected unless all the conditions of the lease are complied with.

While, as urged by the respondent, no departmental rule or regulation requiring the lessee to pay taxes appears to have been introduced as testimony in this case, there is a covenant in the lease to that effect, and this covenant must have been in contemplation of the parties to this action when the deed of conveyance was executed, and therefore becomes just as binding as though some departmental rule or regulation existed independent ly of the lease requiring the lessee to pay taxes.

We do not need to review the authorities cited by the respondent relative to the duty of every owner of property to pay all taxes levied and assessed thereon, and we can agree with respondent that if the deed of conveyance and the lease to which we have referred did not require the lessee to pay all taxes, then and in that case it would be obligatory upon the defendant to pay whatever taxes might be levied upon his 25 per cent. interest.

[3] It necessarily follows from what we have said that the finding of the court relative to the payment of taxes is unsupported by the evidence, and that the construction given to the agreement by the court is not in accordance with the true intent and meaning thereof. A further question, however, is presented for our consideration in the cross-complaint filed by the defendant and the plaintiff's answer thereto relative to the costs and expenses of cracking the emulsion heretofore referred to in this opinion. The contention of the plaintiff is that an oral agreement was entered into between the parties to the effect that the costs and expenses of cracking the emulsion should be paid by the parties in proportion to their interest in the oil, gas, and hydrocarbon products produced or extracted from the premises. The finding of the court in relation to this question is simply that the market value of the oil with the emulsion therein was and is not nearly so great as when the emulsion is broken and the water and gases removed therefrom. There is no finding of the court to the effect that the breaking of the emulsion was reasonably necessary in order to profitably market the product. Paragraph C of the deed of conveyance provides for the extraction of oil, gas, and other hydrocarbon substances from the premises by the plaintiff at the sole cost and expense of the grantee, etc., and that the product "shall be diligently sold at all times by the said grantee, and its successors in interest in said land, at the highest price reasonably obtainable therefor." No construction can be given to this portion of the deed of conveyance by reason of the absence of any finding of fact as to whether the cracking of the emulsion was reasonably necessary, to the intent and purpose that the highest price reasonably obtainable for the product should or could be obtained. If the cracking of the emulsion is a treatment of the oil reasonably necessary to obtain the highest price which might reasonably be obtained for the product, then and in that event the costs and expenses thereof would necessarily be chargeable to the plaintiff as grantee under the deed of conveyance. Otherwise, it would be an item of expense to be borne by the parties interested in the product.

[4] Here, again, we are confronted with the provisions of section 1060 of the Code of Civil Procedure providing for declaratory judgments. That section, so far as material here, reads, as follows: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another," etc., may bring an action to have such instrument or contract or deed construed, etc. The question arises, must the contract sought to be construed be in the form of an instrument in writing? Is it within the contemplation of the section that testimony shall be taken to establish an oral contract, and then pronounce judgment construing the same and declaring the intent and purpose of the parties as found in such contract? While the language of the section, literally construed, would include an oral contract, a careful consideration of all the words preceding the word "contract" leads us to the conclusion that the portion of the section quoted and relied upon in this action must be held to refer only to a contract that is in writing, to a contract the terms of which are fixed and definite and not depending upon the oral declarations of witnesses or the memory of the parties as to the language used by them in entering into an agreement. Section 1061, Code of Civil Procedure, reads: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." Thus, it may be safely stated that whether the Legislature intended to refer to oral contracts by the words used in section 1060, supra, it is evident that the court ought to and should refuse to exercise the power granted under the provisions of section 1060, Code of Civil Procedure, whenever it is necessary, first, to take testimony to prove the existence of an oral contract, and then enter a judgment granting declaratory relief. In all such cases, we have no hesitancy in stating that the proper course is to remit the parties to the remedies provided by law, as provided for in section 1062, Code of Civil Procedure. While the California cases are silent upon the subject, the whole tenor of authorities found in other states is to the effect that declaratory judgments will be refused where, to enter the same, requires a judicial investigation of disputed facts. This has been carried so far in some cases having to do with written instruments, where both questions of fact and construction are involved, that relief will be denied. Thus, in 6 Ruling Case Law Permanent Supplement, page 3957, we find the following: "Declaratory judgments being within the discretion of the court, it may in its discretion refuse a declaration which can only be made after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action. For example, the court will not make a declaration as to the construction of a writ-

ten instrument where both questions of fact and construction are involved, and a decision as to the matter of construction will not settle the controversy."

In the notes found in 68 A. L. R. beginning on page 110, the rule is thus stated: "Ordinarily, a declaratory judgment will be refused where to render same requires a judicial investigation of disputed facts." Citing Newsum v. Interstate Realty Co., 152 Tenn. 302, 278 S. W. 56; also, 12 A. L. R. 72; Ladner v. Siegel, 294 Pa. 368, 144 A. 274. To the same effect are the notes found in 12 A. L. R. beginning on page 72. See, also, as to relief being discretionary, notes in 50 A. L. R. beginning on page 42; also, a long list of annotations contained in 19 A. L. R. beginning on page 1124.

[5] While the respective parties in their briefs have given considerable attention to the meaning of the words "handling or otherwise," found in paragraph C of the deed of conveyance, we do not think that the use of the word "otherwise" extends either the rights or duties of the respective parties any further than to like or similar actions previously specified in said paragraph, and that the interpretation of the word does not call for special consideration herein.

From what we have said, it necessarily follows that the judgment of the trial court should be, and the same is hereby, reversed, and the cause remanded for further proceedings.

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115 Cal.App. 230

ROSSI v. JEDLICK et al.

Civ. 149.

District Court of Appeal, Fourth District, California.

June 27, 1931.

Rehearing Denied July 27, 1931. Hearing Denied by Supreme Court Aug. 24, 1931.

1. Licenses 🔑39.

Contract for preorganization subscription to stock of proposed corporation, made when no permit to sell stock was issued, *held* valid when made (St. 1917, p. 685, § 25, as amended by St. 1921, p. 1118, § 3).

> Plaintiff paid money to promoters of corporation and received receipt reciting that money was paid as preorganization subscription to capital stock in corporation to be organized and that money was to be repaid if party could not agree on conditions whereby corporation was to take over business. At time instrument was executed, no permit to sell stock in proposed corporation had been issued, but subsequently conditional permit was issued providing that stock should be placed in escrow until ordered released by corporation commissioner, which release was never ordered, and stock was never delivered.

2. Licenses 🔑18½.

Corporate Securities Act making subscriptions to stock conditioned on incorporation *held* to become part of contract for preorganization subscription (St. 1917, p. 685, § 25, as amended by St. 1921, p. 1118, § 3).

3. Licenses 🔑39.

Invalidity of contract for preorganization subscription to corporate stock by promoter's failure to secure permit to sell stock did not affect agreement to return money paid (St. 1917, p. 685, § 25, as amended by St. 1921, p. 1118, § 3).

4. Corporations 🔑82.

Without written agreement to return money paid as preorganization subscription to stock on failure to issue stock, law would imply such agreement (St. 1917, p. 685, § 25, as amended by St. 1921, p. 1118, § 3).

5. Corporations 🔑88.

Plaintiff paying money for preorganization subscription to corporate stock could sue to recover money on breach of contract (St. 1917, p. 685, § 25, as amended by St. 1921, p. 1118, § 3).

6. Contracts 🔑139.

Where class of contracts is prohibited to protect particular parties thereto, adverse parties cannot assert illegality of contract.

7. Licenses 🔑18½.

Inhibitions of Corporate Securities Act are designed to protect purchasers of corporate stock (St. 1917, p. 685, § 25, as amended by St. 1921, p. 1118, § 3).

8. Limitation of actions 🔑66(4).

Where contract for preorganization subscription to corporate stock was legal when made, action to recover money paid, brought shortly after demand and breach, was not barred by limitation.

9. Corporations 🔑88.

Evidence *held* not to show contract for preorganization subscription to corporate stock was extinguished by subscriber's purchase of interest in business to have been purchased by proposed corporation.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by D. F. Rossi against A. V. Jedlick and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Hendee & Rodabaugh, of San Diego, for appellant.

A. T. Procopio, of San Diego, for respondent.

BARNARD, P. J.

This action was brought to recover money paid by the plaintiff to A. V. Jedlick and Harry H. Heim as a preorganization subscription to the capital stock of a corporation. The action was dismissed as to John Doe and the Hawk Company. At the time the money was paid, the defendants gave to the plaintiff the following receipt:

"San Diego, Cal., April 6, 1925.

"Received of D. F. Rossi the sum of three thousand dollars ($3000.00) as a preorganization subscription to the capital stock in a corporation to be organized by the undersigned to be known as the Jedlick-Heim Co., which corporation is to take over the business now being conducted by the undersigned at the southeast corner of Sixth and C Streets, San Diego, California. Should said Rossi and the undersigned be unable to agree upon the terms, price and conditions upon which said corporation is to take over said business or upon any of the other details connected with or arising out of said matters or connected therewith we agree to repay said amount to said Rossi together with interest thereon at the rate of 7% per annum from the date hereof to the date of payment together with any further sum said Rossi may advance in connection with these matters and interest thereon, within 90 days after said Rossi shall have made written demand for the same, which said written demand shall be given us personally.

"A. V. Jedlick
"Harry H. Heim."

At the time this instrument was executed, no permit to sell stock in the proposed corporation had been issued. Plaintiff's subscription for stock was not mentioned in the articles of incorporation, which were later filed under the name of Jedlick-Heim Company. The said Jedlick-Heim Company did not receive its charter until October 1, 1926. Some time later application was made to the commissioner of corporations for permission to issue stock of the corporation in exchange for the business which had been previously conducted by Jedlick and Heim. A conditional permit was issued, which provided that the stock should be placed in escrow until it should be ordered released by the corporation commissioner. Such a release was never ordered, and the stock was never delivered. A number of oral demands were made by the plaintiff for the return of his money, and on October 18, 1928, a written demand therefor was made. Thereafter, this action was brought.

The complaint alleges that Jedlick and Heim are indebted to the plaintiff in the sum of $3,000 on account of moneys, at the special instance and request of said defendants and pursuant to the written agreement above set forth, paid and advanced to said defendants by the plaintiff. It further alleges the parties to the agreement have been unable to agree upon the terms, price, and conditions upon which the corporation mentioned was to take over the business referred to, and that they have been unable and have not agreed to any of the details in connection therewith. It is then alleged that the plaintiff has elected to declare the said amount due and owing from the defendants, and has made written demand therefor. The defendants answered and the case was tried before the court without a jury.

The court found that the agreement was entered into and the money paid; that the defendants had no permit from the commissioner of corporations to issue or sell stock in the corporation; that the corporation subsequently formed received its charter on October 1, 1926, more than ninety days after the execution of the subscription agreement; that the plaintiff signed the articles of incorporation in which he is named as having subscribed for one share of stock; that on March 11, 1927, a permit was issued by the commissioner of corporations authorizing the issuance of 480 shares of stock in exchange for the assets of a business which had theretofore been carried on by these defendants, but requiring said stock to be placed in escrow until certain conditions were complied with and until it was authorized to be released by the corporation department; that such a release has never been authorized; that the plaintiff has received nothing for his $3,000, other than the written receipt and contract above set forth, and no stock has ever been delivered to the plaintiff; that the parties to the agreement referred to have not been able and have not agreed upon the details connected with the organization of the proposed corporation; and that demand has been made for the return of the money, which demand has been refused. As conclusions of law, the court found that the defendants' promise to deliver the stock in question was void, and also found that the defendants had breached their contract through failure of consideration, and through their failure to repay the plaintiff after demand made. A judgment in favor of the plaintiff followed, from which this appeal is taken.

Appellant's particular contention is that the judgment is in reality based upon a cause of action for money had and received, and that such a cause of action is both outside the allegations of the complaint and barred by the statute of limitations. This contention is based not upon the findings, but upon the first conclusion of law, to the effect that the agreement in question was void because the defendants were at that time prohibited by law from entering into such a subscription contract, and that the payment of the $3,000 was without legal consideration and the defendants held the same for the use and benefit of the plaintiff.

[1] We think this agreement was not void at the time it was entered into. Section 25 of the Corporate Securities Act, as amended in 1921 (Stats. 1921, p. 1114, 1118, § 3), provides as follows: "Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic corporation made prior to the incorporation thereof and set forth in its articles of incorporation; but such subscriptions shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter and, when incorporated, shall with reasonable diligence apply for and secure from the commissioner a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions."

[2-7] Under the terms of this section it was incumbent upon the defendants to set forth this subscription for stock in the articles of incorporation of the corporation subsequently formed, and the subscription was deemed to have been made and accepted upon the condition that incorporation should take place within ninety days, and that the incorporators would thereafter proceed with reasonable diligence to secure a permit for the issuance of the shares thus subscribed for. This section became a part of the contract by operation of law. Any subsequent illegality in the contract arose through the failure of the defendants to carry out the terms imposed by law. Through this failure the defendants breached the contract in an additional respect. The defendants had agreed to return the money in a written agreement which did not outlaw for four years. It was valid when made, and any subsequent invalidity not only arose through the actions of the defendants, but applies only to the transfer of the stock. While their own neglect later made it impossible for the defendants to enforce the subscription for stock as against the plaintiff, their own agreement to return the money paid upon certain conditions was not rendered illegal. In the absence of any written agreement, the law would have implied an agreement to return the money paid. Santa Clara Valley Peat Fuel Co. v. Tuck, 53 Cal. 304. This being so, certainly a written agreement to return the money would not be contrary to law when the entire contract was legal when made, and any subsequent illegality arose through the fault of the defendants. The court found upon sufficient evidence that the contract itself had been breached, and in addition found that the defendants had failed to comply with the provisions of section 25 of the Corporate Securities Act, which were a part of the contract. Under such circumstances, we are of the opinion that the respondent was not barred from bringing an action under the contract to recover the money paid. Where a class of contracts is prohibited for the protection of particular parties thereto, the adverse parties cannot take advantage of the illegality of such contracts. Savings Bank v. Burns, 104 Cal. 473, 38 P. 102. Smith v. Bach, 183 Cal. 259, 191 P. 14. The inhibitions of the Corporate Securities Act are designed for the protection of the purchasers of stock in corporations, and the finest of technicalities should not be indulged in to enable the promoters of such corporations to escape their obligation to the very persons whom the statute was designed to protect.

[8] Even if this action should be construed as one for money had and received, it would not necessarily follow, under the circumstances here existing, that this action was barred by the statute of limitations. In Rose v. Foord, 96 Cal. 152, 30 P. 1114, 1115, certain stock in a certain corporation had been paid for under a written agreement that the same should be delivered. The issuance of the stock was held up by an injunction and after about six years, plaintiff sued for the return of the money paid, in an action for money had and received. The court held that the plaintiff was not confined to damages for breach of his contract, but that he had a right after waiting for a reasonable time, to demand the return of his money, that until such demand was made the retention of the money by the seller was lawful and, therefore, there was no cause of action prior to the demand and the statute had not run. In the case before us, the agreement was legal when made, the defendants did not comply with the statute, and later, the stock, although issued, was held up by the terms of the permit so that it could not be delivered to the plaintiff. While he had the right to demand the return of his money at an earlier date, until he did demand it, the retention of the money by the defendants was lawful. While he waited longer than he was required to wait, as was said in Rose v. Foord, supra, "it does not lie in the mouth of the defendant to say that he waited too long. When he chose to wait no longer, and to demand back his money, he had an undoubted right to receive it." As was said in Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39, 41: "But the action is not for a breach of the original contract, but upon an obligation growing out of the failure to perform it. The plaintiff was not bound to treat the contract as abandoned on the first breach of it, or on any particular breach, but had his election

still to rely upon it. The statute could not begin to run until he made his election to rely no longer upon the contract, and to sue for the money paid to the defendant under it."

The defendants were obligated to return this money both by the contract implied by law and by their express contract. They seek to avoid this liability on the claim that their written contract was void under the statute and that their implied contract was barred by the statute of limitations. While such a result might obtain under some circumstances, we think it is not necessary to so hold under the conditions here existing.

A further consideration is that the bar of the statute of limitations was not pleaded by the defendants. While they seek to explain this by asserting that they took a different view of the complaint, and while they requested permission to amend their answer in that regard after the court's decision had been announced, the situation is not one that requires us to hold that the court abused its discretion.

Appellant asserts that the finding that the details connected with the transaction in question were never agreed upon is not supported by the evidence. The matters pointed out in this connection merely create a conflict in the evidence upon this point. The defendant Heim, after testifying to numerous disagreements, testified that he was finally compelled to leave when the lock on the door was changed to prevent him from entering the premises, and that nothing was definitely agreed upon, prior to his departure.

[9] The only other point raised is that the written agreement above referred to was abandoned and extinguished by mutual consent, and that thereafter a new and distinct agreement was made by the parties, which new agreement was fully performed. It is here contended that at a later date the respondent purchased an interest in the business previously conducted by the defendants, paying therefor the sum mentioned in the written agreement, and that he was in fact one of the partners, irrespective of the forming of the corporation. Not only is this defense not pleaded but it is not supported by the evidence. Nothing appears in the evidence to indicate that the respondent did anything other than assist in the formation of the corporation by signing its articles of incorporation and by attending meetings at which the parties were attempting to arrive at an agreement concerning the details of the transaction. In this connection appellant relies upon certain testimony given by Heim in which he stated that they considered the respondent one of the firm, and that he would have shared in the profits if there had been any; that respondent was supposed to get stock if they incorporated, but until things were settled he would share in the profits. However, Heim also testified that he couldn't remember having talked such a proposition over with the respondent. There is no evidence that such an arrangement was ever agreed to by the respondent, or even mentioned to him. Jedlick testified as follows: "Q. Was he to receive an interest in the business or was he to receive some stock? A. Well, stock, as soon as the corporation is formed, naturally stock."

While we are not in accord with the first conclusion of law set forth by the trial court, we think the judgment is sustained both by the pleadings and the evidence, and that the action was not barred by the statute of limitations.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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115 Cal.App. 490

SAWYER v. NELSON et ux.

Civ. 406.

District Court of Appeal, Fourth District, California.

July 15, 1931.

Rehearing Denied July 30, 1931.

1. Automobiles ⚷244(11).

Evidence *held* sufficient to support judgment against driver of automobile colliding at intersection with other car approaching from right (St. 1923, p. 560, § 131, as amended by St. 1925, p. 398, § 15).

2. Automobiles ⚷244(43).

Evidence *held* not to establish that driver of automobile approaching from right was guilty of contributory negligence in respect to collision at intersection (St. 1923, p. 560, § 131, as amended by St. 1925, p. 398, § 15).

3. Damages ⚷132(6).

$14,000 for injuries consisting of broken right ankle and right femur broken in two places *held* not excessive.

4. New trial ⚷105.

Newly discovered evidence which was merely cumulative and of impeaching character *held* not to require new trial.

Newly discovered evidence in action to recover for injuries in automobile collision consisted merely of that of newsboys to effect that taxicab driver who had testified that he witnessed accident did not arrive at scene of collision until five minutes after it happened, as to which other witnesses had already testified, making it apparent that evidence sought to be obtained from newly discovered witnesses was solely impeaching and cumulative.

5. New trial ⚷105.

Newly discovered evidence that is merely impeaching does not furnish any ground for new trial.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Ralph M. Sawyer against George F. Nelson and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

Kenneth J. Murphy, of Los Angeles, and Hugh A. Sanders, of San Diego, for appellants.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for respondent.

MARKS, J.

This action grew out of an automobile collision happening about 5 o'clock in the afternoon of December 31, 1927, at the corner of Cedar and Dale streets in the city San Diego. The case was tried before the court without a jury. A judgment was rendered in favor of respondent in the sum of $14,000.

Appellants present various grounds upon which they urge a reversal of the judgment. These may be consolidated under four heads, which may be stated as follows: First, that the evidence is insufficient to support the judgment; second, that the evidence shows contributory negligence as a matter of law on the part of respondent; third, that the damages awarded are excessive; and, fourth, that the court erred in denying appellants' motion for a new trial. We will consider the first two grounds together.

As is very frequently the case in actions of this kind, the evidence offered by the respective parties is sharply conflicting. Had the trial court found in favor of appellants, there would have been ample evidence to support such a finding. However, as it found in favor of respondent, it will only be necessary for us to discuss such portions of the record as are most favorable to him.

The evidence discloses that Cedar and Dale streets intersect each other at right angles. Just prior to the accident, respondent was driving a Ford delivery truck south on Dale street approaching its intersection with Cedar street. When he was between thirty and forty feet northerly from the north line of Cedar street he saw Marie J. Nelson on Cedar street at a point between sixty and seventy feet east from the easterly property line of Dale street. She was approaching westerly on Cedar street at a speed of between thirty and thirty-five miles per hour. When he saw the Nelson car approaching the intersection respondent applied his brakes and reduced his speed until he was traveling less than fifteen miles per hour as he reached the northerly line of the intersection. At this time Mrs. Nelson had reached a point about twenty feet from the intersection and had greatly reduced the speed of her automobile. She testified that, "I slowed up so I was almost to a dead stop. Then I started to go across the street." Respondent, seeing the speed of the other automobile so greatly reduced, proceeded on his way across the intersection, believing that Mrs. Nelson was stopping to yield the right of way to him. Instead of stopping, Mrs. Nelson accelerated the speed of her car and entered the intersection. Respondent, seeing that a collision was imminent, swung his automobile to his right and Mrs. Nelson swung her car to her left, its right side coming into contact with the left side of the Ford truck in what is commonly called a "side swipe." The point of the collision was about fifteen feet westerly from the center of the intersection. Both automobiles proceeded toward the south curb line of Cedar street, the front wheels of respondent's truck mounting the curb. The truck turned over on its side throwing respondent over the windshield and onto the pavement, where his right leg was broken in three places.

Respondent entered the intersection first. Mrs. Nelson approached the intersection from his left. Section 131 of the California Vehicle Act (as added by St. 1925, p. 398, § 15), in effect at the time of this accident, provides in part as follows: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed."

[1, 2] A statement of the foregoing facts effectively refutes appellants' contentions that the evidence is insufficient to support the judgment, and that respondent was guilty of contributory negligence as a matter of law. As respondent entered the intersection first at a lawful speed, and as Mrs. Nelson was approaching from his left and had brought her car almost to a standstill twenty feet from the intersection, the question of what an ordinarily prudent person should have done under these circumstances, and the question of her negligence and the contributory negligence of respondent, were questions of fact to be determined by the trial court. It having resolved these questions in favor of respondent, its findings are conclusive and cannot be disturbed by this court.

[3] Appellants next complain that the amount of damages awarded were so excessive that they indicated passion and prejudice

and a disregard of the evidence on the part of the trial court. The evidence discloses that respondent's right ankle was badly broken and his right femur broken in two places. He was removed from the place of the accident to a hospital, where his fractures were reduced and a rigid cast was placed upon him extending from his waist to the extremity of his right leg. He was compelled to wear such a cast continually thereafter. He remained in the hospital until June 22, 1928. He returned to the hospital during the month of September, 1928, and again in February, 1929. He was compelled to again return to the hospital in May, 1929, where he remained for six weeks, as the femur had failed to unite. During his last hospital confinement, he was required to undergo a bone-grafting operation. At the time of the trial in August, 1929, he was still in the cast, and the court found that he would be required to wear it for a period of at least four additional months. Respondent faces the possibility, if not the probability, of being required to undergo a second bone-grafting operation which will cost him at least $1,000. His right leg is shortened so that it will be one or more inches shorter than normal during the remainder of his life. It was stipulated at the trial that he had incurred bills for medical attention, hospital care, X-ray and other services as a result of his injuries in the sum of $2,010.60. He also suffered pain from the time of the injury on December 31, 1927, to the time of the trial in August, 1929, and faced the prospect of further suffering over a considerable period of time.

Under the facts of this case, we cannot conclude that the damages awarded were excessive in view of the rule in California, applicable here, which is set forth in the case of Cosey v. Los Angeles Railway Corp., 192 Cal. 265, 219 P. 978, 980, as follows:

"There is a multitude of authorities in this state to the effect that in actions for damages for personal injuries, where the amount of the award is left to the sound discretion of the jury, or of the court, if the case is tried without a jury, the award made in the trial court is conclusive on appeal unless the amount appears to have been given under the influence of passion or prejudice. * * * 'If a motion for a new trial upon this ground is denied by the trial court, we cannot reverse the judgment unless the amount thereof is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury" (Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83).'"

Appellants' motion for a new trial was made upon several grounds, one being newly discovered evidence supported by an affidavit of George F. Nelson. This affidavit fails to disclose that appellant used any great amount of diligence in attempting to discover and produce the witnesses mentioned therein. More than fifteen months elapsed between the filing of the complaint and the trial of the action. During this time appellants knew they were being sued for damages resulting from the injuries to respondent, and they should have been diligent in discovering their witnesses and producing them at the trial. However, we prefer to base our conclusions upon grounds other than their apparent lack of diligence.

[4] Respondent produced Glenn Kennet Rose, a taxi driver, as a witness in his behalf. Rose testified that just prior to the accident he was driving his taxicab south on Dale street about fifty feet in the rear of respondent's truck and that he witnessed the accident, reaching the place where Mrs. Nelson's automobile and the truck came to rest a few seconds after the collision. According to the affidavit of George F. Nelson, all of the newly discovered witnesses were expected to testify that Rose did not reach the scene of the accident until four or five minutes after it happened. In addition, two of the witnesses, whose names are not disclosed in the affidavit, they being described as newsboys who at the time of the making of the affidavit were residing in New York City, were expected to testify that they arrived at the scene of the collision between one and two minutes after it occurred, and that Rose was not then at the scene of the accident, and, further, that they heard respondent say "That the accident was caused by his going too fast, that he was unable to swerve his car to the left and go behind the defendants' automobile and thus avoid an accident." Appellant Marie J. Nelson and her son Maxwell Nelson both testified to this alleged statement. Both these witnesses, together with a third witness, testified that Rose did not appear at the place of the accident until four or more minutes after the collision. It is immediately apparent that the evidence sought to be obtained from the newly discovered witnesses was solely impeaching and cumulative.

[5] Newly discovered evidence that is merely impeaching, and an impeachment of evidence offered at the trial, does not furnish any ground for the granting of a new trial. Estate of Baird, 198 Cal. 490, 246 P. 324; Waer v. Waer, 189 Cal. 178, 207 P. 891. The rule is clearly stated in 20 Cal. Jur. 98, as follows:

"Newly discovered evidence designed merely to impeach or contradict the testimony of adverse witnesses, or which has only that effect, is not of a character to warrant a new trial. Nor will a new trial be granted because of the discovery of new evidence which, if produced, would only tend to impair the credibility of the evidence given, or to contradict a witness of the opposing party, or where the only value of newly discovered testimony is as impeaching evidence. Thus a new trial is properly denied where the new evidence consists of a written statement made by one of the principal witnesses for the adverse party which varied in material respects from his testimony subsequently given at the trial.

"Evidence of a statement of a party contradicting a fact he had testified to upon the trial is impeaching and not sufficient to warrant a new trial."

The rule regarding newly discovered cumulative evidence is stated in 20 California Jurisprudence, at page 94, as follows: "Newly discovered evidence which is merely cumulative affords no ground for a new trial, unless it is clear that such evidence, notwithstanding its cumulative character, is of sufficient probative force to render probable a different result upon a retrial of the case, in which event it not only warrants, but may require, an order granting a new trial. In accord with this rule it is clearly not an abuse of discretion to refuse a new trial where the new evidence is merely cumulative." Smith v. Lombard, 201 Cal. 518, 258 P. 55; Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622; Robinson v. McKnight, 103 Cal. App. 718, 284 P. 1056.

In the instant case, we cannot conclude that the newly discovered evidence of the two newsboys, which was merely cumulative and impeaching, was of sufficient weight to render probable a different result on a new trial, and accordingly there was no abuse of discretion on the part of the trial court in denying the motion.

Judgment affirmed.

We concur: BARNARD, P. J.; GRIFFIN, Justice pro tem.

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115 Cal.App. 486

ZELLER v. KNAPP et al.

Civ. 6809.

District Court of Appeal, Second District, Division 2, California.

July 14, 1931.

Rehearing Denied Aug. 13, 1931. Hearing Denied by Supreme Court Sept. 10, 1931.

1. Appeal and error ⚷1011(1).

Conflict in evidence precludes contrary ruling on appeal, where findings are supported by some substantial evidence.

2. Attorney and client ⚷127.

Proof of actual fraud as between attorney and client is not requisite to maintenance of action for moneys intrusted to attorney.

3. Attorney and client ⚷123(1).

Relation of attorney and client is confidential in character, and any contract whereby attorney obtains advantage is presumed to have been obtained by undue influence.

4. Money received ⚷1.

Action for money had and received may be maintained whenever equity arises from circumstances of which it appears that one has money which he ought to pay to another.

5. Attorney and client ⚷127.

Evidence warranted recovery of money intrusted to attorney for investment on ground of false misrepresentation respecting business.

6. Appeal and error ⚷996.

Appellate court is not authorized to disturb findings of fact or judgment, where fair and reasonable ground for difference of opinion is presented.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Bessie Zeller, formerly Bessie Cook, against D. A. Knapp and another. Judgment for plaintiff, and defendant named appeals.

Affirmed.

D. A. Knapp and Ewell D. Moore, both of Los Angeles, for appellant.

A. S. Goldflam, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The defendants, as alleged trustees for the plaintiff and respondent, were by her paid certain moneys which they agreed to invest in an incorporated trucking business of which they were directors. It was also alleged by the plaintiff that the defendant and appellant D. A. Knapp, an attorney and counselor at law, was at the same time her legal adviser; that he promised large returns upon said investment, the issuance of stock or investment certificates in their names as such trustees, the payment of plaintiff's share of profits each month, and the refund of her principal together with any unpaid accrued interest, upon one year's notice in writing; that the business was not profitable; that its returns were not as represented by appellant; and that no part of the same had been refunded. The defendants admitted receipt of the moneys for investment, denying any misrepresentation as to volume of business or amount of returns, or that D. A. Knapp was then or at any time the plaintiff's attorney, or that either of the defendants acted in any capacity other than as

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

recipients of checks aggregating $6,000 for investment as directed by her. Defendant Knapp affirmatively alleged that "to the end of insuring the success of said investment to plaintiff, this defendant secured stock therein to represent her full pro rata, ever holding the same as her trustee; * * * that this defendant as said trustee has far exceeded the requirements in said trustees' agreement set forth and has done everything humanly possible in the premises to conserve plaintiff's investment and bring realization to plaintiff's hopes therein; that at all times this defendant has been ready to turn over to plaintiff corporate evidence of the holdings of the defendants to and for the benefit of plaintiff according to the terms of said agreement, but plaintiff has never made demand therefor, either in writing or otherwise." Findings of fact and judgment were awarded the plaintiff, and the defendant Knapp appealed from said judgment.

[1] There is a sharp conflict of evidence, direct and circumstantial, from which the trial court found that appellant falsely and with intent to deceive and defraud the plaintiff, represented the trucking business as of a large volume and that its proceeds were enormous, and that he made numerous other fraudulent representations. This conflict alone precludes a contrary ruling upon appeal, even though, as argued by appellant, such findings appear to be against a preponderance of the evidence, where they are, as here, supported by some substantial evidence. City and County of San Francisco v. Center, 133 Cal. 673, 66 P. 83. But we think that for other reasons the judgment must be affirmed, and that a more extensive consideration of this phase of the case is therefore unnecessary.

The complaint contained a cause of action for money had and received, and the plaintiff also alleged that appellant acted as her attorney in the matter, which, as already mentioned, was strenuously denied both in the answer and upon the trial. It was testified by respondent and her daughter, and the trial court found, that appellant "arranged all of the terms of the contract between the parties while acting as the attorney for the plaintiff"; that the defendants received from the plaintiff the sum of $6,000, which she paid to Knapp for investment and which he turned over to Hunt; that no stock was issued to the plaintiff; that she received no benefit from the investment; and that she made demand for the return of her money. Specifically, the respondent swore that the appellant not only was a director of the company, but that "he, Mr. Knapp, and Mr. Hunt had taken over this Golden State Transportation Company and that if I would invest some money in it he would get me—have a safe investment for me, and that I would be in on the ground floor and my money would be safe and he would watch it as an attorney for me and be my attorney in the investment of this money. * * * I said, 'Mr. Knapp, of course, I want a safe investment. I don't know anything about these investments. I don't know a thing about them.' He said, 'Well, that is just why I want to look after your money and you do not need to worry about anything of that sort because you know an attorney does not make mistakes.' * * * Mr. Knapp told me what an enormous business this transportation company was carrying on and what big returns I would receive from my money. He said, 'Why, in a short time you will be able to live at the Biltmore Hotel.'"

[2-4] The proof of actual fraud as between attorney and client is not requisite to the maintenance of an action for moneys of the latter which are intrusted to the former in such cases. "The rule is well established that the relation of attorney and client is confidential in character, and that any contract entered into between them while that relation continues, whereby the attorney obtains an advantage from the client, is presumed to have been made by the client under the undue influence of the attorney. Kisling v. Shaw, 33 Cal. 440, 91 Am. Dec. 644; Civ. Code, § 2235; 1 Story, Eq. Jur. §§ 310, 311; 2 Pom. Eq. Jur. § 390." Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981, 986. To the same effect are Cooley v. Miller & Lux, 168 Cal. 120, 142 P. 83; Metropolis, etc., Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265. It has long been established law that whenever an equity arises from the circumstances of which it appears that one has money which he ought to pay to another, an action for money had and received may be maintained. Quimby v. Lyon, 63 Cal. 394; Cox v. Delmas, 99 Cal. 104, 33 P. 836; Black v. Riley, 20 Cal. App. 199, 128 P. 764.

[5, 6] The evidence in this case tends to establish an official and financial interest of appellant in a business which he and his codefendant had taken over, the solicitation and investment therein of moneys of a client, and admissions by both defendants that there was no profit and that said moneys had not been repaid as agreed. The equities impel an affirmance upon the action for moneys had and received. Arguments upon remaining issues, as we have seen, go to the weight of the evidence, and we are not authorized to disturb findings of fact or a judgment where a fair and reasonable ground for differences of opinion is presented. Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

BROWN v. SOUTHERN CALIFORNIA EDISON CO.*

Civ. 6478.

District Court of Appeal, Second District, Division 1, California.

July 21, 1931.

Rehearing Granted Aug. 19, 1931.

1. Negligence 🔑136(14).

Ordinarily, negligence is fact question for jury.

2. Negligence 🔑136(19).

Whether instrumentality is attractive to children, and owner obligated to guard against injuries to trespassing children, is jury question.

3. Appeal and error 🔑866(1).

Court's duty on appeal from judgment of dismissal after sustaining demurrer to complaint in death action is to determine whether legally admitted facts admit of inference that defendant was negligent.

4. Negligence 🔑23(1).

Attractive nuisance doctrine prevails in California.

5. Negligence 🔑121(1).

Negligence of one whose violation of statute directly results in injury to another is conclusively presumed.

6. Electricity 🔑19(2).

Complaint *held* to state cause of action for death of boy coming into contact with high voltage wire on defendant's pole (Henning's Gen. Laws, Act 1350, as amended by St. 1915, p. 1058).

> The complaint alleged that pole was located on public property in immediate neighborhood of children's playground to defendant's knowledge; that climbing spikes were within easy reach of child of deceased's age; that wires at top were uninsulated and contained high voltage of electricity; and that defendant failed to paint cross-arms bright yellow or paint words "high voltage" thereon, as required by statute.

7. Electricity 🔑19(12).

Power company's negligence, proximately contributing to death of boy climbing pole carrying high voltage wires, *held* for jury.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Harry R. Brown against the Southern California Edison Company. From a judgment of dismissal, plaintiff appeals.

Reversed.

McGee & Sumner and William A. Sumner, all of Los Angeles, for appellant.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment of dismissal after order sustaining the defendant's demurrer to plaintiff's second amended complaint, which judgment was entered upon refusal of plaintiff to file a third amended complaint.

The minor son of the plaintiff, who is alleged to have been of the age of twelve years and a normal, healthy, active boy of the ordinary capacity and understanding for that age, was injured by a certain high-tension or high-voltage power line, alleged to have carried an electric current of between 600 and 10,000 volts, which injury resulted in his death. It is alleged that this power line was erected and maintained in Los Angeles county, and that the defendant caused wooden poles of a height of about 60 feet to be erected along the northerly curb line of the public street along which the power line was run, said poles carrying heavy uninsulated copper wires attached to wooden cross-arms. The pole where the son of the plaintiff is alleged to have been injured was located in a thickly settled community, in which there resided a large number of boys of about the age of decedent, which boys were accustomed to congregate and play in and around that vicinity. The theory of the complaint apparently was that the erection of such a pole and the fact that the pole contained iron spikes placed alternately on each side, spaced about 18 inches apart, to form steps or a ladder by which to climb the pole, constituted a nuisance on the part of defendant, and was an implied invitation to a child to climb the same.

It was alleged that the lowest step was six feet off the ground on the pole in question, and that the steps reached to the top of the pole or to the cross-arms at or near the top thereof. It was also alleged that the average height at which the spikes or steps started on other poles in said power line was about eight feet instead of six feet as on the particular pole in question. It was further alleged that there was no sign or warning of danger posted upon the pole to indicate that it was dangerous or that it was a high-voltage power line. It was also alleged that Act 1350 of (Henning's) General Laws of California, as amended by the Statutes of 1915, page 1058, provided that in

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 7 P.2d 770.

cases where more than 600 volts of electricity are carried on any wire or cable, the cross-arms, or such other appliances as may be used in lieu thereof, to which such wire or cable is attached, must be kept at all times painted a bright yellow color, or on such cross-arms, or other appliances used in lieu thereof, shall be placed signs providing in white letters on a green background, not less than three inches in height, the words "high voltage" on the face and back of each cross-arm. It was further alleged that the defendant carelessly and negligently failed to fence off or guard said pole, and failed to place any sign or other warning of danger on or near said pole; that said defendant carelessly and negligently failed to insulate the wires supported by said pole, and carelessly and negligently conveyed a high-voltage current of electricity through uninsulated wires; failed to comply with the statutory requirements in relation to painting the cross-arms on said pole; failed to paint said cross-arms a bright yellow, and failed to paint on said cross-arms in letters three inches high the words "high voltage," or any words.

It was also alleged in the complaint that the death of the said Fred C. Brown was proximately caused by the negligence of the defendant as alleged in the complaint, and that he was killed by the electric current from the pole passing through his body.

The defendant demurred on the ground that the complaint did not state a cause of action; also on grounds of uncertainty, etc., in the complaint. The appeal herein, as presented by counsel for the respective parties, deals only with the general demurrer; and this court will limit its attention to the matter of sufficiency of the complaint to state a cause of action.

The demurrer having been sustained, the plaintiff was given ten days within which to amend and, having refused to amend within that time, the court thereupon, upon motion of the attorneys for defendant, dismissed the action and ordered judgment that defendant have and recover its costs.

It will be observed that from the allegations contained in the complaint the particular acts of negligence charged to the defendant are that to the knowledge of the defendant the pole in question was located on public property in the immediate neighborhood of a children's playground where children were accustomed to congregate and play; that the climbing spikes on said pole were within easy reach of a child of the age of twelve years; that the said pole was neither fenced nor otherwise guarded in any way to prevent easy or unobstructed access thereto; that the electric wires of the defendant at the top of said pole were uninsulated and "contained a high voltage of electricity"; and that in violation of statutory requirements the defendant failed to paint the cross-arms of said pole a bright yellow, or to paint thereon in letters "three inches high" the words "high voltage."

[1, 2] The proper application of the term negligence to the conduct of individuals depends upon "the situation and knowledge of the parties and all the attendant circumstances." 19 Cal. Jur. 549. Ordinarily, the question of determining whether the acts of a defendant were negligent is one which rests with the jury; yet where, as on demurrer to the complaint, the facts are undisputed or admitted and are such that but one inference may be drawn therefrom, although it is generally ruled that as a matter of law the trial court is authorized to declare that negligence does not exist (19 Cal. Jur. 725), nevertheless, even in such cases, it has been declared that the ruling by the court can never be a "question of pure law. The real decision of the question by the court is a decision of fact" (Zibbell v. Southern Pacific Co., 160 Cal. 237, 240, 116 P. 513, 515), and more particularly (with reference to the facts herein), it is for the jury to determine whether an instrumentality is attractive to children, and whether or not the owner is obligated to guard against injuries to trespassing children. 19 Cal. Jur. 627.

[3] In the premises, the duty of this court is primarily to determine whether the legally admitted facts will admit of any inference other than that the defendant was guilty of no negligence; in other words, are the facts such that from a consideration of them by no possibility might reasonable men differ in their conclusions regarding the question of negligence of the defendant?

Considering first what may be termed the ordinary facts regarding which no particular prescribed statutory duty rested on the defendant to take care that no injury resulted to any one, and especially to children, from the instrumentality in question —that is to say, the location of the pole, its height and equipment, its purpose and use, and the condition in which it was maintained—it may be said that the common observance of mankind, and particularly that of judges of courts, is that what might amount to extreme care under one condition of knowledge and one set of circumstances might be gross carelessness with different knowledge and changed circumstances. 19 Cal. Jur. 549. To illustrate: If in a given case it appeared that on the side of a desert road, many miles from human habitation, the defendant herein had erected a pole identical in height and equipment with that here under consideration, probably no jury would have been justified in reaching a conclusion that the defendant was guilty of negligence in so maintaining the pole because some aged woman had fallen therefrom and thereby sustained serious injuries as a result of her having attempted a "pole-sitting" feat on one of the cross-arms of such pole. But manifestly no situation analogous to that just suggested herein obtains. In addition to the alleged knowledge on the part of the defendant that the pole in question was located near a playground where children were accustomed to congregate and play, the defendant also may be presumed to have known of the possible or probable effect which a tall pole, provided with climbing spikes and with cross-arms at its top, would ordinarily have upon small children. Section 1960 of the Code of Civil Procedure contains the declaration of law that "an inference must be founded: 1. On a fact legally proved; and, 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men. * * *" It would seem probable that one of the propensities of boys is to climb poles of the character of that here under consideration. It is a well-known fact that children, and especially boys of the approximate age of the son of plaintiff, are much inclined to climb about the joists and rafters of houses under construction, piles of lumber, trees, or anything that is capable of being climbed. For the average boy of the age of twelve years, it is about as natural for him to climb as it is for a creeping babe to attempt to walk; in fact, one of the chief anxieties of fond mothers is regarding the dangers that exist to their children from such former activities. In addition to the fact that a pole equipped as was the pole in question ordinarily would present to a small boy an attractiveness of no small proportions, when in the boy the ever-present characteristic of bravado, or the desire to "show off" to his companions, is taken into consideration, it approaches the certainty of a mathematical demonstration that such a pole, in such a locality, and in such a situation of circumstances as are presented by the allegations in the instant complaint, ordinarily would constitute such a challenge to the agility and the daring of the boy that its consideration could not be ignored, nor its acceptance declined.

[4] In this state, the so-called doctrine regarding "attractive nuisance" has been adopted and consistently followed.

"* * * And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense. [Citing cases.] The rule of course is not to be confined to turntables, but applies to any attractive and dangerous machinery so placed." Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 574, 96 P. 84, 86, 19 L. R. A. (N. S.) 1094.

In Pierce v. United Gas & Electric Co., 161 Cal. 176, 181, 118 P. 700, the "attractive nuisance" consisted of a guy wire to an electric light pole which had become detached from its ground fastenings and thereafter from its other end hung parallel to the pole. It was there held (syllabus): "The so-called 'attractive nuisance' doctrine imposes on one who places an attractive but dangerous contrivance in a place frequented by children, knowing or having reason to believe that children will be attracted to it and subjected to injury thereby, the duty of exercising ordinary care to prevent injury to them. Such doctrine obtains in this state, and is not confined to cases of turntables."

In that case, the court further ruled (syllabus) that: "It was a question for the jury whether the defendant should reasonably have anticipated that the contrivance was of such a nature that it would naturally attract children of such age to play with it, even to the extent of endeavoring to obtain electric shocks, without any realization of the extent of the danger to which they were exposing themselves. * * *"

But in addition to what has herein been called the ordinary facts of the case, from the allegations of the complaint it appears that the defendant failed to take certain definite statutory precautions to prevent injury from resulting to any person by reason of the conditions existing in the maintenance of the pole and the use to which it was put by defendant; that is to say, the statutory requirements that the cross-arms of said pole be painted a bright yellow, or have painted thereon in letters "three inches high" the words "high voltage," were entirely ignored by the defendant; and that such omission constituted a proximate cause of the injury which resulted in the death of the son of plaintiff.

[5] In the instant case, it is readily perceivable how a compliance by the defendant with the terms of the statute might have prevented the happening of the accident. In these days of free liberal education and rapid advancement of apt pupils in the work of the common school system of this state, it is not unusual to know of boys of twelve years having concluded the grammar school education. At any rate, it would be most unusual to know of a boy of that age who was unable to read and to understand that the words "high voltage" were intended to designate that a very great danger lurked in the vicinity of the place where such a sign was exhibited. And if the words "high voltage" were omitted, it is not improbable that if the alternative of the statutory command had been obeyed, and in compliance therewith the cross-arms of the pole had

been painted a bright yellow, the average small boy of the neighborhood in which such a signal was displayed never would have rested until after he had learned of its full significance. But aside from such speculations, it is a universal rule that where injury directly results to the plaintiff from the violation of a statute by the defendant, the negligence of the latter is conclusively presumed as a matter of law. 19 Cal. Jur. 632, and authorities there cited.

[6, 7] Considering as admitted as true the allegations of the complaint herein, it follows that said complaint was not legally subject to the objection that it failed to state a cause of action; in other words, the admitted facts readily admit of the inference that the defendant was guilty of negligence. Furthermore, aside from the feature involved in the alleged violation by the defendant of statutory requirements, the question of whether negligence actually existed, and, if so, whether it contributed proximately to the death of the son of plaintiff, was one regarding which reasonable men might differ one from the other in their respective conclusions, and which should have been submitted to the jury for its determination.

The judgment is reversed.

KATZ v. HELBING et al.*

Civ. 7642.

District Court of Appeal, First District, Division 1, California.

July 21, 1931.

Rehearing Denied Aug. 20, 1931. Hearing Granted by Supreme Court Sept. 17, 1931.

1. Municipal corporations ⚷809(1).

Ordinarily, one lawfully placing materials on sidewalk need not take unusual precautions against injury to strangers, but if reasonably prudent man would foresee probable injury, such probability must be guarded against.

2. Negligence ⚷35.

Building owners who knew, or, due to frequency of occurrence, should have known, that boys had access to contractor's lime box and were throwing lime at street cars *held* liable to injured passenger.

3. Negligence ⚷136(16).

Whether policeman notified contractor or another that boys were throwing contractor's lime at street cars *held* for jury on conflicting evidence.

4. Witnesses ⚷255(3).

Allowing witness to refresh recollection from statement made five years before trial *held* not error.

> It appeared that witness originally made statement in question when facts contained therein were fresh within his recollection, and that statement was taken down in shorthand and transcribed, but was not presented to witness until two or three weeks before trial, and court allowed statement to be used to refresh witness' recollection only as to certain relevant date which he had already mentioned in his testimony as being approximate time of occurrence involved; and if facts set forth in statement were true, and witness recognized them as true when he read them, length of time between making of statement and reading thereof was immaterial.

5. Appeal and error ⚷1050(1).

Admitting ordinance legalizing materials on sidewalk *held* not prejudicial to contractor sued by passenger injured when boys threw lime at street cars.

6. Municipal corporations ⚷809(2).

Unauthorizedly placing building materials on sidewalk constitutes nuisance.

7. Trial ⚷229, 260(1).

Court need not repeat instructions already given, or give instruction fully covered by others.

8. Negligence ⚷1.

Act not negligent when done may become so because of another's subsequent acts.

9. Negligence ⚷61(1).

Where two wrongdoers contribute to injury by negligent act and omission respectively, negligent act of one will not exculpate other's negligent omission.

10. Negligence ⚷128.

Allowing question whether contractor, sued by passenger injured when boys threw lime at street cars, had warned children to stay away from lime box *held* proper.

> Question was properly allowed, since, under allegations, evidence was competent to show whether contractor had warned children of dangerous character of their acts, or had taken any precautionary or preventive measures.

11. Master and servant ⚷316(1).

Generally independent contractor rather than his employer is responsible for contractor's negligence.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 10 P.2d 1001.

12. Negligence 🔑16.

When building owner or contractor obtains from proper authorities permit for act which might otherwise be nuisance, permittee contracts to do act lawfully and cannot relieve himself by contracting with another to do permitted act.

13. Principal and agent 🔑177(3).

Independent contractor procuring owners' approval of lime box on sidewalk pursuant to permit obtained by owners *held* owners' agent to enforce permit; hence, notice to contractor that boys were throwing lime at street cars instituted notice to owners.

14. Negligence 🔑136(16).

Whether building owners obtaining permit authorizing materials on sidewalk knew that boys were unlawfully taking lime from contractor's box thereon and throwing lime at street cars *held* for jury.

15. Damages 🔑132(14).

$30,000 for loss of eye *held* excessive and reduced to $16,000.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Fred Katz against William Helbing, Sr., and others, partners doing business under the firm name and style of the Helbing Company, and others. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

See, also, 271 P. 1062.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant A. G. Isaacs.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants Helbing Co. and members of the copartnership.

Hubbard & Hubbard, of San Francisco, for respondent.

WARD, Justice pro tem.

Plaintiff brought suit to recover damages for the loss of an eye. The jury returned a verdict in favor of plaintiff in the sum of $30,000; judgment was entered thereon, and from the judgment the defendants appeal.

Appellants Helbing, copartners doing business under the firm name and style of Helbing Company, were general contractors engaged in erecting a building on Sutter street in San Francisco. The Helbing Company owned the parcel of land upon which the building was in course of construction. For convenience and brevity herein, the Helbings and the Helbing Company will be referred to as the "owners." A. J. Isaacs was an independent contractor employed to do certain plaster work in the building. Hereafter he will be referred to as the "plastering contractor."

An ordinance of the city and county of San Francisco prohibited the use of sidewalk, etc., for building materials unless a permit was obtained from the board of public works. The ordinance provided that such material "shall be prevented from being blown or otherwise moved to any portion of the street or from interfering in any way whatever with the carrying on of any business or enjoyment of any property." The owners obtained such a permit. The plastering contractor, with the approval of the owners, constructed and used a lime or plastering box on a portion of the walk and street. On August 25, 1925, the respondent, after work had ceased upon the building for the day, was riding on a Market Street Railway car, which operated upon the tracks on the street in front of the building. Two young boys, approximately of the ages of twelve years, were playing "soldiers of France." In this game, the ammunition used was the lime from the box above referred to. The objective was passing street cars. Respondent was hit in the right eye, which was burned to the extent that its removal was necessary.

[1, 2] An order sustaining a demurrer to an amended complaint was passed upon by the Supreme Court in this case. See Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A. L. R. 825. The law of this case is that ordinarily it is not necessary that a person who lawfully places materials upon a sidewalk should take unusual precaution to guard against injury to strangers. However, if a reasonably prudent man would have foreseen probable injury, it would be necessary to guard against such probability. If the owners well knew that boys had free and open access to the box and were taking lime and throwing it at passing cars, then the defendant owners would be liable. If the frequency of this occurrence was such that a reasonably prudent owner should have known of the action of the boys, then the owners would be liable.

[3, 4] Witness Steaglich, a police officer, appeared on behalf of respondent and testified, in substance, as follows: That on or about the 20th day of August, 1925, a report from the Market Street Railway Company was received by the police department calling attention to the throwing of lime from the box in front of this building, by boys at passing street cars; that the plastering contractor upon the 20th of August was notified of the communication from the railway company and warned by the witness to cover up the box. There is some conflict in the evidence whether it was the defendant plastering contractor, Isaacs, or some one else bearing the same name working under defendant Isaacs,

or one Diaz, who was notified by Steaglich. This was a question for the jury to determine. When first called, the witness gave the date of the interview as "some time in the month of August—about the 20th," whereupon he was further examined as to the exact date. About five years prior to the trial, Steaglich made a statement in the presence of respondent and respondent's attorney. This statement was taken down in shorthand and transcribed. Some question was raised relative to the stenographer's presence, but it was clearly proved that the stenographer was in or near the room during the Steaglich visit. The transcribed statement was not presented to Steaglich until two or three weeks before the trial. The court definitely stated that the transcribed statement might be shown to the witness for the limited purpose of refreshing his recollection as to the date of notification. Whereupon the witness testified that the interview at the building was upon the 20th day of August, which was five days prior to the accident. It was an important matter, but in view of the court's ruling limiting the presentation of the statement to refreshing the witness' recollection only as to the date, we think that the defendants were not prejudiced. The interview occurred at a time when the witness had in his possession his original notes made when the witness reported his talk with Isaacs to the police department. From those notes he made a statement which was fresh within his recollection. He testified that the statements then made were true; that the statements were taken down in shorthand, and that when he subsequently read them he knew them to be true. On cross-examination conflicting testimony was given, but there was ample evidence for the court's ruling. The remoteness of time between the making of the statement and the reading of the statement was of no consequence if the facts set forth in the statement were true and he recognized them as true when he read them. This witness had some recollection when he first appeared upon the witness stand. He said it was about the 20th. After reading the statement, he did not select some other date. The statement conformed to his best recollection as given originally upon the stand.

[5-7] The admission of the ordinance in evidence did not prejudice the defendant plastering contractor. If done without authority, a nuisance would necessarily be created. If the ordinance had not been admitted, the jury would undoubtedly have wondered under what legal authority the defendant was occupying the street. The case of Santina v. Tomlinson, 36 Cal. App. 29, 171 P. 437, cited by appellants, was a case wherein the ordinance did not apply to the facts in the case, and the court held that the jury might have concluded that the introduction of the ordinance was an indication that it had been violated. That is not true in this case. Appellant plastering contractor feels aggrieved because the court gave only a few of his many proposed instructions. All of the instructions were properly refused, modified, amended, or given as presented. A court is not bound to repeat instructions already given or to give an instruction fully covered by other instructions. A reading of the instructions discloses that the jury was fairly and dispassionately instructed upon every necessary phase of the case.

[8, 9] Negligence in this case is not predicated upon the mere throwing of caustic lime, but upon the information that the defendants possessed prior to the accident that lime was being extracted and used in a way that might cause injury to persons or property, and that thereafter the defendant reasonably failed to take precautions to protect persons or property. An act not negligent at the time may become so because of subsequent acts of another. Where two or more wrongdoers contribute to an injury, one by a negligent act and the other by a negligent omission, the negligent act of one will not exculpate the other from the negligent omission. The boy witnesses in this case did not have a thorough comprehension of the consequences of their act until the injury occurred. It is true that one boy testified he knew a rock would do more harm than a snowball. They both knew it was wrong to throw anything at a passing car, but they did not know the effect of caustic lime upon the eye. It is contended that the act of the minors was an independent intervening agency. Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 P. 280, is cited. This case was considered in Katz v. Helbing, supra. The intervening act in the Hale Case was not to be anticipated, but in this case, after notification by the police department, any injury to person or property should have been anticipated.

[10] It is further contended that the court committed error in permitting the following question to defendant Isaacs: "Q. On the 20th of August, 1925, or at any time after that, did you ever warn children to stay away from this lime box?" In Katz v. Helbing, supra, at page 636 of 205 Cal., 271 P. 1062, 1065, the court said: "Evidence would also be admissible under the foregoing allegations to show whether defendants had warned said children of the dangerous character of their acts and commanded them to desist, * * * or whether any precautionary or preventive measures whatsoever had been taken." The trial court's ruling was correct.

[11-14] The appellant owners contend that the evidence shows no negligence on their part; that the lime was kept and maintained on the street or sidewalk by the plastering contractor for whose negligence his employers are not liable. The general rule is that the

employer of an independent contractor is exonerated and responsibility for the negligent acts of an independent contractor must be borne by the independent contractor. There are exceptions to this rule and the exception that we are interested in may be stated as follows: When an owner or contractor obtains from the duly authorized governmental representatives the right to perform an act which might be a nuisance if performed without legal permission, then the permittee contracts with the legal authorities to do the act in conformity with law and to protect the public against injury. Such permittee cannot relieve himself by contracting with another to do the permitted act. Colgrove v. Smith, 102 Cal. 224, 36 P. 411, 27 L. R. A. 590; Luce v. Holloway, 156 Cal. 162, 103 P. 886. Appellant owners call our attention to Schmidlin v. Alta Planing Co., 170 Cal. 589, 150 P. 983. That case did not present the features and does not come within the rule laid down in Colgrove v. Smith, supra, and the decision so held. Green v. Soule, 145 Cal. 96, 78 P. 337, is a closer approach to the case at bar. In the last case, an ordinance provided that when any portion of a street was made dangerous a substantial barrier should be placed around the dangerous portion of the street. There is nothing in the decision indicating that a permit was issued or that a permit was required. The owner had entered into several contracts with independent contractors and they, in turn, had entered into further contract. In Green v. Soule, the defendant, on appeal, was one of the contractors and not the owner. The defendant subcontracted the plastering job. The court said, at page 100 of 145 Cal., 78 P. 337, 339: "There was nothing in the contract for the plastering which contemplated or required that the person doing the plastering should place his materials on the street or sidewalk, and therefore it could not be contended that the contract itself was for the creation of an obstruction in the street which would constitute a nuisance." The exception to the rule laid down in Colgrove v. Smith, supra, is not discussed in Green v. Soule. Appellants also cite Frassi v. McDonald, 122 Cal. 400, 55 P. 139, 140, 772, but therein the court said: "* * * These facts do not bring the case within the principles of law laid down in Colgrove v. Smith. * * *" Fitzpatrick v. Donahue Realty Co., 151 Minn. 128, 186 N. W. 141, 36 A. L. R. 20, cited by appellants, is a case in which the lime was not on the street, but in the back yard. In the instant case, the owners consented or approved of the erection and use of the lime box. The owners were responsible under the permission granted for the use of part of the street to see that the material or any part of it was not moved to any other portion of the street and did not interfere with the rights of others. In the actual plastering work performed, Isaacs was an independent contractor, but the contract did not provide for the erection or use of this lime box. The independent contractor obtained the approval of the owners to use the lime box. To this extent he was the agent of the owners to see that the street was used in conformity with the permit and the ordinance. Accordingly, notice to Isaacs was notice to the owners. The owners were also the general contractors of this building, and in that capacity spent much time in or near the building. As the permittees of the right to use the sidewalk, it was a question for the jury to determine if they had knowledge of the misuse of the lime located on the walk and street. The boys testified that they had previously taken lime and used it to throw at passing street cars. Likewise, other boys had played the same or a similar game. In Katz v. Helbing, supra, at page 635 of 205 Cal., 271 P. 1062, 1064, the court said: "We are of the opinion that it must be held that under these allegations proof might be offered showing that the frequency, extent and character of the acts of the small boys were such as to create liability on the part of defendants to plaintiff. In determining the probability of an event happening in the future, its occurrence in the past under similar circumstances is relevant. In cases of this class the courts have stated that the fact that an occurrence has happened in the past is a circumstance to be considered in determining whether it was reasonably to be expected to happen in the future," citing Cole v. German Savings & Loan Society, 124 F. 113, 63 L. R. A. 416, 59 C. C. A. 593.

[15] The final claim presented by appellant owners is that the verdict for $30,000 is excessive, as a matter of law, and they cite in support thereof Maede v. Oakland High School District (Cal. Sup.) 298 P. 987, 990, wherein the award for the loss of an eye by a fifteen year old boy was held excessive and reduced to $16,000. It is true that in that case the verdict of $15,000 for the loss of an eye in Damgaard v. Oakland High School District (Cal. Sup.) 298 P. 983, was used as a basis for the order modifying the award, but the Supreme Court also considered a long list of cases in which the loss of an eye was the single damage to be compensated. The court said: "We now come to the consideration of the question earnestly urged by appellants, which is whether or not the damages as assessed herein are so far excessive and disproportionate to the injuries sustained by respondent, as measured by other awards judicially sanctioned in this and other states of the Union as fair compensation for like injuries, as to require reduction on the ground that they appear 'to have been given under the influence of passion or prejudice.' Section 657, subd. 5, Code Civ. Proc. It being impossible to restore a lost member of the body, the law undertakes to do the next best thing humanly possible, in

lieu of restoration, which is to compensate the loss with a money consideration. Out of the long experiences of the past, in which all the elements and inconveniences of loss have been considered, weighed, and appraised, a standard, not invariable, it is true, has been adopted by courts of law. The average amount for particular injuries, as fixed by the verdicts rendered by juries and approved by courts, has its place in arriving at the estimate. The compensation assessed in the instant case, compared with a long list of cases in which the loss of an eye was, as here, the single damage to be compensated, so greatly exceeds the amounts of award in the average cases as to justify the claim on the part of the school district and the officers that the verdict of the jury was the result of passion and prejudice." In view of the language just quoted and the facts and circumstances of this case, we feel constrained to modify the judgment by reducing the award from the sum of $30,000 to $16,000, and, as so modified, the judgment is affirmed.

Affirmed as modified.

We concur: TYLER, P. J.; CASHIN, J.

CALIFORNIA SAVINGS & COMMERCIAL BANK v. McINTOSH et al. *

Civ. 7591.

District Court of Appeal, Second District, Division 1, California.

July 20, 1931.

Rehearing Denied Aug. 8, 1931. Hearing Granted by Supreme Court Sept. 17, 1931.

1. **Alteration of instruments** ⚿5(1), 17.

Unauthorized alteration of mortgage placing property for first time under mortgage lien *held* "material alteration" relieving mortgagor of all liability (Civ. Code, § 1700).

[Ed. Note.—For other definitions of "Material Alteration," see Words and Phrases.]

2. **Alteration of instruments** ⚿5(1).

Material alteration of mortgage adding property thereto was not rendered harmless because not in furtherance of fraudulent purpose (Civ. Code, § 1700).

3. **Alteration of instruments** ⚿29.

Authority to make or consent to alteration in executed contract must plainly appear from evidence, and will not be presumed from relation of principal and agent.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by the California Savings & Commercial Bank against Frazier McIntosh, as executor of the will of Harriette E. Wheeler, deceased, and others. From a judgment for defendant, plaintiff appeals.

Affirmed.

Edgar K. Brown and Leo B. George, both of Los Angeles, for appellant.

Frazier McIntosh, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Plaintiff was denied all relief against defendant Wheeler in this action to foreclose a mortgage, because her (Wheeler's) consent was not given to a post execution alteration of a mortgage by which some of her property was added to its embrace. We are of the opinion that the unapproved alteration was properly found to have relieved her of all liability under the mortgage.

[1, 2] The lot involved was one of a number deeded to defendant Wheeler's husband and to her codefendant Brown in September, 1923. At the time of the execution of the mortgage, which followed soon after the deed, the northwesterly twelve feet of this one lot had been deeded to a city for some public purpose, so that portion of the lot was omitted from the property included in the mortgage by employing the words, immediately following the reference to the lot, "excepting the northwesterly twelve feet thereof." Some time later, after March 26 of the succeeding year, probably, when the city reconveyed the strip, the mortgagee, plaintiff here, made several changes on the face of the mortgage, among others being the elimination of the words last quoted, which resulted in the mortgage reading as though the whole of the lot were included. This tinkering was done with the approval of defendant Brown, who was potent in plaintiff's councils, and for the purpose of this opinion we are assuming it was done with the consent of defendant Wheeler's husband. It was not done with her consent.

The effect of the unauthorized alteration of an executed contract is declared in section 1700, Civil Code, in these words: "*Extinction, Unauthorized Alteration.* The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." That an alteration which results in placing property for the first time under a mortgage lien is a material one is obvious. Appellant would escape the paralyzing effect of the section by securing a finding that there was no fraud involved here,

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 16 P.2d 737.

and the alterations were made to correct a mutual mistake. So far as concerns the change in the mortgage whereby eleven lots were eliminated from its burdens, because included in the mistaken belief that they belonged to the mortgagors, such a finding might be made, but there is no serious contention advanced that the trial court could have found, and it did not find, that the northwesterly twelve feet was originally omitted through error or subsequently included to correct a mistake. The absence of a fraudulent purpose in making the alteration does not cure it of its deadening influence. Section 1700, Civil Code, does not recognize any such limitations, and the cases cited by appellant do not support the conclusion that a material alteration, i. e., "one that works some change in the rights, interests, or obligations of the parties to the writing" (Lasky v. Bew [1913] 22 Cal. App. 393, 134 P. 358, 360), is harmless if not in furtherance of a fraudulent purpose.

[3] The finding that defendant Wheeler did not consent is challenged on the ground that her husband consented and he as her agent thus bound her. The twelve-foot strip in question was community property. Appellant so contends, and the evidence, so far as brought to us, is in harmony with this conclusion. Defendant Wheeler's signature to the mortgage, then, was not an idle act, but was required. Section 172a, Civ. Code. Her husband's agency did not, apparently, include the right to sign for her. At least he did not. Furthermore, authority to make or consent to an alteration in an executed contract must plainly appear from the evidence; it will not be presumed from the relation of principal and agent. Langenberger v. Kroeger (1874) 48 Cal. 147, 17 Am. Rep. 418; Walsh v. Hunt (1898) 120 Cal. 46, 52 P. 115, 39 L. R. A. 697; Dozier v. National Borax Co. (1917) 35 Cal. App. 612, 170 P. 638; Hengehold v. National Creamery & Produce Co. (1922) 60 Cal. App. 79, 212 P. 239. We assume that a finding that defendant's husband was her agent would be supported by the evidence. This does not better appellant's position, however, for there is no evidence that within the scope of the agency he had authority to add property to the mortgage she had executed.

Even if appellant is correct in the other points it presents, the result will not be changed. There may be no evidence supporting the finding that certain representations were made, but a contrary finding would not remove the obstacle to its recovery already discussed. It may be that the evidence does not support the finding that lot 22 was released, but, as the appeal is not from the judgment as it affects defendants Brown, this is an error which, if corrected, would still leave defendant Wheeler entitled to judgment. Appellant argues that the reduction in the interest rate in the note, which the mortgage secured, was not a material alteration. We do not need to determine whether it was or not, for a deficiency judgment against defendant Wheeler was waived, and there can be no recovery on the note in any event.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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115 Cal.App. 454

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

Civ. 374.

District Court of Appeal, Fourth District, California.

July 13, 1931.

Rehearing Denied July 27, 1931. Hearing Denied by Supreme Court Sept. 10, 1931.

1. Prohibition 🔑1.

Prohibition is proper remedy where trial court has made void order granting motion for new trial.

2. New trial 🔑116(2).

Any notice in writing conveying to losing party that judgment has been entered is sufficient, as respects time to file motion for new trial (Code Civ. Proc. §§ 659, 953d).

3. New trial 🔑116(2).

Notice of entry of judgment served on administratrix and attorney was sufficient as notice on administratrix in individual capacity as respected time for notice of intention to move for new trial (Code Civ. Proc. §§ 659, 953d).

4. New trial 🔑119.

Trial court was without jurisdiction to grant motion for new trial, where notice of intention to move therefor was filed after statutory period (Code Civ. Proc. §§ 659, 953d).

Original proceeding for a writ of prohibition by the Bank of America National Trust & Savings Association against the Superior Court in and for the County of Kern, and Erwin W. Owen, Presiding Judge of said court, and another.

Writ granted.

Borton & Petrini, of Bakersfield, for petitioner.

A. V. Muller, of San Luis Obispo, and Ray B. Lyon and Alex Webster, both of Paso Robles, for respondents.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

MARKS, J.

This is an original petition filed in this court seeking a writ of prohibition prohibiting respondents from setting for trial and trying a petition for distribution in the estate of Teodora Federico, also known as Teodora F. Valenzuela, deceased, and the contest thereto filed by petitioner as the executor of the last will and testament of Jesus Valenzuela, deceased.

The record before us discloses that Teodora Federico died testate on the 13th day of July, 1927, and that Juanita Aguera was thereafter appointed and qualified as the administratrix with the will annexed of her estate. After the death of Teodora Federico, Jesus Valenzuela, who was named as the sole beneficiary in her last will and testament, died testate, and petitioner herein was appointed and qualified as the executor of his last will and testament. Juanita Aguera filed her final account and petitioned for distribution of the estate of Teodora Federico in which petition she sought to have all of the property of the estate distributed to herself as a pretermitted heir, alleging that she was an adopted daughter of Teodora Federico. At the trial of the contest on the petition for distribution, the court found in favor of the contestant and ordered the estate distributed to it as the executor of the last will and testament of Jesus Valenzuela, deceased. The findings of fact and judgment or decree were filed and entered on January 29, 1930. Notice of entry of judgment or decree was served upon Juanita Aguera as administratrix with the will annexed of the estate of Teodora Federico, deceased, and A. V. Muller and Webster & Lyon, her attorneys, on February 3, 1930. On February 7, 1930, A. V. Muller and Alex Webster, as attorneys for Juanita Aguera as administratrix with the will annexed of the estate of Teodora Federico, deceased, filed a notice of intention to move for a new trial. This motion was denied on March 17, 1930. On March 21, 1930, Ray B. Lyon, as attorney for Juanita Aguera individually, filed notice of intention to move for a new trial, which motion was granted on May 9, 1930.

It appears from the record that Alex Webster and Ray B. Lyon were at all times material to this action copartners doing business under the firm name and style of Webster & Lyon. In its findings of fact filed on January 29, 1930, the trial court found that Juanita Aguera, as administratrix with the will annexed of the estate of Teodora Federico, was represented upon the trial and hearing on the contest of distribution by A. B. Muller and Webster & Lyon as her attorneys.

In fairness to the Honorable Erwin W. Owen, who is named as the respondent judge herein, it should be noted that the trial of the contest and the arguments of both motions for new trial were heard, and the decisions rendered by another judge of the superior court. He is named as respondent for the reason that he is presiding judge of the superior court in and for the county of Kern, and in the capacity of such presiding judge was proceeding to set the contest down for a second trial after the order made granting the motion of Juanita Aguera made in her individual capacity.

[1] It seems to be settled in California that prohibition is a proper remedy to be invoked where the trial court has made a void order granting a motion for a new trial and is attempting to proceed with a second trial. Shepherd v. Superior Court, 54 Cal. App. 673, 202 P. 466; Finkle v. Superior Court, 71 Cal. App. 97, 234 P. 432; United Railroads v. Superior Court, 197 Cal. 687, 242 P. 701.

The sole question necessary to be decided on this appeal is whether or not a sufficient notice of the entry of judgment and decree of distribution of January 29, 1930, was served upon Juanita Aguera to start running the ten days within which a notice of motion for a new trial must be filed under the provisions of section 659 of the Code of Civil Procedure.

The notice of entry of judgment served by petitioner on February 3, 1930, is addressed "to Juanita Aguera, as administratrix with the will annexed of the estate of the above named deceased and to A. V. Muller and Webster & Lyon, her attorneys." In the petition filed in this court, it is alleged "that on the 3rd day of February, 1930, notice of entry of said judgment of distribution was served by said Bank of Italy National Trust and Savings Association as such Executor upon the said Juanita Aguera, and her said attorneys, a copy of which notice is hereto attached and marked Exhibit 'E' and made a part thereof." The only denial of this allegation in the answer of respondents is as follows: "Deny that on the 3rd day of February, 1930, notice of the entry of judgment of Decree of Distribution given and made in the matter of said estate was served upon the said Juanita Aguera or upon her attorneys, other than in her representative capacity as Administratrix with the will annexed of the Estate of Teodora Federico, deceased, and allege that the only Notice of the Entry of said judgment or decree is the one, a copy of which is attached to Petitioner's Petition herein and marked 'Exhibit E.'" This admits the service of the notice upon Juanita Aguera in her representative capacity and upon her attorneys on February 3, 1930. Her notice of intention to move for a new trial made in her individual capacity was filed forty days after the service of the notice of the entry of judgment. To give the court jurisdiction to entertain the motion, the notice of intention to move for a new trial must be filed within ten days after receiving written notice of the entry of judgment. Sec. 659, Code Civ. Proc.; section 953d, Code Civ. Proc.; Neale v. Morrow, 174 Cal. 49, 161 P. 1165; Prothero v. Superior Court, 196 Cal. 439, 238 P. 357.

[2] Other than the requirement now existing that the notice of entry of judgment be in writing, no particular form of the notice is prescribed by law. Section 659, Code Civ. Proc.; section 953d, Code Civ. Proc.; Waddingham v. Tubbs, 95 Cal. 249, 30 P. 527. We conclude, therefore, that any notice in writing which will convey to a losing party that the judgment has been entered is sufficient in California.

In the case of Scott v. Glenn, 97 Cal. 513, 32 P. 573, 574, the plaintiff commenced an action to recover money alleged to have been received by the defendant for the use and benefit of the plaintiff's assignors. The defendant filed his answer and also a cross-complaint making the plaintiff and his assignors cross-defendants and praying affirmative relief against them. The cross-defendants filed their answers denying many of the allegations of the cross-complaint. After a trial by the court, it rendered judgment that the plaintiff take nothing by his suit, and gave the cross-complainant the relief demanded in his cross-complaint. The judgment was filed on September 17, 1891. On the following day the attorney for the defendant and cross-complainant served upon the attorney for the plaintiff and cross-defendants the following notice: "To the plaintiff, and Messrs. T. P. Ryan and G. B. Graham, attorneys of record: You will take notice that the court has rendered its decision and findings and judgment, and defendant's memorandum of costs have been this day filed in the above-entitled action. Dated September 17, 1891. J. P. Meux, Attorney for G. R. G. Glenn." It will be noticed that the cross-defendants were not named nor mentioned in this notice of entry of judgment. Their attorney, however, received a copy of it.

On March 21, 1892, the cross-defendants served and filed a notice of their intention to move for a new trial and argued that, as they had received no notice of the entry of judgment, their notice of intention was filed in time. They argued that as the notice of entry of judgment was addressed to the plaintiff and his attorneys and not to the cross-defendants and their attorneys, they had received no notice of the entry of the judgment. The Supreme Court overruled this contention and held that, as the notice had been delivered to the attorneys for the cross-defendant, it conveyed to them sufficient notice of the entry of judgment even though they were not named therein.

[3] Under the decision in the Scott Case, and in view of the fact that no particular form of notice is required by statute, we have concluded that sufficient notice was served upon Juanita Aguera in her individual capacity to start running the ten days within which she was required to serve her notice of intention to move for a new trial even though she was only designated in her representative capacity in the notice. It is admitted that Ray B. Lyon, who signed and filed her individual notice of intention to move for a new trial was the same Ray B. Lyon that was a member of the firm of Webster & Lyon named in the notice of entry of judgment, and which firm was served with the notice. The notice conveyed the information that the judgment or decree of distribution of January 29, 1930, had been filed and entered. This notice contained all of the information required to be conveyed by section 659, Code of Civil Procedure. The information that a judgment had been entered, which was conveyed by the notice, and not its form nor its salutation or address clause, is the controlling factor in this case. Juanita Aguera cannot be permitted to hide behind the fact that she was only named in this notice in her representative capacity as the attorney who represented her as well as the attorneys who represented her in her representative capacity as administratrix were served with a notice which informed them that the judgment had been entered and which started running the ten days within which time any notice of intention to move for a new trial must be filed

[4] The notice of intention to move for a new trial filed on behalf of Juanita Aguera individually having been filed too late, and after the time limited by law for the filing of such notice, the superior court of the state of California in and for the county of Kern was without jurisdiction to grant such motion. It follows that the order made on May 9, 1930, granting a new trial was without the jurisdiction of the respondent court and is therefore void. Respondents are exceeding their jurisdiction in attempting to again set for trial the issues raised by the petition for distribution and the contest thereto which had been fully decided by the judgment and decree made and entered on January 29, 1930.

It is ordered that respondents be prohibited, and that a writ of prohibition be issued restraining them from setting for trial, or trying, the issues raised by the petition for distribution and the contest thereto filed by petitioner herein in the matter of the estate of Teodora Federico, also known as Teodora F. Valenzuela, deceased, being Number 4109 in the records of the respondent court.

We concur: BARNARD, P. J.; LAMBERSON, Justice pro tem.

115 Cal.App. 501

AMERICAN CONCRETE UNITS CO., Inc., v. NATIONAL STONE-TILE CORPORATION.

Civ. 7550.

District Court of Appeal, First District, Division 1, California.

July 17, 1931.

1. Corporations 🔑432(12).

Evidence *held* not to establish lack of actual authority on part of corporate officers to represent corporation after their formal removal, in execution of note and lease of machinery.

Record disclosed that corporate officers were at a regular meeting of board of directors removed from office, and new officers elected in their stead, but that litigation followed this removal, and although it was ultimately held to be effective, the same officers continued during course of litigation to conduct business and affairs of corporation, with evidence to effect that different factions which were seeking control not only acquiesced and consented to management of corporation by former officers, but specially requested that they so act in order that relationship beween corporation and its customers would not be disturbed.

2. Corporations 🔑289.

Corporate officers acting as de facto officers after their removal and pending litigation had full power to bind corporation.

3. Corporations 🔑426(10).

Corporation receiving benefits of transactions through acts of de facto officers is estopped from denying their authority.

4. Corporations 🔑426(10).

Corporation will not be permitted to retain benefits of transaction and at same time question authority of its representatives.

5. Corporations 🔑289.

Title of de facto officers of corporation holding position unchallenged cannot be impeached collaterally.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the American Concrete Units Company, Incorporated, against the National Stone-Tile Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Corbet & Selby, of San Francisco, for appellant.

Arthur L. Shannon, of San Francisco, for respondent.

TYLER, P. J.

The complaint in this action consists of three counts. The first is based upon a promissory note in the sum of $500; the second and third are based upon an agreed amount of rent due for a certain machine manufactured by plaintiff and delivered to defendant. There is no dispute as to the execution of the note, nor is there any question that plaintiff manufactured the machine and delivered it to defendant. The defense advanced was that the officers and agents of defendant corporation who represented it in the transactions were without authority so to do. The trial court found against this contention and rendered judgment in favor of plaintiff. Defendant appeals, and it claims that the evidence does not support the findings in favor of plaintiff and judgment should, therefore, be reversed.

There is no merit in the appeal. There is evidence in the record to sustain the finding of the trial court that the transactions here involved were fully authorized by defendant corporation. Such facts as are necessary for a discussion of the case may be briefly summarized as follows: Prior to February 23, 1928, W. P. Stanton was president and general manager of defendant corporation, and J. T. Voorheis was vice president, assistant general manager, and assistant secretary. On the day last mentioned, at a regular meeting of its board of directors defendant corporation removed them from office and new officers were elected in their place and stead. Litigation followed this removal, but it was ultimately held to be effective. National Stone Tile Corp. v. Voorheis, 93 Cal. App. 738, 270 P. 286. During the course of the litigation Stanton and Voorheis continued to conduct the business and affairs of the corporation, and there is evidence in the record to show that the different factions which were seeking control not only acquiesced and consented to the management of defendant corporation by the former officers, but specially requested that they so act in order that the relationship between the corporation and its customers would not be disturbed. The record further shows that pursuant to this understanding Stanton and Voorheis did, without objection or interference by any one, continue with the sole management until November, 1928, the time when the litigation was terminated. There is also testimony to show that the sum loaned by plaintiff to defendant for which the promissory note was given was used in the ordinary course of business for current expenses by defendant, and that the machine was licensed to licensees of the company for a consideration, a part of which, amounting to the sum of $1,000, was received and retained for the benefit of defendant company.

[1-5] Under all these circumstances it cannot be said that the evidence shows lack of actual authority by Stanton and Voorheis to represent defendant corporation after their formal removal. They were de facto officers and had full power to bind the corporation for the reason that they were permitted to conduct the affairs of the corporation during the period of litigation over its management. Then again, the corporation had received the benefits of the transactions through the acts of such de facto officers and is estopped from denying the authority of the officers. Consumers Salt Co. v. Riggins, 208 Cal. 537, 282 P. 954; Hygienic Health Food Co. v. Grant, 187 Cal. 431, 202 P. 653. A corporation will not be permitted to retain the benefits of a transaction and at the same time question the authority of its representatives. Irwin v. Colburn, 56 Cal. App. 41, 204 P. 551. So long as de facto officers hold their position unchallenged, their title to office cannot be impeached collaterally, and their acts, in so far as third persons are concerned, are valid and binding upon the corporation as though they were officers de jure. 6 Cal. Jur. 1049. Here, as above indicated, the officers whose acts are questioned were not usurpers but, on the contrary, occupied their positions under color of title and exercised the duties thereof with the complete acquiescence if not at the special request of those opposed to them.

Nor is there any merit in the further claim that the evidence shows actual knowledge on the part of plaintiff corporation that Stanton and Voorheis had no authority to act for defendant corporation after February 23, 1928. While there was an attempt on the part of the defendant to show that plaintiff had notice of lack of authority of the deposed officers there was evidence to show that plaintiff's president who dealt with defendant in the transactions, while familiar with the fact that there was internal strife in the defendant corporation over its management, was nevertheless of the opinion that Stanton and Voorheis were defendant's authorized officers and representatives.

Under all the facts and circumstances, we are of the opinion that the evidence is amply sufficient to sustain the conclusion of the trial court that Stanton and Voorheis had full authority to represent defendant corporation and that it was liable for their acts.

Other points urged by appellant are controlled by what we have said and do not require discussion.

The judgment is affirmed.

We concur: KNIGHT, J.; PARKER, Justice pro tem.

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115 Cal.App. 505

PEOPLE v. McCLAIN.

Cr. 2083.

District Court of Appeal, Second District, Division 1, California.

July 17, 1931.

1. Criminal law ⚷1159(4).

Determination of facts is solely for jury, and verdict showing jury disbelieved defendant's witnesses cannot be disturbed on appeal, provided people's evidence was substantial and sufficiently strong to support verdict.

2. Larceny ⚷64(1).

Possession of stolen property, however soon after crime, is not in itself sufficient to sustain conviction.

3. Larceny ⚷68(3).

Whether defendant's explanation respecting manner in which he acquired possession of stolen property is true is solely for jury.

4. Larceny ⚷55.

Evidence *held* sufficient to sustain conviction of grand theft.

5. Larceny ⚷51(1).

In prosecution for theft of property, including $100 bills, evidence that, after commission of crime, defendant used $100 bill though not specifically identified as part of stolen money *held* admissible.

Evidence was admissible for purpose of tending to prove possession by defendant of part of stolen property; $100 bills not being in common circulation in community.

6. Criminal law ⚷829(15).

Refused instruction respecting requirements for conviction of grand theft on circumstantial evidence *held* not covered by given instruction.

Defendant requested instruction that, in order to convict upon evidence of circumstances, it is necessary not only that circumstances concur to show beyond reasonable doubt that crime was committed, but that defendant was one who committed crime, and that circumstances are inconsistent with any other rational conclusion, and that it was not sufficient that circumstances proved coincide with, account for, and therefore render probable theory sought to be established by prosecution, but that they must exclude to moral certainty every other theory but single one of guilt. Court instructed jury that, if they were satisfied to moral certainty and beyond reasonable doubt of defendant's guilt, they should so find, though certainty was produced by circumstantial evi-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

dence, and that law makes no distinction between circumstantial and direct evidence as to required degree of proof, but requires only that jury be satisfied beyond reasonable doubt.

7. Criminal law ⚷784(7).

Where evidence was entirely circumstantial, refusing instruction that, to convict, defendant's guilt must be shown beyond reasonable doubt and that circumstances must be inconsistent with other rational conclusion, *held* reversible error.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Clarence James McClain was convicted of grand theft, and he appeals.

Reversed.

Guy Lewis and Orville A. Rogers, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

Defendant was convicted of the commission of the crime of grand theft. He appeals not only from the judgment, but also from the order denying his motion for a new trial.

The first specification of error to which appellant directs attention is that the evidence adduced on the trial of the action was insufficient to support the verdict. In its nature the evidence presented by the prosecution was entirely circumstantial.

[1-4] It appears that a part of the property which was stolen included a trunk, a large number of rare coins, a cigarette lighter, a knife, a rosary, six $100 bills, and many articles of wearing apparel, all of which, with the exception of the six $100 bills, were found either in the immediate personal possession of defendant, or hidden in various locations about the premises occupied by him. It was shown that shortly after the theft was committed defendant removed from his then residence to a different place of abode, at which latter place he used an assumed name; that, although he had a room within which he might have lodged, at one time he slept in an automobile parked on premises used for the sale of secondhand cars; that defendant made contradictory statements regarding the manner in which the cigarette lighter came into his possession; that some of the stolen coins were found at the head of the bed in a room occupied by defendant, others in a "stack" in the yard of the premises, and 197 of such stolen coins were found in a canvas bag concealed under a plank in the same yard; and the rosary, with other stolen articles (not of this theft), was found wrapped in a handkerchief and secreted behind a wash basin in defendant's room. The stolen knife, trunk, and a three-cent United States bill were found in defendant's automobile. Following the theft of the goods and shortly before defendant was arrested, he used a $100 bill in making a part payment on an automobile which he had acquired, which bill defendant claimed he had secured by exchanging for it ten $10 bills, but which defendant's brother testified he had given to defendant for an automobile which he had purchased from him. After defendant was arrested and before he was taken to jail, while standing in a store awaiting the arrival of the police automobile to convey him to prison, he was seen to "fumble" with his left hand in one of the pockets of his trousers. Immediately thereafter "about an inch and a half or two inches of the pocket" was seen protruding from the trousers and a $5 gold piece of date 1806, which was one of the stolen coins, was found under a cash register which was located in front of where defendant had been standing. At that time defendant denied ownership of the coin, or that he had any knowledge concerning it, although at the trial he testified that his brother had given it to him. Summarized, it thus appears that, besides the possession by defendant of the stolen property, the following incriminatory facts were shown to exist: Secretion of the stolen property; different explanations regarding the manner of acquiring the cigarette lighter and $100 bill which are not in harmony one with the other; when arrested, the attempt to get rid of the $5 gold piece; that circumstance which may be termed the flight of defendant; and the fact that at his new place of residence he gave a fictitious name.

The evidence presented in behalf of defendant and which tended to establish his innocence of the offense of which he was charged consisted principally of testimony of himself, his wife, and one disinterested witness to the effect that at all times on the night when the crime was committed defendant was at his home, and consequently could not have participated in the commission of the offense; also a confession by defendant's brother on the trial of the action that it was he and a man known as Joe Carson who committed the crime, and that defendant was in no way connected with its commission. But manifestly the determination of the facts was solely the province of the jury, and if for any one of various reasons it chose to give no credit to the testimony of either or all of the witnesses who testified in behalf of defendant, its conclusion as expressed by its verdict cannot be disturbed by this court, provided that the evidence adduced on behalf of the prosecution was substantial in its nature and of sufficient strength to support the verdict. Necessarily the question whether any set of assumed incriminatory facts in a given case present a situation from which it may be said that they meet the legal requirements as to sufficiency in showing the guilt of a defendant, is one of opinion on which the respective minds of lawyers or judges may differ one from the other. It has long been the rule that possession of stolen property by a defendant, however soon after the crime was committed, is not in itself sufficient evidence upon which to base a verdict of guilt. However, should the defendant make an explanation as to the manner in which he came into possession of such property, the question as to whether he is telling the truth in that regard rests solely with the jury. In the case of People v. Melvane, 39 Cal. 614, the stolen property consisted of gold and silver coin amounting to $313, "among which were four $20 gold pieces, an Australian sovereign, and a $3 gold piece, considerably worn." It was proved that the defendant was arrested on the day after the burglary, and that there was found on his person $250.50 in gold and silver coin, amongst which were four $20 gold pieces, an Australian sovereign, and a $3 gold piece. In considering the circumstances connected with the case, in part the court said: "The weight to be given to the testimony was for the jury to decide; but when money is stolen, proof that a part of it, on the following day, was found on the person of another in the vicinity, certainly tends, when not satisfactorily explained, to raise a presumption that he is the guilty party; and if an explanation is attempted by the accused, it is for the jury to judge of its truth and plausibility. The corroborating evidence may be slight, and entitled to but little consideration; nevertheless, the requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the accused with the commission of the offense."

And in People v. Getty, 49 Cal. 581, where "a part of the stolen money consisted of a quantity of Chilean gold coin—half ounces and a Peruvian ounce," it is said: "The possession of money of the same kind as that which was recently stolen is usually of slight, if any, weight as evidence to prove the guilt of the person in whose possession it is found, if money of this kind is in general circulation at that place; but it is of much greater significance when that kind of money is rarely seen in circulation at that place; and its value as evidence is further increased when both the money found in possession of the accused and that which was stolen consists of a combination of pieces of such money, as in this case, of a large number of Chilean half ounces and a single Peruvian ounce. It strongly tends to the identification of the money as the money which was stolen, and thus to connect the defendant with the burglary."

Aside from objections presented by appellant which are hereinafter considered, it would seem clear that, in view of the situation delineated by the circumstances hereinbefore set forth, the jury was authorized to reach the conclusion that defendant was guilty of the commission of the offense of which he was charged. People v. Lang, 142 Cal. 482, 76 P. 232.

[5] Appellant complains of the admission by the trial court, over the objection of defendant of certain evidence relating to the fact that after the crime had been committed, in a transaction regarding the purchase of an automobile, defendant had given as part compensation to the seller thereof a $100 bill. The particular objection by appellant is that the $100 bill paid by defendant was not identified as one of the $100 bills which was a part of the stolen property. However, as is pointed out in the case of People v. Getty, 49 Cal. 581, 583, although the fact that defendant used "money of the same kind as that which was recently stolen" ordinarily would constitute but slight evidence of the guilt of defendant, nevertheless, if such money was of a kind "rarely seen in circulation," the weight to be attached to such evidence is considerably increased, which is a rather clear indication by the court that evidence of the nature of that to which appellant has directed attention was admissible for the purpose of tending to prove possession by defendant of a part of the stolen property. In passing, it may not be amiss to suggest the unlikelihood that any one will contend that $100 bills are now, or in recent years have been, in common circulation in this community.

[6, 7] Appellant presents a further specification to the effect that, to his substantial prejudice, the trial court erred in refusing to give to the jury, at the request of defendant, the following instruction: "In order to convict the defendant upon the evidence of circumstances it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the information, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant not guilty."

On behalf of respondent it is urged that the principle of law involved in such instruction was fairly covered by the trial court in giving to the jury an instruction by which was pointed out the essential difference between direct evidence and circumstantial evidence, which instruction was concluded with the admonition that, "if upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

But it is apparent that the instruction to which respondent refers merely defined circumstantial evidence and thereafter directed attention to the weight to which such evidence was legally entitled. Aside from the broad general indication to the effect that on the consideration by the jury of circumstantial evidence, before it would be authorized to find the defendant guilty the jury must be "satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant," the instruction contains not even a suggestion of the principle of law set forth in the instruction offered by defendant and refused by the trial court. The authorities of this state are unanimous in the declaration of the law that, when the evidence in a case is entirely circumstantial and admits either of a theory of the guilt or of the innocence of the defendant, upon his request therefor, he is entitled to a special instruction embodying the principles set forth in the instruction to which appellant herein has directed attention and of the refusal of which he here complains. People v. Dick, 32 Cal. 213; 8 Cal. Jur. 371, and cases there cited.

In addition to the foregoing authorities, the case of People v. Heuss, 95 Cal. App. 680, 273 P. 583, is particularly pertinent to the question here involved. It there appears that an instruction requested by the defendant and refused by the trial court was practically identical with the instruction here under consideration. However, on the trial of the cited case an instruction was given to the jury that, "in order to warrant a conviction for crime on circumstantial evidence, the circumstances taken together should be of a nature and tendency leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no one else committed the offense charged, and it is the invariable rule and law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the party charged."

A judgment of conviction of the defendant was affirmed by the District Court of Appeal; but, in denying a hearing of the case, the Supreme Court used the following language: "In denying the petition for a hearing herein, we withhold our approval of the action of the trial court refusing to give the instruction, or its equivalent, requested by defendant to the effect that circumstantial evidence, in order to justify a conviction, must not only be consistent with the guilt of the defendant, but 'inconsistent with any other rational conclusion.' The portion included in quotation marks, or its equivalent, was omitted from the instruction. Said instruction was legally sufficient in all respects as far as it went, but it fell short in not including the well-approved and frequently announced statement of the law that the evidence adduced must not only be consistent with guilt, but 'inconsistent with innocence,' in order to justify a verdict of guilty."

From a consideration of the foregoing authorities, it is clear that the trial court was in error in failing to give to the jury the instruction requested by defendant.

From the fact that before reaching a verdict of defendant's guilt the jury considered the evidence for a period of seven and one-half hours, it well may be questioned whether, if the jury had had the benefit of such refused instruction, it would not have brought in a verdict of acquittal, or at least that a disagreement by the jury would have resulted. At any rate, it is impossible for this court to judicially declare that in the circumstances defendant was not prejudicially affected in his substantial rights in the premises.

The judgment and the order denying the motion for a new trial are reversed.

I concur: CONREY, P. J.

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115 Cal.App. 496

PEOPLE v. ROBERTS.

Cr. 2071.

District Court of Appeal, Second District, Division 2, California.

July 16, 1931.

1. Criminal law ⚷444.

Lease identified by owner *held* properly admitted in prosecution for unlawful possession and operation of still and apparatus for manufacture of liquor.

Testimony was introduced upon the trial to effect that defendant and his brother rented premises in which still and apparatus were found and agreed to accept them as residence for year, and in corroboration thereof, a document was introduced, which owner identified as lease, and which was signed with fictitious name which owner swore they had given him as true name.

2. Intoxicating liquors ⚷236(19).

Evidence respecting abandonment of premises *held* not such as to prevent conviction for possession and operation of still and apparatus for manufacture of liquor.

3. Criminal law ⚷351(3).

Evidence of defendant's flight from owner of premises after discovery of still was admissible in prosecution for possession and operation of still and other apparatus.

> Evidence was to effect that owner of premises, after discovery of still and apparatus and after defendant had abandoned premises, thereafter encountered defendant on public street in automobile and spoke to him, calling to him to stop, but that defendant avoided him, and although followed at high speed over public streets, finally escaped.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Floyd Roberts was convicted for unlawful possession and operation of a still and other apparatus designed and used for the manufacture of liquor, and he appeals.

Affirmed.

Newton J. Kendall, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, J.

Upon an information charging unlawful possession and operation of a still and other apparatus designed and used for the manufacture of intoxicating liquor by Ed Roberts and Floyd Roberts, they were found guilty by a jury, and the latter appealed from the judgment and from an order denying a motion for new trial.

On or about July 12, 1930, one Stirdivant, the owner of premises in Los Angeles county here in controversy, was summoned by a peace officer whom he accompanied to the scene. Upon investigation it was discovered that the walls and plumbing had been mutilated and destroyed, a large whisky still, piping, and vats had been installed, and alcohol and mash in quantities were found about the apparatus, which had so recently been in use that it had not cooled. It is conceded that in March appellant and his brother had rented the premises, and that he and his family took possession of the same. On the date first mentioned officers found in the house groceries, foodstuffs, clothing, and other articles of a woman and of a child, and the kitchen stove was still warm; but the occupants had departed, and so far as the record might indicate, they did not thereafter return. Thereafter, between the date of the search and July 26, 1930, while Stirdivant and his family were driving between the cities of Santa Monica and Ocean Park, each of the defendants was encountered on the public streets, in an automobile with other persons. Stirdivant spoke to them, particularly calling to appellant to stop, but the latter avoided him, and although followed by Stirdivant at high speed over the streets of Santa Monica, and finally to Santa Monica canyon, he escaped and the pursuit was abandoned.

[1] Upon the trial it was testified that when the two brothers called at Stirdivant's home and rented the premises in question both agreed to accept them as a residence for one year, that one or the other executed a lease, and that the first and last months' rent was paid. In corroboration of this evidence a document was introduced, which the owner identified as the lease, and which was signed in the fictitious name of "Rhodes Brothers," which he swore they had given him as their true name. Objection here that it was error of the trial court to receive the same in evidence without further identification and proof of its genuineness and due execution as in a civil suit based thereon, or, as in a criminal prosecution in the absence of its connection in any manner with the defendant, is without merit. The prosecuting witness testified positively that he saw the instrument signed, and that he signed it himself. To the question: "I show you a document here, and ask you if that is the lease you speak of," he replied: "Yes, sir; it was Rhodes, instead of Roberts."

[2] Equally untenable is the contention that appellant and his brother had abandoned the premises and left them to another prior to the search, and that there was insufficient evidence to justify the order denying a new trial. Photographs of appellant and his family, and numerous other evidences of recent occupancy of the premises, were found in the house, and it lay with the jury under the instructions given to determine whether all of the evidence before them was consistent or inconsistent with any other hypothesis than that of guilt.

[3] Strenuous objections to the evidence of appellant's evasion and escape from Stirdivant at Santa Monica under the circumstances stated were made, and it is also insisted that failure to instruct the jury upon the rule as to flight from the scene of a crime by one knowing that he had been charged therewith, was prejudicial error. It is readily apparent that authorities relied upon in this respect are not persuasive. In People v. Jones, 160 Cal. 358, 117 P. 176, evidence of flight from mob violence, when explained by the defendant, presented to the jury a ques-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tion of veracity of the witnesses, rather than an evidence of guilt. In People v. Brecker, 20 Cal. App. 205, 127 P. 666, the introduction of a letter explaining the defendant's reason for leaving lodgings where no crime had been committed was held nonprejudicial. However, in such as the instant case evidence of the conduct and general demeanor of the defendant after the offense, is admissible. People v. Welsh, 63 Cal. 167; People v. Hawkins, 127 Cal. 372, 59 P. 697. While the denial of a requested proper instruction, in the event of a showing of flight as legally defined, may constitute error, neither the foundation nor request for such an instruction is presented in this case for consideration.

The judgment and order are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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115 Cal.App. 521

KOFFMAN et al. v. DEKOCH et al.

Civ. 6584.

District Court of Appeal, Second District, Division 2, California.

July 17, 1931.

Rehearing Denied Aug. 14, 1931.

Sales 🔑405.

Buyer of crude oil, subject to another sale contract specifying minimum gravity test, *held* not entitled to damages for seller's refusal to deliver oil.

> Although second contract for purchase of crude oil did not require as high gravity test nor as low percentage of water, sand, or other foreign substance, the production as it came from the well was not subject of either contract, not being of sufficient gravity, so that either buyer had right to refuse delivery, whereupon seller installed a dehydrating machine, the process of which caused water particles to migrate and coalesce and thus settle out more readily, and, after installation thereof, the first buyer requested delivery of oil thus treated under its contract.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by M. A. Koffman and another against William G. Dekoch and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Culbert L. Olson, of Los Angeles, for appellants.

Bauer, Wright & Macdonald and Harold H. Coyle, all of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This is an appeal from the judgment entered in favor of the defendants. The litigation rose out of the following situation. On November 9th, the predecessor in interest of the respondents entered into a contract with the Standard Oil Company for the sale of oil which the former was producing from a well in the Signal Hill field. The material provisions of that contract read as follows: "The first party (respondents' predecessor) hereby sells and agrees to deliver to the second party during the period of five years from the date hereof, unless this contract is sooner terminated as herein provided the total amount of Crude Petroleum Oil, subject to the maximum limit herein set forth, of a gravity of not less than fourteen degrees A. P. I., at a temperature of sixty (60) degrees Fahrenheit, produced by the first party from its property situate in the Signal Hill Oil Field (here follows legal description)."

"The first party agrees that it will operate its property and wells in good faith and with reasonable diligence and endeavor to deliver the maximum monthly quantity expressed herein during the period of this contract."

"Oil considered as a delivery under this contract must be free from water, sand and other foreign substance, as ascertained from the 'Gasoline Test' by means of the centrifugal machine, but should said test fail to prove the existence in said oil of more than three (3) per cent. of water, sand and other foreign substance, the second party will accept the oil and make deduction for all water, sand and other foreign substances determined by the test hereinbefore mentioned. * * *"

"If at any time oil offered for delivery hereunder shall be of a lower gravity than the minimum gravity hereinbefore specified, second party, at its option may accept said oil and pay for said oil at the lowest price at that time effective hereunder, or if at any time oil offered for delivery hereunder shall contain more than Three (3) per cent. of water, sand or other foreign substances, as determined by said test, * * * but no such acceptance shall be deemed a waiver of second party's right at any time thereafter to require deliveries hereunder strictly in accordance with the conditions herein specified. * * *"

Some time prior to June 28, 1924, the well of defendants' predecessor in interest produced oil containing considerably more than 3 per cent. of water and foreign substance, and for that reason the Standard Oil Company refused to accept it under the contract. On November 20, 1925, the plaintiff M. A. Koffman entered into a contract with defendants' predecessor, subject, however, as it is agreed, to the Standard Oil contract, the material portions of which read as follows:

> "[T]he party of the first part (defendants' predecessor) hereby agrees to sell and deliver to the party of the second part, and the party of the second part hereby agrees to purchase and receive from the party of the first part, during a period of three (3) years commencing November 20, 1925, ending November 20, 1928, and during each and every calendar month thereafter until cancelled by a six months written notice of cancellation by either party to the other, the total amount of Crude Petroleum Oil, subject to the maximum limits hereinafter set forth, of a gravity not less than fourteen (14) degrees Beaume at a temperature of sixty (60) degrees Fahrenheit, produced by first party from (here follows description)."
>
> "Deduction shall be made from the gross quantities of oil apparently contained in any delivery of oil for all sand, water, emulsion, and other foreign substances contained in said oil, based upon a centrifugal test made as follows (here follows description of centrifugal test of a sample of oil)."

The contract provides that second party shall pay "the price as publicly offered by the Standard Oil Company of California, at dates of delivery during the life of this contract to other producers in the Signal Hill Field for oil of like gravity and quality as the oil delivered hereunder; and whenever and as often as the prices offered by said Standard Oil Company at any time during the period of this contract to such other producers in the Signal Hill Field for oils of like gravity and quality as the oil delivered hereunder shall advance or decline. * * *"

Deliveries were made to the plaintiffs under the contract until March 1, 1927, and during this time the gravity of the production from the well was considerably under the required 14 degrees, and in fact less than 10. Prior to March 1, 1927, the output contained 60 per cent. to 65 per cent. water, and had been turned into settling tanks, and, after some of the water had descended to the bottom, was drained off. However, during February of that year, the defendants' predecessor installed a dehydrating machine, the process of which consists in steam heating the crude product under pressure to reduce its viscosity, whereupon a current of electricity is passed through it (also under pressure), which charge it is said causes the water particles to migrate and coalesce and thus settle out more readily.

After the dehydrator was installed, the Standard Oil Company said it wanted the oil thus treated and from which the water was removed, under its contract. Consequently, defendants' predecessor refused to deliver to plaintiffs, who brought this action to recover damages for the refusal.

The contention of appellants may be fairly stated in this language, that the respondents (we shall use that designation hereafter to identify defendants' predecessor as well as the defendants themselves, who we may presume, for the purpose hereof, assumed the liability) had no right to eliminate the water, sand, and other foreign substances by passing it through the dehydrating plant. We have been to considerable pains to set forth the material portions of the two contracts, because taken together they demonstrate the untenable nature of the argument of appellants. The two are very much alike, and it is apparent therefrom that there was no enforceable contract for oil of a gravity under 14 degrees Beaume. It is also to be noted that both contracts made deductions for water, sand, and other foreign substances, even though it were sufficient as to its gravity. Therefore, before the oil was saleable, some process had to be made use of to reduce the water content. In view of the fact that the production as it came from the well was not the subject of either contract, i. e., was not of sufficient gravity, we entertain no doubt that respondents were entitled to make use of the most efficient method possible to make it a saleable product, and one to be sold at the smallest deduction for foreign substances. The view we entertain makes further discussion unnecessary.

Judgment affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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115 Cal.App. 466

RHEA v. THOMSON.

Civ. 710.

District Court of Appeal, Fourth District, California.

July 13, 1931.

Rehearing Denied Aug. 10, 1931. Hearing Denied by Supreme Court Sept. 10, 1931.

1. Husband and wife 🔑264.

Evidence *held* sufficient to support finding that property, title of which was taken in name of wife, was her separate property (Civ. Code, § 164).

2. Husband and wife 🔑264.
Trusts 🔑89(1).

Evidence supported finding that undivided half interest in property taken in name of husband was separate property of wife during her lifetime, and that title was taken in trust for her (Civ. Code, § 164).

3. Husband and wife ⚷262(1).

All presumptions are in favor of conveyances to wife (Civ. Code, § 164).

4. Husband and wife ⚷262(1).

Conveyances to wife are presumed to have been made for consideration paid by wife (Civ. Code, § 164).

5. Husband and wife ⚷262(1).

Presumption in case of conveyance to wife for consideration paid by husband is that property was intended as gift to wife as her separate property (Civ. Code, § 164).

6. Husband and wife ⚷262(2).

Burden of showing that conveyance to wife was not intended as gift as separate property is on those claiming under husband (Civ. Code, § 164).

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Emma J. Rhea, as special administratrix of the estate of Dora Thomson, deceased, against F. D. Thomson, as administrator of the estate of Morton W. Thomson, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles J. Kelly, of Los Angeles, for appellant.

Newton Van Why, of Los Angeles, for respondent.

LAMBERSON, Justice pro tem.

The respondent, who is plaintiff herein, is special administratrix of the estate of Dora Thomson, deceased, who, in 1884, in the state of Illinois, was married to Morton W. Thomson, of whose estate the defendant and appellant is the administrator.

Dora Thomson inherited certain property from her father, from which she realized in 1910 the sum of about $21,060. About the year 1913 she realized by inheritance from the estate of her mother the sum of about $8,200. All of the proceeds were, in each instance, deposited in a bank to the account and in the name of her husband. Dora Thomson did not, during the years the couple lived in Illinois, have any bank account, and the only testimony in regard to her having an account is to the effect that about 1925, while the couple were residing in California, they planned to have a joint account upon which she could draw checks. The husband and wife had a small dwelling in Illinois, which was their home, and there is testimony to the effect that the husband had a small amount of real property at the time of marriage. He was a carpenter during the greater part of their years of residence in Illinois, and engaged at times in other occupations, but his income was, at all times during their married life, very modest. There is some testimony in the record that he, at one time, sold a piece of property in Illinois for the sum of $3,500, but the circumstances surrounding the sale are not clear. While they were still residents of Illinois, they invested in land in Canada and lived there temporarily. In 1913 the couple moved to California, and in February, 1916, there was purchased and conveyed to Dora Thomson, lot 1 in block 5 of West Adams and Jefferson street tract in the city of Los Angeles. Early in 1917 Dora Thomson, by deed, in which her husband joined, conveyed the Jefferson tract property to Myron W. Smith, and Smith and his wife, in exchange therefor, deeded to the husband of Dora Thomson and to P. W. Thomson, his brother, 10 acres of land in Riverside county. Dora Thomson died in March, 1926, and her husband a few months later.

Appellant claims that the title to the Riverside property is in himself as administrator of the estate of Morton W. Thomson. The purpose of the action is to quiet the title of respondent as special administratrix of the estate of Dora Thomson, deceased, to said property.

The trial court found, in substance, that an undivided one-half interest in the Riverside property was the separate property of Dora Thomson in her lifetime; that it was bought and paid for with property which was the separate property of Dora Thomson, and title was taken by her husband in trust for said Dora Thomson; that the real property described was purchased by Morton W. Thomson, the husband, by exchanging the real property, which stood in the name of Dora Thomson, and which, at the time, was her separate property, and title thereto was taken in the name of the husband in trust for and for the benefit of said Dora Thomson; that said Dora Thomson relied upon the fidelity of her husband, and believed that he would hold title to the real property in trust for her; that no consideration ever passed from Morton W. Thomson to his wife for said real property, and said Morton W. Thomson had no beneficial interest therein, but the entire consideration therefor was paid by Dora Thomson. Judgment was rendered in favor of respondent as to this particular parcel of land, which judgment decreed that the appellant as administrator, be required to execute a deed conveying title to an undivided one-half interest to respondent as administratrix. From the judgment this appeal has been taken upon a bill of exceptions and upon the ground that the evidence is insufficient to support any of the findings of the trial court.

[1, 2] The evidence is sufficient to support the conclusion of the trial court that the property in the city of Los Angeles was the separate property of Dora Thomson. This conclusion is also supported by the provisions of section 164 of the Civil Code, which specifies that, whenever any real property is conveyed to a married woman by an instrument in writing, the presumption is that the title was to be vested in her as her separate property. This presumption was not controverted, and the force of the evidence which it supported was not overcome or met by any evidence offered by appellant. The status of the title to the Los Angeles city property, as determined by the trial court, must therefore be taken to be an established fact in the case. The evidence was also conclusive that the sole consideration for the exchange of the Riverside property was the Los Angeles city property, which had been for a considerable time before the date of the exchange, and was at that time the separate property of Dora Thomson. Section 853 of the Civil Code provides that, when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

A similar situation appeared in the case of Shaw v. Bernal, 163 Cal. 262, 124 P. 1012, 1015. In that case it was established that a piece of property was purchased in 1897 with funds received by a married woman from her brother. The deed to the property was made to the wife. The husband, who was a machinist, and who attended to all of the business of his wife, including the collection of rentals, sold the property so acquired, and with the proceeds purchased other property, the deed to which was executed to himself and wife as grantees. After her death, the husband claimed that the property was community property. The court, in discussing the questions involved, said: "There was nothing in the evidence to require a conclusion that Mrs. Shaw had ever done more in relation to the money derived from the sale of her lot 6 in block 250 than to intrust it to the custody and control of her husband. As in Title Insurance Co. v. Ingersoll, 158 Cal. 483, 111 P. 364, 'the relation of the parties and their conduct with respect to her money justified the court in preferring the inference that the understanding was that he was to act as trustee for her in the management and disposition of it.' It is well settled that 'if a husband purchase lands with the separate estate of his wife in his hands, * * * or money put into his hands to invest for his wife, and take the title in his own name, a trust results to the wife' (1 Perry on Trusts, § 127), in the absence of a clear understanding to the contrary, had at the time of the purchase. (Id. § 140). See, also, 3 Pomeroy, Eq. Jur. § 1049; Heinrich v. Heinrich, 2 Cal. App. 479, 483, 84 P. 326. It was substantially said in Title Insurance Co. v. Ingersoll, 153 Cal. 1, 5, 94 P. 94, that it is well settled that the mere acquirement of the possession of a wife's separate property by the husband, and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband or to change its status from separate to community property, that the presumption in such a case is that the property continues to be the separate property of the wife and that the husband holds it in trust for her, and that under such circumstances it devolves on the trustee claiming a gift or change in the status of the property to show the same."

In the instant case the testimony is plain that over a long period of years the decedents, aside from the possible sale of a piece of property in Illinois for the sum of $3,500, had no considerable amount of property except that which was inherited by the wife; that they were aided to a considerable degree by her father before his death; that the income of the husband was very small; that the wife placed in his hands all of the money received by her, and the same was deposited to the husband's account; that from the Los Angeles city property she received a small monthly rental before its sale, which rental was treated as hers, and of the lack of which she complained after the acquisition of the Riverside property.

[3-6] In this state all presumptions are in favor of conveyances to the wife. They are presumed to have been made for a consideration paid by the wife, or, if it be conceded that the consideration was paid by the husband, it will be presumed that the property was intended as a gift to the wife as her separate property. The burden is upon those claiming under the husband's right to show the contrary. Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657. Where the presumption is not controverted, the court is bound to find in accordance with the presumption. Fanning v. Green, 156 Cal. 279, 104 P. 308.

"It is the settled rule that the fact of the receipt by the husband of his wife's money presumptively makes him her debtor and imposes upon him the legal duty of returning it to her, and no affirmative proof is required on the part of the wife to show that the husband received the money as a loan, and not as a gift. To the contrary, the burden is upon the husband, or his heirs claiming the money, to show circumstances entitling him, or them, to retain the same. White v. Warren, 120 Cal. 322, 49 P. 129, 52 P. 723; Wormley's Estate, 137 Pa. 101, 20 A. 621; Stickney v. Stickney, 131 U. S. 227, 33 L. Ed. 136, 9 S.

Ct. 677; see, also, Rose's U. S. Notes." McKay v. McKay, 184 Cal. 742, 195 P. 385, 386.

We are of the opinion that the findings of the court are fully supported by the evidence, and that the judgment should be affirmed. It is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

115 Cal.App. 559

PEOPLE v. COLDWELL.

Cr. 36.

District Court of Appeal, Fourth District, California.

July 21, 1931.

1. Homicide ⚷250.

Evidence *held* to justify conviction of manslaughter.

2. Criminal law ⚷1186(4).

Instruction to determine whether defendant be guilty or not guilty of offense charged or guilty of lesser degree of crime within such offense *held* not reversible error, in view of other instructions (Const. art. 6, § 4½).

> Jury was fully instructed on degrees of homicide, circumstances reducing offense from murder to manslaughter, and self-defense, and that verdict might be either guilty of murder in first degree, guilty of murder in first degree with punishment at life imprisonment, guilty of murder in second degree, guilty of manslaughter, or not guilty.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Adam Coldwell was convicted of manslaughter, and he appeals.

Affirmed.

Fred Duffy, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

GRIFFIN, Justice pro tem.

This appeal is prosecuted by appellant from a judgment against him pursuant to his conviction of the crime of manslaughter and from an order denying his motion for new trial.

Appellant was informed against by the district attorney of San Bernardino county. The information charged that on the 14th day of April, 1930, appellant did willfully, unlawfully, feloniously, and with malice aforethought kill and murder Florencio Carillo, a human being. He entered his plea of not guilty. A trial by jury resulted in his conviction of the crime of manslaughter. His motion for a new trial was denied, and he was ordered committed to the state prison at San Quentin for the term prescribed by law. A stay of execution was granted pending appeal.

[1] It appears from the evidence that on the afternoon of April 14, 1930, the deceased, accompanied by John Garcia and Juan Provencia, were walking along a street near a reservoir in East Highland in San Bernardino county, talking and joking with each other. Near this reservoir stood an old Ford car which was used for pumping. As they came near this Ford, deceased picked up a rock and threw it in the direction of the Ford. The rock did not hit the Ford but went into the reservoir. Appellant was passing by at this time and told him not to throw any rocks at his Ford, that he used it to pump water. John Garcia asked appellant to show him where the rock hit the Ford, and defendant replied, "Well, it's all right; I am just telling you that, not to throw any rocks at that Ford." After this the deceased and his two companions continued their walk along the same street, later returning and again meeting appellant. The witness John Garcia asked appellant if he had any beer for sale, and he replied that he did not.

Deceased and his two companions then left appellant, and they did not encounter each other again until in the evening about 8:30 o'clock, when they met in a pool room in East Highland. Neither of deceased's companions saw appellant in the place until they heard him command the deceased to take his hands out of his pockets. At this time the deceased was leaning against a pool table with his hands in his pockets. When the witness Provencia heard this command, he turned and saw appellant with a revolver in his hand. Appellant repeated the command, and, stepping toward the deceased, pulled the gun and shot him.

From the testimony of the prosecution's witnesses it does not appear that any argument or discussion of any kind preceded the shooting. Furthermore, it appears from the testimony of the witness Provencia that the deceased did not understand the English language, and we may assume, therefore, that he did not understand the command made by appellant. Provencia further testified that the deceased was not armed nor did he have any words with the appellant, and that neither he nor the other companion, Garcia, had any words with appellant. This testimony is corroborated in full by the witness John Garcia.

The testimony of these witnesses is further corroborated by that of J. H. Hernandez, proprietor of the pool room, who testified that the first thing that attracted his attention in the direction of appellant and deceased was appellant's command to the deceased to take his hands out of his pockets or he would kill him. When he heard this he looked up and saw appellant, with a revolver in his hand, take a few steps toward deceased, command him again to take his hands out of his pockets, and then fire. He further testified that the deceased was not doing anything at this time. This testimony was corroborated by the witness Elpidio Ochoa, who was an employee at the pool room.

The defense interposed was that the deceased approached appellant in a threatening manner and had two billiard balls in his hands, which were in his pockets. Appellant testified that he only attempted to strike the deceased with the revolver instead of shooting him, and did not intend to kill him.

This evidence we believe is clear and at least certainly justifies the verdict of the jury in finding the defendant guilty of manslaughter.

[2] Appellant designates several grounds for a reversal of the judgment. The only argument advanced is in support of the fifth ground, to wit, that the court erred in giving the following instruction:

"The offense with which the defendant is charged is murder, a felony, committed as follows: That said Adam Coldwell, on or about the 14th day of April, 1930, in the said County of San Bernardino, State of California, did wilfully, unlawfully and feloniously, and with malice aforethought, kill and murder one Florencio Carillo, a human being.

"It is the duty of the jury to determine from all of the evidence offered in the trial whether the defendant be guilty or not guilty of the offense charged or *guilty* of any lesser degree of crime contained within the offense charged in the information."

It appears from the instruction above quoted that, after this was presented to the court, the court interlined the word "guilty" in the last portion thereof. Because of this added word or interlineation appellant contends that the interpretation to be placed upon this instruction is that it was a direction to the jury to find appellant guilty of one of the lesser or included offenses in the charge of murder, if they were unable to convict him of murder in the first degree. The instruction as modified was not as clear as it should have been made, but, in substance, it told the jury that it was their duty to determine from all the evidence offered whether the defendant be guilty of murder as charged, or guilty, or not guilty of any of the lesser degree of crimes contained within the charge in the information. Particularly is this so when we consider this instruction in connection with the rest of the charge. Such a construction is one which we believe the jury, as reasonable persons, placed upon this instruction. The jury was fully instructed on the degrees of homicide and circumstances which would reduce the offense from murder to manslaughter and when the right of self-defense existed in connection therewith. The jury was instructed as to the forms of verdict as follows:

"In this case your verdict may be in either of the following forms:

"I. We, the jury in the above entitled action, find the defendant guilty of murder in the first degree; or

"II. We, the jury in the above entitled action, find the defendant guilty of murder in the first degree and fix his punishment at life imprisonment; or

"III. We, the jury in the above entitled action, find the defendant guilty of murder in the second degree; or

"IV. We, the jury in the above entitled action, find the defendant guilty of manslaughter; or

"V. We, the jury in the above entitled action, find the defendant not guilty.

"In either case, let your verdict be reduced to writing and signed by your foreman before returning into open court."

When the foregoing instruction is considered in connection with the instruction complained of, there can be no question but that the jury understood the court's statement to them as to the different types of verdicts they could render. Under these circumstances we see no reversible error in the given instruction. The error complained of is harmless, and should be disregarded, under section 4½ of article 6 of the Constitution of the state of California.

The judgment and order of the trial court denying a new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

118 Cal.App.(Supp.) 777

HICKS v. FRAZER.

C. A. 731.

Appellate Department, Superior Court, Los Angeles County, California.

July 16, 1931.

1. Principal and agent ⚷136(2).

Agent may bind himself personally on principal's contract.

2. Principal and agent ⚷184(2).

Where third party elects to take agent as debtor in place of named principal, principal is not liable on contract.

3. Contracts ⚷124.

Election campaign printing indebtedness created in excess of statutory limits *held* void, notwithstanding printing matter was furnished only on personal credit of candidate's campaign manager, since it was nevertheless furnished "on behalf of" candidate (St. 1907, p. 672, § 3).

[Ed. Note.—For other definitions of "On Behalf of," see Words and Phrases.]

Appeal from Municipal Court of Los Angeles; W. D. McConnell, Judge.

Action by E. G. Hicks against Guernsey Frazer. Judgment for plaintiff, and defendant appeals.

Reversed and remanded for new trial.

Harold Ide Cruzan, of Los Angeles, for appellant.

Loton Wells, of Los Angeles, for respondent.

SHAW, Acting P. J.

The evidence clearly shows that the defendant was campaign manager for Jack Bean, a candidate at the general election of 1928 for the office of supervisor of Los Angeles county, and in that capacity ordered from plaintiff printing to be used and which was used in the Jack Bean campaign. Plaintiff was fully informed as to this situation and the intended use of the printing. Plaintiff furnished on this order printing for which the total bill was $1,658.87, of which $1,000 remains unpaid. All of these facts appear without conflict.

By the provisions of section 3 of the Purity of Elections Law (Stats. 1907, pp. 671, 672) "no sum shall be paid and no expense shall be incurred, directly or indirectly, by or on behalf of a candidate, whether before, during, or after an election, on account of or in respect of the conduct and management of an election at which he is a candidate, in excess of the maximum amount following, that is to say: if the term of the office for which the person is a candidate be * * * for more than three years, and not more than four years, twenty percentum of the amount of one year's salary of the office." The salary of the office of supervisor is $5,000 per year, and the term is four years. The allowable expenditure of a candidate for the office is, therefore, $1,000, and this amount was exceeded by plaintiff's bill alone, regardless of other expenditures. The indebtedness to plaintiff was incurred in violation of the law, and for that reason it is void and affords no basis for an action (Mathewson v. Bean [Cal. App.] 300 P. 56), unless it is saved from such condemnation by certain other facts to which plaintiff's president testified.

In substance, these facts are that when the witness went to the Bean campaign headquarters, at defendant's request, and received from defendant an order for printing, he informed defendant that the account would have to be with him personally, and that plaintiff was not interested in doing any campaign printing unless the price was paid in advance, to which defendant replied that he would guarantee the bill; that the witness then stated that a guarantee was not what he wanted, but the printing must be sold to defendant personally and not to the Jack Bean campaign; that defendant agreed to this, and that the charges were made accordingly. These facts do not alter the application of the Purity of Elections Law to the case. The controlling words of the statute in this respect limit the expense which may be incurred "by or on behalf of a candidate." A substantially identical statute exists in Wisconsin, construing which the Supreme Court of that state said, in State v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A. L. R. 348, 372: "In the act, particularly that part relating to the amount which may be spent and the filing of accounts, the phrase, 'by and on his behalf,' is used. There is no difficulty in understanding what is meant by the term 'by'; the phrase 'on his behalf,' when it refers to a candidate, means by someone who acts for him in the sense that an agent acts for and on behalf of his principal. The authority may be expressed or implied but it must exist; otherwise the disbursement is not made on behalf of the person sought to be charged. Even after a person has announced or declared himself a candidate for a public office, the statute makes no limitation upon the disbursements made by citizens who may, upon their own initiative and on their own behalf, support the candidacy of any person of their choice. Such voluntary support may be given by an individual or by a group of individuals. Persons so engaging in political activities are required to make no account thereof unless and until the total exceeds $50."

Our Supreme Court apparently took the same view of our statute in Bradley v. Clark, 133 Cal. 196, 202, 65 P. 395, where they said: "The findings of the court negative the contention of appellant that the expenditures made for carriages and for banners by Booth, a friend of Clark, were made by him as agent of Clark, and consequently chargeable against Clark, under the law."

This case involved the Purity of Elections Act of 1893, which was substantially the same in its language and purpose as the act now in force, but contained other provisions not found in the present act. The particular provision involved in that case was that requiring a candidate to file a statement of expenses incurred by him or by any person "on my behalf."

[1-3] Giving the words "by or on behalf of a candidate" the meaning ascribed to them in these cases, that is, that they relate only to expenses incurred by the candidate in person or by persons who are acting as his agents, they are directly applicable to this case. Defendant was the agent of Bean and unquestionably ordered the printing in question in that capacity, that is, "on behalf of" Bean. This view of the case is not changed by the fact that plaintiff chose to rely only on the personal credit of defendant. We are aware of the rules that an agent may bind himself personally on a contract made for his principal, and, if he does so, the contract may ordinarily be enforced against him (See 1 Cal. Jur. 820 et seq.), and that where the principal is known to the third party at the time of the contract, and such third party elects to take the agent as his debtor in place of the principal, the principal is not liable on the contract (Pacific, etc., Inc., v. Seeber, 205 Cal. 690, 696, 272 P. 579; Koeberle v. Friganza, 66 Cal. App. 323, 329, 226 P. 35). But even in such a case the contract is one made "on behalf of" the principal, so that the agent is entitled to reimbursement from the principal for anything which the agent is required to pay upon it, unless to his knowledge the contract is illegal. 2 Corpus Juris 793–798 and cases cited; Thomson-Houston Electric Co. v. Central Ry. Co., 6 Cal. Unrep. Cas. 202, 55 P. 777; Gardner v. Kinney, 60 Or. 292, 117 P. 971; Dow v. Worthen, 37 Vt. 108. Hence if this transaction is legal as between plaintiff and defendant, defendant may recover from Bean the amount of the judgment herein, the latter may lawfully pay an indebtedness which the statute says he may not incur, and a plain and easy way is opened for evasion of the law. We do not think it may be so evaded. The plaintiff's attempt to escape the condemnation of the statute by merely stipulating that its contract is with the agent alone can have no more success than the similar conduct of the traditional ostrich, which is said to believe itself hidden when its head only is covered. We are not required in this case to say whether a different conclusion could be reached if plaintiff had been ignorant of defendant's agency and of the intended use of the articles supplied.

The judgment is reversed, and the cause is remanded for a new trial, with costs of appeal to appellant.

I concur: YANKWICH, Judge pro tem.

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213 Cal. 145

McGILLYCUDDY v. LOS VERJELS LAND & WATER CO.

S. F. 13462.

Supreme Court of California.
July 16, 1931.

1. Work and labor 🔑10.

Where contract to issue corporation manager stock as compensation for services was rendered impossible when Railroad Commission decided stock might not be issued, implied contract arose to pay reasonable value of services.

2. Work and labor 🔑10.

Where services are performed for consideration which turns out to be impossible of performance or unenforceable, implied contract arises to pay reasonable value of services.

3. Limitation of actions 🔑148(1).

Resolution of board of directors that manager's salary authorized at previous directors' meeting was proper *held* to revive obligation barred by statute of limitations.

4. Corporations 🔑308(3).

Directors' resolution revived obligation of original contract respecting compensation for manager's services and was not merely conditional promise to pay in stock.

> The resolution was, in substance, that it was understood and agreed by directors that the stock salary of $200 per month, authorized to be paid manager at directors' meeting of certain date, was proper and continued up to certain date, and was thereby acknowledged as debt due manager, payable in stock of corporation at par value.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by V. T. McGillycuddy against the Los Verjels Land & Water Company. From the judgment, defendant appeals.

Affirmed.

Evan J. Hughes and Jas. D. Meredith, both of Sacramento, for appellant.

Orville C. Pratt, Jr., of San Francisco, and George F. Jones, of Oroville, for respondent.

LANGDON, J.

This is an action to recover compensation for services performed by plaintiff. The essential facts are few and not disputed. On June 16, 1913, by resolution of the board of directors of defendant corporation, plaintiff, the president of said corporation, was appointed general manager, his compensation to be treasury stock of the par value of $200 per month. He rendered the services called for in the contract, but the railroad commission denied the application of the corporation to issue the said stock, and none was ever received by him. On August 25, 1920, a resolution was passed at a directors' meeting, terminating the original provision for compensation, and placing plaintiff on a salary of $25 per month. On December 11, 1924, another resolution was passed, reaffirming the resolution of August 25, 1920, and acknowledging liability to plaintiff under the resolution of June 16, 1913. Plaintiff continued to perform until April 25, 1925. No compensation was ever received by him. This action was commenced on December 11, 1926. The trial court found that the reasonable value of plaintiff's services over the various periods covered by the agreements was $7,800 and accordingly gave judgment for him in that sum. Defendant appeals, contending that the contract to pay compensation in stock was unenforceable because illegal, and that any claim for the reasonable value of the services rendered was barred by the statute of limitations.

[1, 2] The first proposition may be briefly disposed of. It is true, of course, that defendant corporation, being a public utility, could not issue stock without the permission of the railroad commission (Public Utilities Act, § 52, Deering's General Laws 1923, Act 6386, p. 2724), and a contract for the issuance of such stock without a permit would be unenforceable. But the contract involved herein has no such object, as we view it. It is an agreement for the performance of certain services, the consideration being specified as stock of a certain value. The record shows that when the contract was made both plaintiff and the directors believed that the stock could be issued. The agreement, therefore, is quite distinct from a "contract to purchase stock" to be issued without a permit, where the object of the contract—purchase of the stock—is in violation of the law. Here the object—performance of personal services—was legal, and the payment of the specified compensation was rendered impossible by the decision of the railroad commission that the stock might not be issued. In such a case, it certainly does not follow that defendant corporation, having received the benefit of full performance by plaintiff, may entirely escape liability. It cannot, of course, be required to issue the stock. But where services are performed for a consideration which turns out to be impossible of performance or unenforceable, an implied contract arises to pay the reasonable value of the services. See 3 Williston on Contracts, 3351, § 1972.

[3] The other contention of defendant is that the claim of plaintiff is either wholly or partly barred by the statute of limitations and that no acknowledgment of the obligation has been made, sufficient to toll the statute or revive the debt. A brief review of the facts shows that this is wholly untenable. The contract was made on June 16, 1913, by resolution of the board of directors. This contract was apparently terminated on August 25, 1920. The right of action based upon it was subsequently barred by the statute of limitations. However, on December 11, 1924, the following resolution was passed: "It is understood and agreed by the directors that the stock salary of two hundred dollars per month, par value, authorized to be paid Manager McGillycuddy at the Directors Meeting of June 13th, 1913, was proper and continued up to September 1st, 1920, and is hereby acknowledged as a debt due, Manager McGillycuddy, payable in stock of the Los Verjels Land and Water Company at par value." Another resolution passed at the same meeting reaffirmed the resolution of August 25, 1920, in which it was specified that plaintiff receive $25 per month for his services after that time. The effect of these resolutions was to revive the barred obligation. They fully meet the test laid down in Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009. Suit having been commenced within two years after they were adopted, it is unnecessary to consider whether the four-year statute applying to written contracts, or the two-year statute applying to obligations not evidenced by a writing, governs the present action.

[4] Defendant finds fault with the first resolution of December 11, 1924, claiming that it was merely a conditional promise to pay in stock, and not in money. Properly construed, however, the resolution is an acknowledgment of a debt, and, more specifically, an acknowledgment of the obligations incurred under the contract of June 13, 1913. The effect of the acknowledgment cannot be defeated on the theory that it only admits the obligation to pay in stock, any more than the obligation under the original contract can be wholly defeated because of the stock provision. We think that this acknowledgment revived the obligation of the original contract, whatever it was; and, as we have seen, it was the obligation to pay the reasonable value of the services rendered, when the stock provision became impossible to perform.

It is also contended by defendant that there are variances between the allegations of the complaint, the findings, and the proof. We have examined the record and are satisfied that the proof sufficiently supports the findings.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.

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213 Cal. 131

O'HARA et al. v. GRAND LODGE, INDEPENDENT ORDER OF GOOD TEMPLARS OF STATE OF CALIFORNIA.

Sac. 4484.

Supreme Court of California.

July 14, 1931.

1. Appeal and error 🔑1011(1).

Matters determined in trial court on conflicting evidence cannot be considered on appeal.

2. Charities 🔑50.

Finding that plaintiff corporation did not hold charitable trust property in trust for defendant corporation which acquired property for orphans' home, and subsequently sold property to plaintiff subject to the trust, *held* supported.

3. Trusts 🔑345.

Where settlor parted with entire interest in trust property for valuable consideration, subject to trust, settlor had no standing in court, except as relator, to compel proper execution of trust or to claim interest in property.

4. Charities 🔑37.

When method for carrying out charitable trust provided for in trust instrument becomes impossible, court may empower trustee to carry out general charitable purpose in different manner.

5. Charities 🔑31.

In determining whether there has been expressed general charitable intent, trust instrument is construed most strongly against trustor.

6. Charities 🔑32.

Where it is determined that trustor had general charitable purpose, court presumes trustor did not desire trust to fail.

7. Charities 🔑11.

Circumstances surrounding creation of trust for orphans' home *held* sufficient to indicate general charitable intent to benefit orphans.

8. Charities 🔑37.

Where means of carrying out trustor's general charitable intent to benefit orphans through creating and maintaining orphans' home had become reasonably impossible, court could permit trustees to carry out general intent by selling property and using fund for some cognate purpose.

9. Charities 🔑48(2).

Statute rendering transfer in contravention of trust void *held* inapplicable to sale of orphanage property, where transfer was for purpose of carrying out trust (Civ. Code, § 870).

10. Trusts 🔑189.

Where court would have ordered sale of trust property on proper application, court will not cause sale arranged by trustee to be undone.

11. Abatement and revival 🔑8(2), 9.

Pendency of prior actions *held* not to have effect of abating action, where pleading disclosed that prior actions involved different parties and issues.

12. Trusts 🔑194.

Decree directing sale of trust property should direct disposition of proceeds of sale.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Russell F. O'Hara and another against the Grand Lodge of the Independent Order of Good Templars of the State of California. From an adverse judgment, defendant appeals.

Modified and, as so modified, affirmed.

F. W. Sawyer, of San Francisco, for appellant.

C. H. Sooy, of San Francisco, and H. A. Frank, of Oakland, for respondents.

PER CURIAM.

This action was brought by O'Hara, the purchaser of certain described real property in Solano county, and by the Good Templars Home for Orphans, the seller of that land, as plaintiffs, against the Grand Lodge of the Independent Order of Good Templars of the State of California, as defendant, for the purpose of securing a decree of the superior court confirming the sale, and a determination that defendant corporation has no interest in the real property involved.

The complaint alleges, in part, that the plaintiff corporation is a California corporation, organized in December, 1897; that about that date such corporation became the owner, as trustee, of part of the lands herein involved; that the purpose of such trust was to acquire a tract of land and operate thereon an orphanage; that on the 13th day of June, 1919, the Home for Orphans, conducted by plaintiff corporation under the terms of the trust, was closed and abandoned; that said home was abandoned for the reason that the plaintiff corporation was unable to acquire or secure sufficient sums of money properly to or at all conduct a home for orphans thereon; that the buildings of the orphanage had become so obsolete that rebuilding and remodeling had become necessary, at an expense which was prohibitive to plaintiff corporation; that for five years next preceding the closing of the orphanage very few orphans had applied for admission to the institution, until, in 1919, only two full and two half orphans were being cared for therein; that there was no longer any need for an orphans' home such as plaintiff corporation had been conducting; that the real property held by plaintiff corporation under the terms of the trust did not, when taken with the other assets and property of such corporation, yield a sufficient income to carry on or conduct the home; that the real property involved at the time of sale was of the reasonable value of $17,000; that after the closing of said home in 1919, the income from said property did not amount to the gross sum of $2,000, from which sum all expenses had to be paid.

It is further alleged that, prior to January 14, 1927, it had become apparent to plaintiff corporation that it could not then or in the future conduct an orphans' home; that on that date the plaintiff corporation duly authorized a sale of the property to certain parties by the names of D. Brosnahan and Carlos B. Rookwood, in accordance with certain terms and conditions set forth in the deed; that, on February 29, 1928, the grantees in said deed did convey and sell to plaintiff Russell F. O'Hara, by quitclaim deed, the interest of said grantees in the real property involved herein; that defendant corporation has objected to the sale of said property and has claimed an interest therein adverse to the interests of plaintiffs; that the claim of defendant is without foundation; that plaintiff O'Hara has paid to plaintiff corporation, as and for the purchase price of said property, the sum of $8,500 in cash, and has given his promissory note in a like sum, which note draws interest at the rate of 7 per cent., and which note is secured by a first mortgage on the property; that the sale to plaintiff O'Hara was made in good faith and for the best interests of the trust.

In the prayer of their complaint, plaintiffs ask that the sale be confirmed; that the defendant corporation be decreed to have no interest in the land; and for other and further relief.

The deed from plaintiff corporation to Brosnahan and Rookwood is attached to the complaint as an exhibit. Among other things, the deed provides that, in addition to the payment of $17,000, the purchasers will pay "all expenses in connection with said transfer, including court expenses and pending litigation * * * it being understood, however, that said sale shall be made subject to confirmation by the Superior Court of Solano County, California, and that the purchaser or purchasers shall pay all costs of transfer, including any court expenses and expenses of litigation pending or that may be hereafter commenced, necessary to perfect title to said property, or to procure the transfer of a good title to the purchaser or purchasers."

Defendant, in its answer, alleges that it was first organized as an unincorporated association September 9, 1850, and that it was incorporated October 4, 1876; admits that the orphans' home was closed in 1919, but denies that it was closed for the reasons alleged in the complaint, and alleges that said home was closed because of its mismanagement by plaintiff corporation.

As a separate defense, defendant corporation alleges that all during its existence said corporation has been engaged in the performance and the carrying out of its purposes, one of which was to erect, maintain, and endow an orphans' home near Vallejo; that defendant corporation is the parent and grand lodge and that plaintiff corporation is a subordinate lodge; that the movement for the erection and maintenance of the orphans' home was first started in 1867 by levying a tax of one dollar per member on all members of the lodge; that sufficient money was so collected by that means and by donations to purchase a site for such purposes; that a site for said orphans' home was purchased with the funds so collected, such site being the lands herein involved; that the title to said lands was taken in the names of three trustees (defendant not then being incorporated), who thereafter held the property in trust for defendant; that, in 1868, defendant subdivided part of the lands herein involved, twenty acres of the same being specially set apart for the sole purpose of a site for said home, the remainder to be sold, the proceeds to be used to construct the orphanage, and to maintain the same; that, for the purpose of carrying out this plan, defendant incorporated a sales corporation known as the Orphans' Homestead Association, and caused the trustees to convey all of the real property to said corporation; that said Orphans' Homestead Association, on December 30, 1868, deeded the twenty acres reserved for the orphanage to certain named trustees, under the terms of an express trust expressed in the deed of conveyance to said trustees, and which trust is pleaded in hæc verba, and which, among other things, provided that said trustees held the property in trust for defendant "for the purpose of a site for an Orphans' Home and its necessary appurtenances, and for the perpetual maintenance of said Orphans' Home and the support and education of its inmates and for no other purpose"; the remaining portions of said lands (about 152 acres) were subdivided and sold by the Orphans' Homestead Association, all funds thus received being placed in a trust fund for the erection and maintenance of an orphans' home; that the purchasers reconveyed the land back to this corporation for trust purposes; that, in 1871, the trustees conveyed the title to the 20 acres back to defendant; that for the greater convenience and better protection of all of said land, and for the purpose of better carrying out the provisions of the trust, defendant caused to be incorporated plaintiff corporation; that, thereupon, defendant conveyed to plaintiff corporation all of the property herein involved, said plaintiff corporation agreeing to live up to and abide by the terms and conditions of the trust; that at all times this defendant has been and still is ready, able, and willing to carry out and perform the trust, but that plaintiff corporation refuses to permit defendant so to do, and has attempted to sell said property in violation of the trust; that, prior to this attempted sale, both plaintiffs had full and actual knowledge of all the terms and conditions of said trust.

It is further alleged that this action must abate, for the reason that on February 4, 1925, this defendant commenced an action against plaintiff corporation in the superior court of Solano county, in which action this defendant has claimed the sole ownership of the entire estate and property involved herein; that a notice of lis pendens was filed; that said action is still pending; that plaintiffs knew this fact; that the subject matter of the two actions is identical.

It is also alleged that this action must abate because of the fact that there is now pending another action commenced in 1927 by defendant against plaintiff corporation and others in the superior court of the city and county of San Francisco, wherein this defendant has asked for a decree canceling the conveyances set forth in plaintiff's complaint, for an accounting, and for a decree terminating the trusts and for a reconveyance of the properties.

After a trial before the court without a jury, the court caused a judgment to be entered in favor of plaintiffs. The trial court found that the history of the acquisition of the property and its several transfers were substantially as set forth in the answer; that the plaintiff corporation held the property as trustee "for the sole purpose of locating and establishing an Orphans' Home thereon," and "to forever maintain an Orphans' Home," and "to have and to hold for the sole purpose of a site for an Orphans' Home and its necessary appurtenances and for the perpetual maintenance of an Orphans' Home and the support and education of its inmates, and for no other purpose"; that the home had been abandoned in 1919 for the reasons set forth in the complaint; that the reasonable value of the property was $17,000; that the circumstances leading up to the sale of the property to Brosnahan and Rookwood, and its subsequent transfer to O'Hara, were substantially as set forth in the complaint; that "the sale of the said land to plaintiff O'Hara and his assigns was made in good faith, and for the best interests of the trust of plaintiff corporation"; that it is not true that plaintiff corporation's only claim to the real property involved was as trustee for defendant corporation; that it is not true that plaintiff corporation was incorporated by defendant corporation for the sole purpose of greater convenience in carrying out the trust, but that plaintiff corporation was incorporated so that it might take over the land and pay a consideration therefor, and that the consideration to be paid and that was paid was that plaintiff corporation should pay certain debts of defendant corporation amounting to $10,000; that it is not true that defendant corporation is ready, able, or willing to perform the trust; that defendant corporation, since 1898, has been gradually shrinking in size and membership, so that, in 1919, it had less than 600 members and a total income of less than $1,000; that defendant corporation is financially unable and without means to operate the Orphans' Home; that defendant knew of the closing of the home in 1919 and made no objection thereto; that "it is true that the objects of the trust had become and were impossible prior to the said 13th day of June, 1919."

As its conclusions of law, the trial court held:

1. That defendant is estopped to question the validity of the right of plaintiff corporation to have closed the home in 1919, and is estopped to deny the right of plaintiff corporation to the full control and right to control the lands herein involved, by reason of defendant's laches and delay in objecting thereto.

2. That the sale of the land to plaintiff O'Hara should be and is affirmed.

3. That defendant corporation is hereby decreed to have no right, title, or interest in and to the real property.

From the judgment entered in accordance

with the above findings and conclusions, defendant prosecutes this appeal.

[1] At the trial defendant sought to show that plaintiff corporation was a mere subsidiary of defendant, and no more than an agent or trustee for defendant corporation, and that it had mismanaged the trust. These matters were thoroughly gone into on the trial, and, on conflicting testimony, found adversely to appellant, and, for that reason, cannot be considered on appeal.

[2] There can be no doubt of the correctness of the trial court's finding that plaintiff corporation did not hold the property in trust for defendant. The evidence tended to show that defendant corporation, during its period of prosperity, acquired the land herein involved in trust for the purpose of establishing and maintaining an orphans' home thereon; that, faced with the decrease in its membership and consequent loss of income, it sold the lands to plaintiff corporation, subject to the trust, for the sum of $10,000; that in this deed of conveyance no reversionary interest was retained by defendant. The trust for an orphans' home was undoubtedly a charitable trust, it having been collaterally so held in Re Estate of Upham, 127 Cal. 90, 59 P. 315. Defendant was not even the donor or creator of this trust, in the ordinary sense, having secured the money with which the land was purchased by a levy on the members of the lodge and by donations, and thereupon became trustee for those donating the money.

[3] However, even if defendant be treated as the creator of this trust, it does not appear what standing it has in this action to claim any interest in the real property. Defendant parted with its entire interest in the property for a valuable consideration, subject to the trust, and retained no reversionary interest therein. Under such circumstances, it has no standing in a court of equity, except as a relator, to attempt to compel the proper execution of the trust, or to claim any interest in the trust property. The law is well settled that when property has become fully vested in trustees for a valid charitable purpose, neither the creator of the trust nor his heirs or assigns have any standing in court in a proceeding to compel the proper execution of the trust, except as relators. Perry on Trusts (7th Ed.) p. 1255, § 732-A. In Clark v. Oliver, 91 Va. 421, 22 S. E. 175, at page 176, the rule is stated as follows: "The contributors to this fund parted with their interest in it, and when it was paid their control over it ceased. They are not described as persons belonging to the class intended to be benefited by the application of the fund. The money was devoted to a charitable use. As we have said, the whole interest of the donors was divested. There remained in them no scintilla of right. How, then, can they be heard in a court of equity with respect to the disposition of it? There is no such thing as a resulting trust with respect to a charity. Where a fund has been devoted to a charity, which, if the charity fails, will go to others, those persons having hostile interests may, of course, assert any claim they may have in the subject, and show that the charitable use has for any cause failed and become inoperative and void; but, where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him, have any standing in a court of equity as to its disposition and control."

In other words, the only person who can object to the disposition of the trust property is one having some definite interest in the property—he must be a trustee, or a cestui, or have some reversionary interest in the trust property. In the instant case, there is more than sufficient evidence to sustain the trial court's finding that defendant has no right, title or interest in the property. At most, defendant is the creator of the trust, who, for a valuable consideration, has parted with its entire interest in the trust property. Under such circumstances, it would appear that defendant has no standing in court, except as a relator, to object to the disposition of the trust property. In addition to the authorities cited, supra, see Women's Christian Ass'n v. Campbell, 147 Mo. 103, 48 S. W. 960, 967; Petition of Burnham, 74 N. H. 492, 69 A. 720, 721; MacKenzie v. Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 A. 1027, 1038, 3 L. R. A. (N. S.) 227.

[4-6] Assuming, however, that defendant corporation could object to the confirmation of the sale, and that, therefore, the validity of the trial court's order is involved on this appeal, we are of the opinion that the trial court properly confirmed the sale of the trust property. Appellant seems to be of the opinion that confirmation of the sale will result in the termination of the trust. Such is not the fact. This proceeding is merely a step in carrying out the general purpose of the trust, the particular means specified in the trust instrument having failed. The law has long been well settled that the trial court, sitting as an equity court, has the power, when the method for carrying out a charitable trust provided for in the trust instrument has become inadequate or impossible, to empower the trustees to carry out the general charitable purpose in another or different fashion. In the instant case, the creator of the trust specified that the trust should be carried out by the maintaining of an orphans' home, but that method of carrying out the general charitable purpose of aiding and assisting orphans and half orphans has become reasonably impossible of performance, due to a change in conditions not foreseen at the time

of the creation of the trust. In such a case, it becomes the duty of the equity court to construe the trust instrument in view of all the circumstances, and, if a general charitable purpose be ascertained, to apply the trust fund to the carrying out of that general purpose, even though so to do requires a change in the method or means specified in the trust instrument. This doctrine, frequently referred to as the cy pres doctrine, is in reality a mere matter of construction. In determining whether there has been expressed a general charitable intent, the trust instrument is always construed most strongly against the trustor, for the reason that the courts favor charities. Once it has been determined that the creator of the trust had a general charitable purpose, the courts will presume that the creator of the trust did not desire the trust to fail. Examples of the application of the doctrine are numerous. A leading case in this country, reviewing the early authorities, is Jackson v. Phillips, 14 Allen (Mass.) 539, in which case there was involved a bequest to trustees to be expended in a specified fashion to create a sentiment for the abolishment of negro slavery in the United States. After slavery had been abolished, the court found a general charitable purpose for the benefit of the negro race, and applied the funds for the purpose, as nearly as possible, of carrying out that intention. See, also, Perry on Trusts (7th Ed.) p. 1233, § 724 et seq. The doctrine has repeatedly been recognized in California. See 5 Cal. Jur. 15, § 10.

[7, 8] In the present case the facts and circumstances surrounding the creation of this trust were more than sufficient to indicate a general charitable intent to benefit orphans. The proceedings of the meetings of the Grand Lodge, the manner in which the money was collected, the absence of a reversionary clause in the trust deed, all indicate a general charitable intent to benefit orphans. It is true that it was specified in the trust instrument that this purpose should be accomplished by the creation and maintenance of an orphans' home, but that means of carrying out the intention of the creator of the trust has become reasonably impossible, because of changed conditions not foreseen at the time of the creation of the trust. Under such circumstances, it is the clear duty of the equity courts to permit the trustees to carry out the general trust purpose by selling the land, and using the fund thus acquired for some cognate purpose.

[9] Appellant complains that the sale of the land, under the conditions here existing, comes directly within the terms of section 870 of the Civil Code, which provides: "Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void."

This section has no application to the facts of this case. The sale here involved is not "in contravention of the trust," but, for the purpose of carrying out the terms of the trust, and making it effectual in a manner different from that originally contemplated, but within the presumed intention of the creator of the trust, as determined under the principles discussed, supra. In Alemany v. Wensinger, 40 Cal. 288, a particular property had been donated for church purposes, and was found to be unsuited therefor. The court ordered a sale, in order that suitable property might be purchased, stating at page 292 of 40 Cal.: "The principal purpose intended by the donors was to provide 'a Roman Catholic Church for the German Congregation of the City of San Francisco.' As a means to this end the lot on Sutter street, near Montgomery, was selected, and at the time of the selection it was suitable or at least not inappropriate for that purpose. Subsequent events, not then anticipated, and therefore not expressly provided for by the donors, have already practically defeated the scheme of the original donation. Hotels and business houses and places of public resort have grown up in close proximity to the property. A variety of circumstances, the results of the unforeseen growth of a populous city beyond and around the premises have, as found by the Court below, rendered this lot 'unsuitable as a site for an edifice for religious worship.' These circumstances have, at the same time, greatly enhanced its value in the market, and it appears that a sum can be obtained for it which will be sufficient, after paying off the indebtedness of the church, to purchase a suitable lot in the city and erect thereon an edifice proper for the accomplishment of the original design of the donation. The Court below directed, under these circumstances, a sale of the premises and a reinvestment of the proceeds of the sale in furtherance of the objects of the trust. We see no error in the general scope of the decree. It cannot be said to have displaced or interfered with the original trust for that, so far as the particular premises are concerned, had already been practically defeated by the circumstances before adverted to. The decree in its effect re-establishes the trust as far as possible, and provides the only means by which the intent of the donors may be executed and carried into substantial effect." The rule therein enunciated was in no way changed by the adoption of section 870 of the Civil Code.

In such cases, the better practice is to petition the equity court for permission to sell the property, before consummating the sale. In the instant case the trustee first sold the property, subject to confirmation, and now seeks approval of the acts performed by it.

[10] The rule is well settled that where an equity court, on proper application, would have ordered a sale, it will not cause a sale to be undone that has been arranged by the trustee, in order that the court itself may order the sale. The principle was thus stated in the early case of Newark v. Stockton, 44 N. J. Eq. 179, 14 A. 630, at page 637: "It seems to us plain that, under the conditions presented, the chancellor, if he had been properly applied to, would have been bound to permit the designed transmutation of this property. And, if this be so, then the injunction should not have been issued; for the court will not enjoin the act of a trustee of a charitable use which itself would have directed to be done had the case been before it. Such a trustee may alienate the trust property, but he will do such act at the peril of his conduct being disapproved of by the court of chancery. On this head, the case of Attorney-General v. South Sea Co., 4 Beav. 453, is an illustration. Eight messuages were conveyed to trustees, the rents to be applied, by way of certain charitable uses, for the poor of the parish. The trustees leased these properties for 99 years to the South Sea Company, and this was complained of as a breach of trust. But Lord Langdale, defining the power and duty of a trustee of this class, says: 'It is plain that, in ordinary cases, a most important part of this duty is to preserve the property; but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation; and this court, upon various occasions, with a vew to promote the permanent interests of charities, has not thought it necessary to preserve the property in specie, but has sanctioned its alienation.' And after remarking that the trustees may do, at their own risk, what the court would have done under the circumstances, and deeming the alienation made by the trustees, on the whole, beneficial, he dismissed the bill. This, we think, should have been the course in the present case. The chancellor, even on the theory adopted by him that this charity was not subject to legislative control, should not have enjoined the municipal authorities from doing the act contemplated by them, inasmuch as, if the case had been before him, he would have been constrained, by the force of a principle of equity that is not open to question, to have directed the doing of this same act."

See, also, City of Tacoma v. Tacoma Cemetery, 28 Wash. 238, 68 P. 723.

[11] The pendency of the two actions pleaded in defendant's answer could not have the effect of abating this action, for the reason that it appears from the face of defendant's pleading that in those actions the parties and issues are different from those here involved.

[12] It is usual in decrees ordering or directing sales of trust property to direct the disposition of the proceeds of the sale. It was not done in this case, the parties stating in open court that a receiver had been appointed in the San Francisco action heretofore mentioned, and that the money received from the sale would be paid over to him until it was determined in that action how such proceeds should be disposed of. For the protection of all concerned, this should have been part of the judgment in this case. It is, therefore, ordered that all proceeds from the sale of this land be held by plaintiff corporation or turned over to the receiver in the San Francisco action, to be held by him or it in trust until that court, or some other court, in a proper action, orders its disposition.

As thus modified, the judgment appealed from is affirmed.

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213 Cal. 256

LEIS v. CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 13947.

Supreme Court of California.

July 30, 1931.

1. Appeal and error 🔑842(7).

Where evidence was undisputed and indisputable, trial court's findings and conclusions amounted to mere conclusions of law, and as such were proper subject of review upon appeal.

2. Municipal corporations 🔑662.

Court erred in holding that jurisdiction over area to be occupied by civic center, including streets within area, lay within exclusive control of board of park commissioners.

The city charter limited jurisdiction of board of park commissioners to that of control over parks, squares, grounds surrounding public buildings and public pleasure grounds, but gave them no jurisdiction or control over public streets; jurisdiction and control over public streets, including acquisition, opening, closing and improvement thereof, being by terms of charter intrusted exclusively to board of supervisors and board of public works.

3. Dedication 🔑44.

In suit to enjoin erection of structure along street, evidence showed city, by resolutions of board of supervisors and by course of action and conduct of officials, had accomplished dedication of street in lands acquired by city for civic center.

4. Appeal and error ⚷1176(3).

Where evidence submitted was sufficient to show dedication contrary to trial court's holding, and evidence erroneously excluded was but cumulative thereof, trial court would be directed to enter judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Frank W. Leis against the City and County of San Francisco and others. From the judgment, plaintiff appeals.

Reversed, with direction.

Joseph G. De Forest, Tobin & Tobin, and Stoney, Rouleau, Stoney & Palmer, all of San Francisco (Charles A. Shurtleff, Hugh Henry Brown, and Walter Shelton, all of San Francisco, of counsel), for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg, Asst. City Atty., both of San Francisco, for respondents.

PER CURIAM.

This action was commenced by the plaintiff to obtain an injunction aimed to prevent the defendant city and county of San Francisco and its officials from carrying into effect the provisions of a certain resolution adopted by the board of supervisors of said municipality on December 12, 1927, and approved by the mayor thereof on December 23, 1927, directing the board of public works thereof to proceed with the erection of a certain structure along and upon the southerly line of Fulton street opposite and adjacent to the property of the plaintiff, and which would have the effect of preventing ingress into and egress from his said property into and upon Fulton street. The contention of the plaintiff, as set forth in his complaint, is that Fulton street throughout the entire width of 160 feet thereof lying between Leavenworth street and the intersection thereof with Market street is a public street, upon which his property, situate at and westerly for some distance from said intersection and along the southerly line of said Fulton street, abuts, giving him the right of ingress thereto and egress therefrom, which said city by its aforesaid resolution is seeking to obstruct. The city and county of San Francisco by its answer to said complaint denies that the strip of land along and upon which defendant proposes by said resolution to direct the erection of said obstruction is a portion of the public street commonly known as Fulton street, or that the same has ever been declared or dedicated as such by said municipality.

[1] Upon the trial of the cause upon the issue thus presented, the evidence pro and con was practically undisputed, consisting chiefly in the introduction and offer to introduce of a considerable amount of documentary evidence, derived in the main from the official records of said municipality, and having particular reference to the establishment of the so-called civic center therein, and in the course thereof of the extension and opening of that broad avenue or esplanade looking westerly from Market street to the park, which forms the center of said so-called civic center and occupies the square immediately in front of the new city hall. The evidence thus educed before the trial court being, as to the essential features thereof, undisputed and indisputable, the findings and conclusions of the trial court thereon amounted to merely conclusions of law, and, as such, the proper subject of review upon this appeal. The question as to what shall be required to constitute the dedication of a street by a municipality for public uses as such has not been made the subject of either Code or other statutory definition in this state, although dedication as a method by which the public may acquire a highway is recognized in section 2618 of the Political Code, and although there are certain acts of the Legislature providing a method for the exchange of lands for street purposes, for the opening of new streets thereon, and for the abandonment and closing of property theretofore in use as public streets. Stats. 1911, p. 1346. The result of this absence of definite provisions from the statutory law of this state having relation to the subject of dedication of public streets is that the question as to whether such dedication of a specific area within a municipality has or has not been accomplished depends upon the application of the principles of the common law, and upon the action of the courts in determining from the official charters, resolutions, ordinances, acts, and conduct of said municipality whether the area claimed to have become and to constitute and be a public street has in point of fact and law been dedicated as such. Smith v. City of San Luis Obispo, 95 Cal. 463, 30 P. 591; Wilcoxon v. City of San Luis Obispo, 101 Cal. 508, 35 P. 988; 9 Cal. Jur., p. 4; 18 C. J. 38, 41, 42; People v. Marin County, 103 Cal. 223, 37 P. 203, 26 L. R. A. 659; McQuillin, Mun. Corp., vol. 4, p. 474; People v. Beaudry, 91 Cal. 213, 27 P. 610.

The evidence in this case, in so far as the trial court permitted its introduction, purports to contain and exemplify the official purpose of the municipality to dedicate the entire 160 feet width of Fulton street from its intersection with Larkin street and abutment

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

thereat upon the said civic center park eastwardly to the intersection of Fulton street with Market street as a public street. If the evidence thus educed establishes that purpose, and if the evidence sought to be introduced on behalf of the plaintiff was and is germane to such purpose, it follows necessarily that the trial court was not only in error in the exclusion of such offered evidence, but was also in error in reaching the legal conclusion from the admitted evidence that the dedication of said area as a public street had not been accomplished. We shall, therefore, proceed to a review of such evidence and to a determination of the relevancy, effect, and conclusiveness thereof in determining whether the trial court was in error in rendering and entering its judgment in favor of the defendant upon the evidence presented before it, and was also in error in refusing to permit the presentation of certain evidence offered in support of the plaintiff's contention.

Prior to the date and disastrous effect of the earthquake and fire of the year 1906, the city and county of San Francisco had no civic center, unless the space then occupied by the old city hall and bounded in part by Hyde and McAllister streets and by what was then known as City Hall avenue, which extended in a southwesterly direction from the southerly intersection of McAllister street with Leavenworth street to or adjacent to what was then known as Marshall Square, might be called such civic center. When the old city hall and its adjacent buildings were destroyed by such earthquake, and fire and when the work of rehabilitation of the devastated city had been fairly entered upon, the public-spirited people of San Francisco, including its then officials and charter makers, began to formulate plans for the establishment of a civic center in the vicinity of where the old city hall had been and in the district bounded by Market and Franklin streets and by Golden Gate avenue. By the terms of the amendment to the charter of said municipality, adopted by its people in the year 1912 and approved by the Legislature on March 28, 1913 (Stats. 1913, p. 1602), the board of supervisors thereof were authorized to acquire lands within the above-defined area for the purpose of establishing a civic center. In order to accomplish such purpose, the board of supervisors was thereby given ample powers to acquire such lands and to make such exchanges of lands as might be required to carry out the very definite purposes provided for in the aforesaid amendment to the charter. Upon the adoption thereof, the board of supervisors proceeded in various ways to carry into effect the purposes of such amendment. One of the earliest steps taken in that direction consisted in the official closing of certain portions of City Hall avenue, which had theretofore extended transversely across the area to be thus acquired for and devoted to the declared purpose of a civic center, and in order to effectuate the closure of the portion of said avenue thus to be abandoned, and to effectuate such exchanges of the abandoned area with the owners of property theretofore abutting thereon as were made necessary by such closure, certain portions of what was formerly known as Marshall Square were also abandoned by similar processes and through the enactment of formal resolutions adopted by the board of supervisors and by certain exchanges of such lands through the execution of mutual deeds, in conformity with the terms of said resolutions. It is to be noted, however, in this connection, that the portion of City Hall avenue which traversed the area now occupied by the open space lying between Hyde street and the intersection with Market street which, according to the plaintiff's contention has been dedicated as to the entire width thereof as a public street, was not at any time closed or abandoned as such by the board of supervisors in the course of acquiring such lands as had theretofore been owned by private persons, in order to accomplish an opening of the esplanade which has come to be known as Fulton street, and which has been designated as such in the numerous plats, maps, and plans of the so-called civic center, which have from time to time been made either under the direct authority of the board of supervisors or under the implied authority and completed action of such subordinate bodies as the board of public works of said municipality in carrying forward to their present state of completion the charter plans for the formation and occupancy as a civic center of the foregoing area as defined by the terms of said charter. It is also to be noted as having an important bearing upon the decision of the trial court that the foregoing area designated and to be improved as a civic center, prior to the formulation of the plans for the acquisition and devotion thereof to such purpose, had been intersected by several long-established public thoroughfares, such as Hyde, Larkin, Grove, Hayes, and Polk streets, and Van Ness avenue. Fulton street had formerly extended from Golden Gate Park eastwardly as far as Larkin street. In the formulation of the plans for the civic center and in the course of the erection thereon of the new city hall and the establishment of the civic center park in its present location, it was necessary that the portion of Fulton street lying within said area should be closed; but since the plans for the civic center as thus formulated embraced the opening of a broad esplanade extending from the point on Larkin street where Fulton street had formerly stopped eastwardly and parallel with McAllister street and with Grove street to Market street, the area to be thus occupied thereby apparently took on the name of Fulton street in the further plans and in the execution thereof on the part of the board of supervisors and the board of public works pursuant to the creation of such esplanade. The foregoing fact, as above stated, has an important bearing upon the correctness of the conclusions and judgment of the trial court, since it is made to appear therefrom that a considerable portion of the so-called civic center area was either formerly occupied by the said public streets or was to be occupied by and devoted to such public street purposes in the consummation of the civic center plan.

[2] As to such public streets and thoroughfares, whether existent or in contemplation, and in the course of being acquired for use as such streets and thoroughfares, it may not be argued successfully that the control over such street areas was ever by the charter of said city, or otherwise, invested in the board of park commissioners of said municipality. The charter itself in providing for the creation and powers of such board of park commissioners expressly limits the jurisdiction thereof to that of control over parks, squares, grounds surrounding public buildings and public pleasure grounds when acquired by said city and county, but gives them no jurisdiction or control over public streets. See City Charter, art. XIV, § 1. On the other hand, jurisdiction and control over each and all of the public streets, lanes, and thoroughfares of said municipality, including the acquisition, opening, closing, and improvement thereof, are by the terms of said charter intrusted exclusively to the board of supervisors and to its subordinate body, the board of public works. See Charter, art. II, chap. 2. In so far, therefore, as the trial court undertook to hold that jurisdiction over the area occupied or to be occupied by the civic center of said municipality lay within the exclusive control of its board of park commissioners, including jurisdiction and control over such of the public streets thereof as lay within said area or as might be opened, improved, occupied, and dedicated to public uses as such, the trial court was in error not only in its conclusions based upon such evidence, as was admitted during the course of the trial bearing upon the opening and devotion to the uses of a public street of that portion of Fulton street, so called, lying adjacent to and in the vicinity of plaintiff's said property, but was also in error in the exclusion of certain offered evidence on the plaintiff's behalf materially affecting the question of the dedication of the Fulton street area to the uses of a public thoroughfare, and to the particular use of such area by the plaintiff herein for the purpose of ingress to and egress from his aforesaid property.

The particular acts and courses of official action and conduct on the part of the board of supervisors and its executive arm, the board of public works, upon which the plaintiff relies in proof of the dedication of the entire area of Fulton street, so-called, to such public uses, may be conveniently stated in narrative form as follows:

Following the adoption of the provisions of the charter having reference to the acquisition of a civic center above referred to, a period of public discussion ensued respecting its plan or form and the number and architecture of the public structures which were to occupy its area. A commission of well-known architects was presently constituted to bring order out of this informal agitation and discussion, and to report a civic center plan. After careful investigation, this commission, in the early part of the year 1912, made its report, accompanied with an elaborate plat or sketch showing the detailed plan of the area to be acquired for the purposes of a civic center, which report, being adopted by the board of supervisors, has since constituted the official plan and general design of said area. The plat or sketch accompanying this report purported to be a sort of bird's-eye view of the civic center as it was to be. It disclosed three essential features of the plan. These were, first, the location of the new city hall; second, the parked area in front of this proposed structure embraced within Polk, McAllister, Larkin, and Grove streets; third, a broad avenue or esplanade extending easterly from a point upon Larkin street about midway between McAllister and Grove streets, and parallel with these, intercepting Market street at Leavenworth street and intended to constitute the main entrance into the civic center proper and to furnish the vista of its chief architectural feature, the city hall. This avenue, being projected along the more limited lines of what would have been originally Fulton street, had the same extended beyond Larkin street, was indicated upon said plat or sketch as an extension thereof, and was designated thereon by the name of "Fulton Street." There was in this sketch a good deal that was fanciful, such, for example, as the location of certain other public buildings and suggested ornamentations which have not been followed in the later development of the area, but have remained substantially unchanged. Following the adoption of the architects' report, the board of supervisors, on April 1, 1912, adopted a resolution directing the city attorney to institute a large number of condemnation suits against the owners of such private properties as were required to be taken in order to carry into effect the civic center plan. These suits were presently begun, but with one exception were never prosecuted to judgment, for reasons which will presently appear. On March 13, 1913, the board of supervisors adopted a resolution having relation to the closing and abandonment of such portions of the former public street known as "City Hall avenue," which resolution by its terms provided for the extension of Fulton street, from its former terminus at Larkin street to Market street at its junction with Leavenworth street, and its descriptions as to the portions of City Hall avenue to be abandoned contemplated only the closure of such portions thereof as would lie outside of the lines of the proposed extension of Fulton street. In order to carry into execution the foregoing resolution, a number of official plats or maps were prepared by the city engineer's office showing the properties to be condemned, the portions of City Hall avenue to be abandoned, and also showing the portions thereof which would be embraced within the extension lines of said proposed extension of Fulton street to Market street. A number of these maps or plats were either presented or offered in evidence by plaintiff in his main case. In each and all of these the outline of the so-called Fulton street is depicted, showing it to be of the width of 160 feet, and of the extent above indicated. One of the most significant of these maps or plats was that prepared in November, 1913, in pursuance of a resolution of the board of supervisors and duly recorded as an official map of said municipality and upon which Fulton street is delineated as of a width of 160 feet, extending from the parked area on Larkin street to its intersection with the junction of Market and Leavenworth streets. There were also prepared by the city engineer's office several particular plats intended to show those portions of the properties of private owners formerly abutting upon City Hall avenue which were to be condemned, or, in the event of an arrangement to that effect, exchanged for parts of such avenue which were to be abandoned in order that the portions of properties of said private owners which remained to them might have a frontage upon Fulton street. These all show said street as of the width and extent above designated. At the inception of the trial of this cause, the plaintiff produced a map or plat which purported to show with precise detail the situation eastwardly from Larkin street to be effectuated by the condemnation proceedings and by the closure of City Hall avenue with the properties of each private owner designated in the relation of each to said abandoned avenue and to the new or extended Fulton street, which is delineated thereon as of the full width of 160 feet extending to Market street. This map or plat was admitted in evidence without objection, and was used throughout the trial as concededly a correct delineation of the matters set forth upon the face thereof. The condemnation suits and the proceedings for the closure of Fulton street dragged their combined courses through several years, due to a very commendable effort on the part of the public officials and the private property owners to come together upon a basis of agreement which would avoid the necessity of a prolonged and compulsory legal procedure applicable to each individual case. The result was a series of compromises between the municipality and the affected owners of these private properties, which finally took form in a succession of resolutions adopted by the board of supervisors authorizing the execution or acceptance of deeds on the part of each of these owners of such affected private holdings within the civic center area as were to be acquired for public structures or as were to abut upon "Fulton Street." In certain of these resolutions, and of the deeds which passed pursuant to their direction, the properties specifically designated in each as to come within public ownership were stated as being acquired for "Civic Center purposes." It is ingeniously argued by the respondents herein that these words convey the meaning that such properties were to be, in common with the parked areas of the civic center plan, under the exclusive control of the board of park commissioners, and not of either the board of supervisors or the board of public works. There is, however, no merit in this contention, since, as we have already seen, those portions of the civic center area which constitute public streets are, by the terms of the charter provisions above referred to, under the control exclusively of the board of supervisors, acting through its executive arm, the board of public works. In several of these resolutions and conveyances, however, and, of greater significance, in certain of those directly transferring to the municipality property which would come within the projected lines of Fulton street, the properties thus to be acquired are expressly stated as being so acquired "for street purposes." In the course of these negotiations, lasting through a series of years, the property rights of the municipality and of the owners of private property within the affected area were at length so far adjusted as to permit the opening of Fulton street to the full width of 160 feet between Larkin and Hyde streets; and accordingly we find the board of supervisors, by formal resolution adopted on October 17, 1919, declaring Fulton street, between Larkin and Hyde streets, "to the width of 160 feet to be a public street to be known as Fulton street." Following the official action thus taken, negotiations with those property owners whose holdings lay to the eastward of Hyde street proceeded to the point of individual settlements of the same sort as those accomplished to the westward of Hyde street, and, in a number of these transactions consummated by formal resolutions and the passage of deeds, the object to be attained was declared to be that of the "opening of Fulton and Leavenworth streets into Market street." In the year 1925, these negotiations had been practically completed.

and Fulton street was thrown open to public use, and since that time down to the present it has been, to all apparent intents and purposes, and for all the usual uses thereof, an open public street. In order to such uses the usual incidents of public streets, such as street lights, sewers, paving, sidewalks, and street signs were installed. By the latter of these, the new avenue at each intersection and at its point of junction with Market street was designated as "Fulton Street." These various details were carried into effect by or under the direction of the board of public works without express direction from the board of supervisors, but with its apparent sanction, since the cost thereof in each instance was paid out of funds provided by said board. In the year 1925, the city engineer caused to be prepared and filed what purports to be an official map of the area within and adjacent to the civic center, upon which Fulton street to the full width and length thereof is depicted under that name as a public street. In that same year the board of supervisors by formal resolution or ordinance ordered "the improvement of intersection of Fulton street, Leavenworth street and Market street," and authorized and directed the board of public works to enter into a contract for such improvement. In conformity with such direction, the board of public works by formal resolution entered into contracts with one Clarence B. Eaton for the making and completion of this proposed improvement, and the work having been completed in conformity therewith, the cost of the same was ordered paid by the board of supervisors. At an even earlier date, the board of public works had undertaken to lay a sidewalk along the southerly side of Fulton street, between Hyde and Market streets, adjacent to the property lines of the private owners whose properties, including that of the plaintiff herein, abutted upon that portion of the newly opened avenue; and, while it does not appear that the board of supervisors by precedent formal action authorized the laying of said sidewalk, it does appear that, when the same was laid, the cost thereof was paid out of public funds provided by said board.

In the year 1924, the plaintiff herein had purchased from the heirs or successors of the estate of Forbes the property described in his complaint herein as lying at the southerly junction of Market and Fulton streets and extending for a distance of 116.297 feet along the southerly line of the latter street. Prior to his purchase of said property, official permits had been granted by the board of supervisors to the former owners thereof for the erection of the buildings upon said property to abut, as to the rear thereof, upon Fulton street, and such structures had, pursuant thereto, been erected having certain designated entrances and exits to and from Fulton street. These were used by plaintiff for convenient access to and egress from his said buildings upon Fulton street for the several years, without objection up to the date of the adoption by the board of supervisors of the resolution of December, 1927, directing the board of public works to proceed with the erection of some sort of structure along the southerly line of Fulton street immediately adjacent to plaintiff's said property line, and which, if constructed, would prevent his further use of Fulton street as a means of ingress to and egress from his said property.

[3] Upon the trial of the cause, however, it was conceded by counsel for the respondents that said resolution was a mere gesture intended to provoke the present action, and that all that was really intended by the respondents was the assertion or preservation of a claim of right upon the part of the municipality to construct at some future time some form of ornamentation of the entrance into said avenue, thus far designated as Fulton street, as would conform with certain suggestions made originally by the board of architects looking to the beautification of the entrance to said avenue. We are unable to find, however, from the evidence educed herein, that this suggested ornamentation has ever assumed such definite form or substance as would constitute an actual interference with the rights of property ownerships at the junction of Market and Fulton streets as would amount to a limitation upon the completed dedication of the area occupied by said avenue for the general uses of a public street. We do not hold, however, that in conformity with such uses the municipality may not provide for such ornamentation of this broad avenue, as for example by way of fountains, parked areas, or even ornamental entrances as will tend to its beautification and to that of the civic center, of which it forms a very essential feature, without materially interfering with, but rather ministering to, its uses as a broad and beautiful avenue or esplanade. The offending resolution of the board of supervisors which provoked the present action went obviously much further than any such innocuous intention, and amounted to a material interference with the rights of this plaintiff and other abutting property owners to the use of said avenue, provided it had become by dedication, as to all of its width and length, a public street. We have no hesitation in holding from the evidence embraced in the record herein, only a portion of which we have herein undertaken to review, that the city and county of San Francisco by the official resolutions of its board of supervisors and by the consistent course of action and conduct on the part of its duly authorized officials, acting in conformity and

consistency therewith, has accomplished the dedication of Fulton street eastwardly from Larkin to Market street as a public street.

[4] We are satisfied that the evidence which the trial court admitted without objection was sufficient to show such intended dedication, and that the evidence which the trial court erroneously excluded was but cumulative in proof of the fact of such dedication. This being so, there is no necessity of returning this cause for the purpose of a new trial, or for any other purpose than that of a direction to the trial court to make and enter its conclusions of law in conformity with the established and practically undisputed facts of this case, and, having done so, to make and enter its judgment in the plaintiff's favor in conformity with the views expressed in the foregoing opinion.

The present judgment, with such direction, is reversed.

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213 Cal. 175

BERNHARD v. WARING et al.

S. F. 13444.

Supreme Court of California.

July 23, 1931.

1. Judgment ⚷461(5).

Although many of allegations attacking all persons judgment on ground of extrinsic fraud were made upon information and belief, facts and circumstances as pleaded *held* to give rise to inferences sufficient to support attack (St. 1906 [Ex. Sess.] p. 78, as amended).

2. Judgment ⚷443(1).

Fraudulent omission to post copy of summons in all persons action on premises would constitute "extrinsic fraud" (St. 1906 [Ex. Sess.] p. 78, as amended).

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud," see Words and Phrases.]

3. Judgment ⚷443(1).

Successor in interest of claimant to property could contest all persons judgment fraudulently procured while predecessor held title.

4. Judgment ⚷443(1).

Payment of taxes for single year *held* not sufficient notice of procurement of all persons judgment accomplished by fraudulent practices, where adverse claimant paid taxes for other years (St. 1906 [Ex. Sess.] p. 78, as amended).

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Oscar Bernhard against Charles A. Waring and others, in which Annie S. McGinerty filed a cross-complaint. From the judgment, plaintiff appeals.

Affirmed.

H. M. Anthony, of San Francisco, for appellant.

Raymond D. Williamson, of San Francisco, for respondent.

SEAWELL, J.

Appeal from a decree quieting title of respondent, Annie S. McGinerty, cross-complainant in an action brought by appellant to quiet his title to lot No. 3, block 11, as per map of the property of City Land Association, filed for record August 24, 1870, in books C and D of maps, page 11, in the office of the recorder of the city and county of San Francisco. The situs of said lot is in the locality of the Ingleside race track and it has, together with its companion, lot 4, a frontage on Garfield street. Said lots are each 25x100 feet and were held and regarded as one piece or parcel until the present controversy arose as to the ownership of lot No. 3. Said lots were, on August 20, 1870, conveyed by a grant, bargain, and sale deed, according to the map of said City Land Association, by F. L. A. Pioche and L. L. Robinson to George T. Schulz, father of respondent, Annie S. McGinerty, and George F. Schulz. On April 4, 1899, George T. Schulz conveyed said lots by gift deed to his wife, Margaret Schulz. On February 28, 1906, Margaret Schulz conveyed said lots to her son, George F. Schulz. On October 14, 1913, George F. Schulz, by a grant, bargain, and sale deed, conveyed said lots to his sister, Annie S. McGinerty, respondent herein. Said George T. Schulz died within a period of five months thereafter.

Appellant asserts ownership of title by virtue of a judgment procured by George R. Woods v. All Persons, and entered in the superior court of the city and county of San Francisco, August 20, 1913, as provided by "an act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." Chapter 59, p. 78, Stats. 1906 (Ex. Sess.), and Stats. amendatory thereof.

In the presentation of his case appellant offered in evidence the judgment roll and papers in the case of Woods v. All Persons etc., and also a deed from George R. Woods to E. R. Zion, dated August 25, 1914, and a deed from E. R. Zion and Clarice D. Zion to Oscar Bernhard, appellant herein, dated October 16, 1924.

By her second amended answer respondent denied appellant's asserted claim to title and pleaded her deraignment of title as above set out. She further alleges that the basis of the claim of appellant has its only foundation in the fact that said lot No. 3 was erroneously and falsely included in the inventory of the estate of one McCann and was listed in said estate as of no value and was distributed as the property of said estate to Rose J. Shevlin and Catherine McCann, presumably heirs of said decedent McCann, and that on December 27, 1912, said Rose J. Shevlin and Catherine McCann deeded said lot to George R. Woods—appellant's source of title—and that said Woods, well knowing that he had received no title or interest in or to said lot by said deed, nevertheless instituted, four days thereafter, to wit, December 31, 1912, said all persons action; that with the purpose of making less likely the chance of George F. Schulz, who was named in said complaint as a known owner and claimant of an interest in said lot, discovering the design and purpose of said Woods to obtain without his knowledge said lot No. 3, he (Woods) included approximately fifty or more other lots, pieces, and parcels of land in said complaint and in the accompanying affidavit required by law. Said answer further alleges that said George F. Schulz was a person well known to said Woods as a resident of the city and county of San Francisco and could have been personally served in the city of his residence, but said Woods purposely and deliberately failed, omitted, and refused to serve said George F. Schulz with summons, complaint, or affidavit, and said Schulz had no knowledge of the pendency of said action or of Woods' claim of title to said property; that the residence of said George F. Schulz was correctly listed in the city directory of said city of San Francisco in said year 1912, and that he and his father's family had been the owners of and in actual possession of said lot since 1870 continuously to the day of suit, and that he was well known to the neighboring landowners as the owner of said lot, and that his presence could have been easily ascertained by reasonable inquiry; that the plaintiff in said all persons action did not post or cause to be posted a copy of the summons on said premises or lot No. 3, and that neither said George F. Schulz nor respondent herein had any knowledge of the asserted claim of appellant or his predecessors to any interest in said lot until the instant suit was brought and summons served therein.

It is further averred that respondent and her predecessors in interest have paid all taxes and assessments laid upon said lot No. 3, and that appellant has never offered to refund any of the moneys so paid on account of taxes and assessments; that respondent's predecessor erected a building on said lot and actually resided thereon for several years without objection on the part of appellant, his predecessor in interest, or any one whomsoever.

Appellant demurred to the second amended cross-complaint on the ground that it did not state facts sufficient to constitute a defense to his said action, and on the further ground that said second amended answer and cross-complaint were barred by the provisions of section 338, subdivision 4, Code of Civil Procedure.

The complaint in the instant case was not filed by appellant until December 1, 1924, more than eleven years after the entry of the all persons decree, and summons did not issue thereon presumably until some time thereafter, as the record shows that the respondent filed her answer August 31, 1925. Appellant's chief point for reversal is that respondent did not raise the issue of fraud in the procurement of the judgment in said all persons action until approximately twelve years after said decree was signed, as shown by her cross-complaint herein. A further ground of objection is that the allegations of fraud are predicated upon information and belief, the rule being that it is not sufficient to allege fraud or its elements upon information and belief unless the facts upon which the belief is founded are stated in the pleading. Another ground of objection urged by appellant is that the title to said lot No. 3 stood in the name of George F. Schulz, respondent's grantor, at the time said all persons decree was signed and the conveyance to respondent was not made until approximately two months thereafter, and therefore, she not being a party to the suit in which said decree was granted, none of her rights were affected thereby.

[1] At the time said lots were deeded to George F. Schulz by his mother, to wit, February 28, 1906, they were unfenced and unimproved. In fact, the district in which they were situate was an outlying, unimproved portion of the city of San Francisco. Following the fire of 1906, said Schulz built a small board house or "shack," as it was called, 22x24 feet on lot 4, and dug a well on lot 3, and inclosed the whole area with a cheaply constructed fence. He actually resided on said lots for a period of several years, the year of his removal being somewhat uncertain, but it was not earlier than 1908. The fence having become dilapidated, he latterly caused it to be removed. Said small house or shack constructed by George F. Schulz was sold by respondent in 1918 to a neighboring landowner and subsequently removed by the purchaser from said premises. The judgment is attacked on the ground of extrinsic fraud, and, while many of the allegations are made upon information and belief, the facts and circumstances as pleaded give rise to inferences which are sufficient to support a plead-

ing sounding in fraud. Respondent's immediate predecessor in interest, a brother, lived only about five months after the decree was signed, and of course his testimony was not available in an action involving his ownership of said lots brought by an adversary claimant ten years after the passing of two important events, to wit, the execution of respondent's deed by George F. Schulz and his death. Moreover, the ownership of the lots in controversy originated in the father of claimant some forty-three years before the title to one of said lots was questioned by the all persons proceeding, while the title to the companion lot was not challenged at all. It is not explained in the case why lot No. 4 was not also included in said action, as both are held by the same tenure.

[2] As a matter of family history, said lots, beginning with the ancestor, have passed from father to mother, and thence to son, and finally to daughter, as if in obedience to the law of succession, and remained, so far as proprietorship was exercised by any one, under the control of the successive members of the ancestor's family through a period of more than fifty years. The evidence addressed to the issue of fraud could only come from the living member of the family in support of and in amplification of such facts as were known to her and third parties, which were corroborated by independent facts and circumstances sufficiently persuasive to sustain the decree rendered in her favor. But aside from anything here said as to the allegations and proof based on information and belief, the case being one of extrinsic fraud is proved by documentary record evidence. No claim is made that George F. Schulz was personally served with process of any kind. Respondent in attacking the all persons judgment offered evidence tending to show that no copy of the summons was posted on the premises. Said record did not contain an affidavit that summons had been posted as required by law, whereupon appellant applied to the court for relief and the court ordered that the affidavit of posting of Herbert S. Marron, dated the 23d day of June, 1926, be filed nunc pro tunc as of the date February 20, 1913. Respondent produced several persons who resided upon nearby lots, one of whom took more than a casual interest in the Schulz lots, all of whom testified that at no time during the period covered by the affidavit did they or any of them observe a notice, copy of summons, or paper of any kind posted upon the Schulz lots. Their opportunity for observation and the likelihood of being attracted by such a notice, had any been posted, was sufficient to convince the trial court that none was posted. There is nothing so inherently improbable in their testimony in the light of the situation described by said witnesses as would justify a reviewing court in minimizing or discrediting their testimony. If the omission to post a copy of the summons was fraudulent, as alleged in the complaint and found by the trial court, such willful omission would constitute extrinsic fraud. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110, and cases therein cited.

[3] The other major ground upon which appellant rests his appeal is the doctrine that "no person will be permitted to proceed in equity against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights. If the parties to an adjudication are satisfied with it, no outside persons will be permitted to intermeddle with it, at law or equity. * * * So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void, as contrary to public policy, and as savoring of the character of maintenance." Whitney v. Kelley, 94 Cal. 146, 29 P. 624, 625, 15 L. R. A. 813, 28 Am. St. Rep. 106.

It cannot be presumed that a party who had no notice that a suit had been filed and a judgment obtained against him would be satisfied with such an iniquitous and inequitable proceeding. If the judgment was fraudulently obtained against George F. Schulz, his deed was valid and his successor in interest would be in a position to maintain her action. We deem it unnecessary to discuss assignments of interest which are designed merely to give the assignee a "bare" or "naked" right to file a bill in equity, but rather make reference to that class of assignments in which the "assignors 'have some substantial possession, and some capability of personal judgment, and not a mere naked right to overset a legal instrument or to maintain a suit.'" Emmons v. Barton, 109 Cal. 662, 42 P. 303, 304; Kemp v. Enemark, 194 Cal. 748, 230 P. 441.

[4] In the instant case the respondent produced tax receipts beginning with the year 1908 and continuing to the year of trial—1928—except for the year 1921. No claim is made that all taxes levied prior to 1908 were paid by any person other than respondent's predecessors in interest. Receipts were also introduced showing all payments accruing on account of a district improvement known as the Twin Peaks ridge tunnel assessment, beginning with the year 1914, and ending November 25, 1922, were paid by respondent, and also an assessment for the opening of Byxbee street. The taxes on lot No. 3 were paid in 1921 by E. R. Zion, Woods' successor, under the all persons judgment and appellant's grantor herein. Zion was present in court, but did not testify in the case. Respondent called at the tax collector's office to pay the taxes assessed against her lots for that year and was informed by the collector that the taxes on lot No. 3 had been paid by said Zion. Shen then paid the taxes on lot No.

4, and sought Zion, whom she found in the city hall. Zion refused to give her reasonable satisfaction in connection with the transaction and did not assert that he had paid the taxes on said sole lot. He did claim to be the owner. Respondent offered to reimburse him on account of said payment and was willing and able at all times thereafter to do so. It is evident that neither Zion nor Woods nor the appellant herein had unshaken faith in the righteousness of the all persons judgment, for none either thereafter or before had paid any taxes or discharged any assessments levied on said lot 3 or had done a single act indicative of a proprietor's right. It is clear that the respondent was somewhat perplexed as to Zion's attitude, as shown by her statement that she hardly understood him. The payment of taxes for the year 1921 was not sufficient alone to constitute notice as to the procurement of a judgment accomplished by fraudulent practices.

Upon the foregoing state of the record, it would be a harsh rule that would permit one voluntary payment of taxes, in the light of the history of the transaction as above narrated, to interrupt the peaceable enjoyment of said real property by the respondent. She has at no time abandoned her claim of ownership, which is supported by the equities of the case.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.

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115 Cal.App. 539

PEOPLE v. GOLTRA.

Cr. 46.

District Court of Appeal, Fourth District, California.

July 17, 1931.

1. Criminal law 🔑422(6).

In robbery prosecution, statements constituting virtual admission of guilt by participator in robbery, not made in defendant's presence, *held* inadmissible.

2. Criminal law 🔑412(3).

Statement of defendant, charged with robbery, that he had no gun at his own home, afterwards proven false, *held* admissible on behalf of prosecution.

3. Criminal law 🔑407(1).

Accusations in defendant's presence, denied by him, *held* inadmissible.

4. Criminal law 🔑304(2).

It is general knowledge that "rogues gallery" pictures in sheriff's office are taken of prisoners arrested for commission of crime.

5. Criminal law 🔑444.

Admitting "rogues gallery" picture of defendant, not identified at trial, though allegedly identified before trial but not in defendant's presence, *held* improper.

No witness appeared at trial identifying picture as being that of defendant, but there was testimony that third person, participating in robbery with which defendant was charged, had identified picture as that of defendant, and that defendant was told of such identification, but was not shown picture.

6. Criminal law 🔑369(1).

In robbery prosecution admitting testimony disclosing criminal proceeding pending against defendant but not connected with present proceeding *held* prejudicial error.

7. Criminal law 🔑419, 420(1).

Deputy sheriff's testimony that investigation disclosed that records of railroad failed to show that named person worked for railroad *held* inadmissible as hearsay.

Officer should not have been allowed to testify as to what railroad's officers, who were available as witnesses and whose records were open for inspection, told him, either in form of a direct statement, or that his investigation, based upon contents of records and conversations, showed that named person had not been employed by railroad where defendant claimed he was employed.

8. Criminal law 🔑1186(4).

Court being unable to determine whether defendant would have been convicted notwithstanding errors of trial court, constitutional provision against reversal for technical error could not support conviction (Const. art. 6, § 4½).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Evan Goltra was convicted of robbery in the first degree, and he appeals.

Reversed, and new trial ordered.

Thomas Wade Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John D. Richer, Dep. Atty. Gen., W. Earl Redwine, Dist. Atty. for Riverside County, of Riverside, and Harry Amstutz, Dep. Dist. Atty., of Los Angeles, for the State.

MARKS, J.

Appellant was convicted of the crime of robbery in the first degree. From the judgment pronounced upon him and from the order denying his motion for a new trial, he has prosecuted this appeal.

The information filed by the district attorney of Riverside county charged appellant with the crime of robbery accomplished by means of force or fear on the 29th day of December, 1930, and alleged a previous conviction of a felony. Appellant went to trial on his plea of guilty to the prior conviction, and of not guilty to the offense charged.

The evidence shows that Charles E. Ives was in charge of a one-man car of the Pacific Electric Company operating in the city of Riverside on December 29, 1930. Shortly before 8 o'clock on the evening in question, Ives reached the southern terminal of his run near Jurupa avenue in the city of Riverside. He alighted from his car and proceeded to change his trolley for the return trip. While doing this, he observed two men walking toward him. When he had reached the rear of the car and was attempting to place the trolley upon the wire, one of the men thrust something hard like a piece of iron into his back and told him to raise his hands and keep them up. This man went through his pockets and took a purse containing $7.45 from the rear pocket in his trousers, and three silver half-dollars from a side coat pocket. Ives did not see this man during the robbery. The other man, whom Ives identified at the trial as Carl Thompson, came up in front of him and attempted to get the money out of the changer which he carried on a belt around his waist. He was not able to open it, and abandoned the attempt. The two men told Ives to make connections with his trolley, get in his car, and run it back to the center of the city of Riverside rapidly without looking back. He promptly complied with this demand. After he had proceeded about 150 feet toward the business center of Riverside, he saw an automobile approaching from the rear. As it went by, Ives saw a man leaning out over the right door looking back toward the street car. After going about 100 or 150 feet ahead of the street car, the automobile was slowed down and traveled alongside for some distance. The man who had leaned from the automobile was identified by Ives as the appellant.

The city of Colton is distant from Riverside about seven or eight miles. Appellant Carl Thompson and an unidentified third person were seen in the restaurant in Colton a few minutes before 10 o'clock on the evening in question. They alighted from an automobile parked near the restaurant door, which they left with its engine running and its lights illuminated. Thompson and appellant registered under assumed names at a rooming house in Colton about 12 o'clock that same night.

Appellant was arrested in the city of Los Angeles on January 26, 1931. He was taken to the office of the sheriff of Los Angeles county, where several conversations took place. The foregoing evidence, together with the inferences drawn from these conversations furnish the evidence upon which the jury returned its verdict of guilty.

Appellant denied that he committed the crime or had any connection therewith. He testified that he spent the entire day and night of December 29, 1930, at his home in the city of Los Angeles with his wife, his three minor children, and for about three hours in the evening between 7 and 10 o'clock with two friends, a Mr. and Mrs. Miller, with whom he and his wife visited and played cards. Appellant's testimony in this regard was corroborated by Mrs. Goltra and by Mr. and Mrs. Miller.

Appellant presents twenty-five specifications of error upon which he relies for the reversal of the judgment and the order denying his motion for new trial. As many of these specifications relate to the same errors occurring in the testimony of various witnesses, it will be unnecessary to consider all of them.

[1] He first complains of the admission in evidence of a conversation between Carl Thompson and Ives which occurred at about five o'clock in the evening of January 24, 1931, during which appellant was not present. It appears in the record as follows:

"Q. Just state what you saw and what you did and the conversation. A. I went down to the jail.

"Q. All right. A. The city jail in Riverside, or the county jail, I guess it was.

"Q. The county jail? A. The county jail. And I walked in and saw the jailer, and asked him if they had brought—

"The Court: You can't relate any conversation. Just state what you did. A. I stepped up to the jailer and asked to see—

"Mr. Cochran: I object to what he asked him.

"Q. (By Mr. Amstutz, continuing) Just confine yourself, Mr. Ives, to what you did, and what you said, or what was said, in the presence of Mr. Thompson.

"Mr. Cochran: I object to that question as calling for hearsay; it is certainly not admissible unless the defendant Goltra was present.

"The Court: Overruled. Read the question. (Last question read by reporter as follows: 'Q. Just confine yourself, Mr. Ives, to what you did, and what you said, or what was said in the presence of Mr. Thompson.') A. I went into the lobby and sat down behind the door in a chair, and waited for officers Scott and Crane to bring the prisoner in. And I waited there for possibly a half hour or more, and I saw them then coming up the steps to the jail. They came in through the door, and Mr. Scott was on the right of Mr. Thompson and Mr. Crane was on the left. They saw me sitting there back of the door, and they turned Mr. Thompson around facing me, and Mr. Scott says—Officer Scott asked Mr. Thompson—

"Mr. Cochran: Just a moment, please. May I interrupt? Now it is very evident what is being called for here and what is to be related is inadmissible, and calling for the statements of another person made not in the presence of the defendant Goltra. I respectfully ask the court to refer to page 1 of my trial brief, which has set forth the cases right down to the present time, that any admission of any statements of an alleged codefendant made outside of the presence of the defendant on trial, are purely inadmissible and are hearsay.

"Mr. Amstutz: I think this goes to the identification.

"The Court: Overruled.

"Mr. Cochran: May it be restricted to the identification of this man Thompson?

"The Court: I can't tell. You may make a motion to strike. Read the question. (Last question read by reporter as follows: 'Q. Just confine yourself, Mr. Ives, to what you did, and what you said, or what was said in the presence of Mr. Thompson.') A. (Continuing): If he had ever seen this man before, pointing at me as I sat there in the county jail. Mr. Thompson, he spoke up and identified me. I sat there for a few minutes. I then asked him the question why he held me up, and he said 'Because they were broke.' I then asked him what part he took in the holdup."

The conclusion that this conversation was inadmissible in evidence against appellant is supported by the cases of People v. Gonzales, 136 Cal. 666, 69 P. 487, and People v. Matthew, 194 Cal. 273, 228 P. 424. While the admission of this testimony was error, its prejudice does not appear until it is considered in connection with the testimony of Deputy Sheriff Joseph B. Kelley, a portion of which is hereinafter quoted. It should be borne in mind that Thompson, in the foregoing conversation, virtually admitted that he was one of the men who participated in the robbery of Ives.

The next testimony to which we need to direct our attention is a portion of that of Joseph B. Kelley:

"Q. Now, when did you have a conversation with the defendant Goltra in connection with this case? A. He was immediately taken into the office of Capt. Stensland, of the Robbery Squad, Sheriff's office. At this time—

"Q. Who else was there, officer, anybody? A. Capt. Stensland, Deputy Sheriff Williams of Los Angeles, Deputy Sheriff Crane of Riverside, Officer Scott of Riverside, and Officer Smith of the Pacific Electric and Mr. Fish of the Pacific Electric. Goltra at this time asked me what it was all about; and I stated to him that he was wanted for robbery and suspicion of murder in Riverside. At this time he stated to me, he stated, 'You are all wet.' At this time—a little while later, maybe about three or four minutes later, Mr. Thompson was brought into the office of Capt. Stensland and was asked was this the man, and he stated, 'Yes, that is the man.'

"Q. Meaning who? A. Meaning Goltra. Goltra was the man seated at the end of the table nearest the hallway.

"Q. Anything further said to the defendant Goltra at this time about Mr. Thompson? A. Not at that time.

"Q. State what further conversation you had with the defendant Goltra? A. After Thompson left the room Goltra was asked whether he knew Thompson or not, and he said, 'No, I have never seen him; I don't know him.' And then, did Thompson ever see him? And he said, no, he had never saw him. We asked him if he had a gun at his house, and he said, 'No.' And I spoke up and I asked him positively, I said, 'Evan, are you positive you have not got no gun in the house?' He said, 'Mr. Kelley, I certainly am absolutely positive there is no gun in my house.' The men, or Inspector Scott of Riverside, and Deputy Sheriff Williams and Monteleon and Mr. McDermott and Officer Smith of the Pacific Electric, left to search Mr. Goltra's house. I was not there. In the meantime Attorney Cochran came into the office and requested to see defendant Goltra, and I brought him into the room, and Mr. Cochran asked him, he said, 'What is all this about?' And I stated to Mr. Cochran that he was wanted in Riverside for robbery and suspicion of murder; and he said it was a very serious proposition; that he knew no physical abuse would come to Mr. Goltra, and knew very well he was going to be thoroughly questioned. Mr. Cochran then stated to Mr. Goltra that he would see him the following day, and Mr. Cochran left. After Mr. Cochran left, I stated to Goltra, I said, 'You are in an awful jamb,' and I said, 'If you can give us any explanation,' I said 'I have got nothing against you, and if you can give us a proper explanation that this man Thompson is lying,' I said, 'I will go to the bat for you.' I asked him then, 'How do you explain, Mr. Goltra'—or 'Evan,' I called him,—'Evan, how can you explain that this man Thompson can pick your picture out of 18 men, and you claim you never saw him.' He said, 'I can't explain it.'

"Mr. Cochran: I am going to ask that that previous answer and question, or question and answer be stricken from the record.

"The Court: What is the purpose of the objection?

"Mr. Cochran: It is an accusatory statement, immediately and promptly denied by the defendant. His reaction to it was that of any innocent man.

"The Court: Overruled.

"Q. Have you those pictures, Officer? A. Yes, sir (producing pictures). I stated to him at that time that there was first, 12 pictures shown to him, and Thompson stated none of them were Goltra. I stated, then, that I personally brought in—I went to the record room and picked six more pictures, among which was the defendant Evan Goltra, Charles Goltra and Raymond Goltra, and three other pictures, and laid them on the table, face up, and warned Thompson not to look on the back, as the names was on the back of them. Thompson goes up, and I told Evan, immediately picked out the picture.

"Q. Have you the picture that he picked out? A. Yes, sir, I have (producing picture).

"Q. This is the photograph that was there? A. The identical photograph picked out by Mr. Thompson.

"Mr. Amstutz: We offer that photograph into evidence.

"Mr. Cochran: We object to that; no proper foundation laid, and no showing it was shown to the defendant Goltra at all. Nothing but a conversation about something which was alleged to have taken place between Thompson and the officer at another time, and would be calling for hearsay, and is inadmissible.

"The Court: Did you show that picture to Goltra, Officer? A. No.

"Q. But you did tell him— A. Yes, sir.

"Mr. Amstutz: And what did he say, when you told him?

"Mr. Cochran: I would like to have the court's ruling on the objection.

"The Court: It will be admitted as People's 3, State's Exhibit 3.

"Mr. Cochran: I don't know whether this particular fact is clear. I would like to restate, briefly, this fact; The picture was not shown to the defendant Goltra at all.

"The Court: I understand that.

"Mr. Cochran: Merely a conversation had with him, in which the officer stated, at another time and place, some one identified his picture. Now, this picture is offered in evidence as having been shown to someone else outside of the presence of the defendant Goltra.

"The Court: To prove his identification. Yes, I understand.

"Mr. Amstutz: As soon as the Court marks that, I would like to show it to the jury. (Picture shown to the jury)

"Q. Now, Officer Kelley, what else was said on that occasion,—anything? A. I asked Mr. Goltra if he could explain how it was that Thompson could tell us the exact street and corner where the street car turned, to get off —to go to his home, if he did not know him; and he said, no, he could not; could not make any explanation.

"Mr. Cochran: I will make the same motion with respect to that conversation, as previously made.

"The Court: Overruled.

"Q. On the following day what did you do, Officer? A. The following day I procured a court order from department 23; on the following day I took the defendant, Evan Goltra, into department 23, with Judge Doran presiding, and at this time Mr. Cochran was present, and he was surrendered on his bond there for his appearance in court. Judge Doran granted the motion to surrender him; and after this was heard, I procured a court order from Judge Doran to bring the defendant, Evan Goltra, to Riverside for arraignment on the robbery charge."

Officer Kelley further testified as follows:

"Q. On January 26, according to your testimony, I believe, you had a conversation with this defendant? A. I did.

"Q. And at that time was there anything further said concerning the identification of the gun which has been offered in this case, by Mr. Thompson or anyone else? A. Yes, sir. While the officers, or Inspector Scott, Deputy Sheriff Williams and the other officers were over to the house searching for this gun, and in my conversation with the defendant Goltra, I asked him about the gun, and he stated that there was no gun in his house. I told him, I said, 'This fellow Thompson says that the third man in the robbery gave you the gun and that you were supposed to forward the gun to him at Sacramento.' He said, 'No, that is not a fact.' I said, 'Thompson described the gun as an old gun.' He said, 'No, I haven't got no gun.' When the gun was brought back to the Sheriff's office, we showed it to Mr. Goltra. He said, then, 'That is the gun,' maintaining that that was the gun that he got from Gordon. We showed it to Thompson, then, and Thompson said—

"Mr. Cochran: Just a moment. I object to what Thompson said, not in the presence of the defendant Goltra.

"The Court: Was that in the presence of the defendant Goltra? A. No, sir.

"The Court: Sustained.

"Q. (By Mr. Amstutz, resuming): Thompson identified this gun, didn't he?

"Mr. Cochran: The same objection.

"Q. (By Mr. Amstutz, continuing): And the identification was later communicated to the defendant Goltra; is that true?

"Mr. Cochran: That is objected to for the same reason as previously stated,—that it is calling for hearsay and inadmissible evidence.

"The Court: Sustained. I will allow the witness to state what words he used, regarding what Thompson said about the gun when he was talking with Goltra.

"Mr. Amstutz: Very well.

"Q. (By Mr. Amstutz continuing): Have you finished your conversation with Goltra concerning the gun? A. After we went outside into the outer room where Goltra was, and we returned to the room where Goltra was—there is Capt. Stensland's office, and there is a main assembly room of the robbery detail. The night of the 26th, after the gun was brought back, the defendant Goltra was sitting in the captain's office at one end of the table. Thompson was sitting in the assembly room then. After we had shown the gun to Thompson, we returned to the captain's office, and told Goltra that Thompson had stated that that was the gun that the third man in the robbery had given to Goltra. He said no, that it was not; that he got it from Gordon, and that he had returned it to Gordon on the 18th.

"Mr. Cochran: I ask that that particular portion of the conversation be stricken out as accusatory in its nature, and denied by the defendant,—that portion where the witness stated to Goltra that Thompson had said to the witness that that was the gun that was used in the robbery, and that the defendant immediately denied it. I ask that that be stricken out, and the jury instructed to disregard it.

"The Court: Was that the same gun that you related a conversation concerning yesterday as having been found in Goltra's house? A. Yes, sir.

"The Court: Objection overruled.

"Q. That is the conversation, then, is it, concerning the gun on that occasion? A. Yes, sir.

. "Q. Did you have any further conversation at that, or at any time, concerning certain whereabouts of the defendant Goltra? A. In my conversation with Goltra I asked him—

"Mr. Cochran: I would like to have the foundation laid a little better for that conversation.

"The Court: All right.

"Q. (By Mr. Amstutz, continuing): Just give the time and place. A. That was on the evening of January 26th.

"Q. Whereabouts? A. A portion of this conversation was between Goltra and myself alone. Another portion of it was in the presence of Capt. Stensland, Mr. Fish, Mr. Smith, and Deputy Sheriff Crane, of Riverside; and occurred about between 7:30 and 8:30 p. m. The conversation was to the effect of how it was that Mr. Thompson could describe—

"Mr. Cochran: I ask that the witness state what was said, and not what the effect of the conversation was. That is a conclusion.

"The Court: Give the language, if you can. A. I will give the language as nearly as possible. I cannot give it word for word, Mr. Cochran.

"Mr. Cochran: All right. A. I said to Goltra, I said, 'Goltra, Thompson tells us that he knows you. He told us that you were on trial in the superior court, awaiting a probationary hearing for a forgery of a check, which was the proceeds of the Oxnard robbery.' I said, 'Besides that, he knows where you live; he can describe to us the corner that you get off to go to your home, the point where the cars turn, and the signal bell stop.' I said, 'If you don't know, never saw him, and he never saw you, how can he tell those things?' He said, 'I don't know.'

"Mr. Cochran: The same objection with respect to that I did a few minutes ago, that it is accusatory in its nature, and was immediately denied by the defendant, and is not admissible, and hearsay.

"Mr. Amstutz: It goes to the question of identity.

"The Court: Motion denied."

Testimony to the same effect elicited from several officers of Riverside and Los Angeles counties is contained in the record and was admitted over the strenuous and persistent objections of appellant. He made repeated motions to strike all of this testimony, which motions were denied by the trial court.

Other testimony of Officer Kelley was as follows:

"Q. In your testimony yesterday something was said about a conversation with the defendant Goltra concerning one Charles Gordon. Is that true? A. That is correct, yes, sir.

"Q. Will you state whether or not you have made any investigation concerning such an individual? A. I did.

"Q. State what investigation you made? A. At the time that Mr. Goltra stated that he had received a gun from Charles Gordon on January 16, and that he had returned it to Mr. Gordon on January 18th, the day before his probationary hearing in the Los Angeles courts, I asked him who Charlie Gordon was, and he told me that he was a brakeman working for the Southern Pacific railroad, working on the San Joaquin division. The day after that, January 28th or 29th, I took the matter up with Mr. Dolan, who is personal record clerk for Mr. T. H. Williams, assistant general manager of the Southern Pacific railroad, and he went over the records and stated—

"Mr. Cochran: I object to what he stated.

"The Court: Yes. A. My investigation disclosed that there was no one working on the Southern Pacific railroad under the name of 'Charles Gordon.'

"Q. No such individual? A. No, sir.

"Q. Had there ever been on the division? A. Not according to the records, no, sir."

Appellant's motion to strike out this testimony was denied at the close of the people's case.

[2] There are certain portions of the foregoing testimony, such as the statements of Goltra that he did not have a gun in his possession at his home, which were afterwards proven false and were admissible in evidence. There are other portions, however, that are inadmissible under any possible hypothesis or theory of the case and are highly prejudicial to appellant.

[3] It is to be observed that appellant flatly denied the foregoing statements that Thompson had identified him as one of the men participating in the robbery, and that the pistol which was found at his house had been given to him by a third person who participated in the robbery and had been used by appellant in committing the offense. The law governing such a situation is clearly stated in 8 California Jurisprudence, at page 101, as follows:

"It is provided in substance in the Code of Civil Procedure that evidence may be given of the act or declaration of another in the presence and within the observation of a defendant and of his conduct in relation thereto. While the contrary has been stated generally in a few cases, it is undoubtedly the California rule that statements of third persons are not admissible in evidence simply because they were made in the presence and hearing of the accused. It is only when there is something in the conduct of the accused in response thereto that it is material to the issue that they are admissible at all, and they are admissible then solely for the purpose of explaining his conduct. In other words, it is only the conduct of the accused that is evidence in such cases.

"If it is proved that the defendant made incriminating statements or admissions, or failed to deny an accusation under circumstances which may be construed as an admission of its truth, or that he failed to act as it might reasonably be expected that an innocent person would act, evidence of the statement is admissible in connection with evidence of his conduct as an admission or declaration made by him. But if the defendant promptly and fully deny the charge, there is no admission on his part to be introduced in evidence."

In People v. Lapara, 181 Cal. 66, 183 P. 545, 547, it was held as follows: "This testimony of the witness Gallagher was objected to, and followed by a motion to strike out upon the ground of its incompetency, irrelevancy, and immateriality, and upon the further ground that a denial by the defendant of the accusation of guilt rendered the accusation and the conversation which led to it inadmissible for any purpose. It was error to overrule the objection, and likewise error to deny the motion to strike out. 'It is only the guilty conduct or incriminating reply of a defendant in response to an accusation of crime or statements implicating him in its commission that constitute relevant and competent evidence' of that crime. 'Ordinarily, when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. [Citing cases.] But if he promptly and fully deny the charge, the accusatory statements, standing alone, are not in any sense competent evidence of the defendant's guilt (People v. Estrado, 49 Cal. 171; People v. Ah Yute, 54 Cal. 90), and should in such a contingency be excluded from the consideration of the jury. * * * As was said in the case of People v. Teshara, 134 Cal. 542, 66 P. 798, "the court and the district attorney seem to have lost sight of the fact that it is not the accusation but the conduct of the accused that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct."' People v. Ayhens, 16 Cal. App. 618, 117 P. 789. In the Teshara Case, this court declared that the district attorney should not have offered the statement, knowing, as he did, that the accused had not stood silent before the accusation, but had repelled it at the time it was made; and it may not be amiss to reiterate that, for the same reason, the district attorney in the present case should not have offered the accusatory statement complained of."

[4, 5] It appears from the record that the picture which Kelley testified was identified by Thompson as that of appellant was taken from the files in the office of the sheriff of Los Angeles county, which records are commonly known as the "rogues gallery." It is a matter of general knowledge that these pictures are taken of prisoners arrested for the commission of a crime. No witness appearing at the trial identified this picture as being that of appellant. There is also an irresistible inference to be drawn from the testimony that Thompson had identified this picture as that of one who participated in the robbery with him, he having admitted in his conversation with Ives at the county jail of Riverside county that he was one of those who committed the robbery. The question of the admission in evidence of a photograph in the case of People v. Thorp, 104 Cal. App. 379, 285 P. 916,

is somewhat similar to the one in the instant case. The judgment in the Thorp case was reversed because of the admission in evidence of a photograph taken from the files of a criminal identification bureau, without it having been identified as that of the defendant by any witness appearing at the trial. The officers producing the picture testified that it had been identified as the picture of Thorp by third persons who were not produced as witnesses.

[6] The testimony of Officer Kelley concerning the proceedings taken before department 23 of the superior court of Los Angeles county discloses that a criminal proceeding was pending against Goltra in that court in which no final judgment had been entered. It went further and showed that appellant was accused in that action of "a forgery of a check which was the proceeds of the Oxnard robbery." This case had not been brought to a conclusion, and, as no judgment had been pronounced, appellant had not been convicted of this felony. This evidence has no place in the record. Its effect on the jury cannot have been otherwise than highly prejudicial.

[7] Kelley's testimony concerning his investigation which disclosed that the records of the Southern Pacific Railroad Company failed to show that Charles Gordon ever worked for such company on the Bakersfield division was hearsay and should not have been admitted. The officers of the railway company were available as witnesses, and their records were open for inspection. Kelley should not have been allowed to testify as to what he was told by these officers either in the form of a direct statement or that his investigation, based upon the contents of the records and the conversations, showed that Gordon had not been employed on the Bakersfield division of the railroad.

[8] It remains for us to determine whether the conviction of appellant can be affirmed under the provisions of section 4½ of article 6 of the Constitution. It is true that in a multitude of cases where the evidence of the guilt of the defendant is clear and convincing the courts have sustained convictions where errors occurred in the record. With this constitutional provision in mind, we have examined the entire record and all the evidence to determine whether or not the errors occurring in the trial court resulted in a miscarriage of justice, and have reached a conclusion in accordance with the views expressed in the case of People v. Walker, 69 Cal. App. 475, 231 P. 572, 582, as follows: "We must say under this record that 'we are unable to determine whether appellant would or would not have been convicted but for the errors of the court. * * * Under such circumstances the provisions of section 4½ may not be availed of * * * to support the judgment of conviction.' People v. Irby, 67 Cal. App. 520, 227 P. 920."

It will not be necessary to consider any other errors occurring at the trial of which appellant complains. Many of them are similar to those which we have set forth. The one instruction given to the jury of which appellant complains does not contain a correct statement of the law. However, other instructions given cure the defect and do not render the instruction prejudicially erroneous. It should not be given upon another trial of the case.

The judgment and order denying appellant's motion for a new trial are reversed, and a new trial is ordered.

We concur: BARNARD, P. J.; GRIFFIN, Justice pro tem.

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116 Cal.App. 59

Ex parte QUITMAN.

Cr. 219.

District Court of Appeal, Fourth District, California.

Aug. 6, 1931.

1. Habeas corpus 🔑109.

Where petition for habeas corpus was not sworn to and no evidence produced at hearing, commitment by police judge, regular upon its face, *held* to justify sheriff in detaining prisoner.

2. Habeas corpus 🔑46.

That prior application for habeas corpus in superior court was denied when defendant was not in custody *held* not ground for not applying there, after being taken into custody, instead of applying to District Court of Appeal (Supreme and District Courts of Appeal Rule No. 26, § 1).

Application by Charles C. Quitman, on behalf of Luther Branham, for writ of habeas corpus directed to the Sheriff of San Diego County.

Writ discharged, and prisoner remanded to custody of sheriff.

Charles C. Quitman, of San Diego, in pro per.

Thomas Whelan, Dist. Atty., and B. L. Comparet, Deputy Dist. Atty., both of San Diego, and O. C. Ludwig, City Atty., of Chula Vista, for respondent.

PER CURIAM.

This application was made in behalf of Luther Branham. The petition alleges that he is unlawfully imprisoned and detained by the sheriff of San Diego county. It is further alleged that he was found guilty of violating section 367d of the Penal Code by the police judge of the city of Chula Vista and by him sentenced to pay a fine of $50, or, in lieu thereof, to be confined twenty days in the county jail of San Diego county. The petition then alleges a claimed irregularity in connection with the arrest of the defendant, a lack of jurisdiction in that court to try the case, and that the defendant was deprived of the full opportunity to present his defense. It is also alleged that a prior application to the superior court of San Diego county for a writ of habeas corpus was denied after a hearing, it being stated that at the time of that application the defendant was not in custody.

The return of the sheriff shows a commitment issued by the judge of the police court of the city of Chula Vista, regular upon its face, setting forth that the defendant, having waived a jury trial, was tried by the court; that he was found guilty, and that judgment was pronounced at the time fixed for sentence.

[1] The petition is not sworn to, and no evidence of any kind was produced at the hearing. The commitment justifies the officer in detaining the defendant, in the absence of any showing of facts rendering the same illegal.

[2] A further consideration is that no reason appears why this application should not have been made to the superior court (rule 26, sec. 1). Even if it be assumed, as alleged in the petition, that a prior application in the superior court was denied at a time when the defendant was not in custody, no reason appears why such a writ was not there applied for after he was taken into custody. For these reasons the application must be denied.

The writ is discharged, and the defendant is remanded to the custody of the sheriff of San Diego county.

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115 Cal.App. 612

BANK OF ITALY NAT. TRUST & SAV. ASS'N v. SPICER.

Civ. 302.

District Court of Appeal, Fourth District, California.

July 23, 1931.

1. Money received 🔑18(3).

In action to recover money paid for undelivered corporate stock, verdict that transaction was separate deal with defendant who organized corporation *held* supported.

2. Money received 🔑18(3).

In action to recover money paid for undelivered corporate stock, verdict that buyer was entirely without understanding justifying recovery without rescission *held* supported (Civ. Code, §§ 38, 39).

3. Election of remedies 🔑7(3).

That buyer of undelivered corporate stock filed claim in bankruptcy proceedings of investment company did not constitute election precluding suit against organizer of corporation to recover money paid, where buyer was entirely without understanding (Civ. Code, § 38).

This was so, as against the organizer's contention that the buyer's transactions were with the investment company which acted as syndicate manager, and that the filing of the claim against the company precluded suit against the organizer.

4. Pleading 🔑248(4).

Amended complaint that defendant agreed to purchase for buyer stock in accordance with original underwriting agreement *held* not to change cause of action where original complaint alleged that defendant agreed to purchase corporate stock for plaintiff.

5. Pleading 🔑248(4).

Amended complaint alleging buyer's entire lack of understanding *held* not to change cause of action, where original complaint alleged that buyer was incompetent to transact any business whatsoever.

6. Money received 🔑17(3).

In action to recover money paid for undelivered corporate stock, amended complaint *held* sufficient to raise issue of mental incapacity of buyer.

The amended complaint contained the allegations that the buyer was a man of advanced years, feeble in mind and body, and, by reason of loss of memory, failing mental powers, and senile dementia, was wholly incompetent to transact any business whatsoever, and was incapable of caring for his property or understanding the nature and effect of his acts, and was entirely without understanding.

7. Pleading 🔑369(1).

Where three causes of action all had reference to same transaction and sought recovery of identical sum, motion to require plaintiff to elect between counts *held* properly denied.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the Bank of Italy National Trust & Savings Association, as guardian of Thomas J. McLemore, sometimes known as T. J. McLemore, against R. D. Spicer. After the death of Thomas J. McLemore, the action was continued by the Bank of Italy National Trust & Savings Association, as executor of the last will and testament of the deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

Ray M. Harris, of San Diego, for respondent.

BARNARD, P. J.

This is an action to recover money paid for certain stock in a corporation, which stock was never delivered. The general situation leading up to the controversy is as follows: Thomas J. McLemore, a business man of large experience and considerable success, came to California for his health in 1919, being then about 68 years old, and settled at Escondido about 35 miles from San Diego. Early in the spring of 1924, he met R. D. Spicer who was vice president of and manager of the San Diego office of Stephens & Co., a firm dealing in investment securities. He developed a very considerable confidence in Mr. Spicer, and made a number of investments through him. In June, 1925, Spicer organized the San Diego Ice & Cold Storage Company, of which he became president. On June 24, 1925, Spicer, McLemore, and a number of others, signed an agreement providing that a corporation should be organized to take over an existing ice business, that Stephens & Co. should receive a certain proportion of the stock for their services in organizing the corporation and acting as "syndicate manager," and that the signers should pay $105 for each unit of five shares of class A and one share of class B stock, the said stock to be paid for within fifteen days after August 14, 1925, upon demand therefor by Stephens & Co. McLemore signed for 500 shares of class A stock and 100 shares of class B stock, agreeing to pay therefor $10,500, and on November 10, 1925, gave his check to Spicer for that amount. Spicer cashed this check and gave to McLemore a receipt acknowledging full payment for the stock. Of the parties signing this subscription agreement, ten received their stock in September, 1925, one in October, 1925, three in January, 1926, one in April, 1926, and one in March, 1927, some months after Stephens & Co. had gone into bankruptcy. McLemore and one other subscriber never received any stock. McLemore was adjudged incompetent in October, 1928, and this action was filed on November 9, 1928, by him through the Bank of Italy National Trust & Savings Association, as his guardian, and after his death continued by his executor.

The original complaint set up three causes of action, and, at the conclusion of the taking of evidence, an amended complaint was filed, with the permission of the court, which also set up three causes of action. In the amended complaint, in the first cause of action, it is alleged that on November 10, 1925, McLemore gave to Spicer his check for $10,500 under Spicer's agreement to obtain for McLemore, in accordance with a prior arrangement known as the "original underwriting agreement," 500 shares of class A stock in the San Diego Ice & Cold Storage Company; that Spicer cashed this check and never delivered or caused to be delivered the stock, nor returned the money; that up to the beginning of the year 1927, Spicer repeatedly assured McLemore that the stock had been obtained for him and would presently be issued to him; that about January, 1926, Spicer wrote McLemore that the stock would be issued and the dividends taken care of; that McLemore believed and relied upon these representations until January, 1927, when he first learned that Spicer had not obtained the stock for him and that it had not been issued in his name, and when for the first time Spicer refused to deliver the stock or return the money; that during all that period the San Diego Ice & Cold Storage Company was issuing its stock and would have issued the 500 shares to McLemore had Spicer paid to the company the $10,500 placed in his hands by McLemore; and that, in fact, Spicer converted the money to his own use. It is further alleged that during that time McLemore was a man of advanced years, feeble in mind and body, and, by reason of loss of memory, failing mental powers, and senile dementia, was, from about the first day of June, 1925, continually until the time of his death, wholly incompetent to transact any business whatsoever and incapable of caring for his property or understanding the nature or effect of his acts, and was entirely without understanding during that period, in the sense that he was incapable of understanding the nature, purpose, or effect of the transactions mentioned, and that during all of that time Spicer knew of such physical and mental condition of McLemore. The prayer is for $10,500 with interest at 7 per cent. from November 10, 1925, less $656.25 dividends on said stock, which it is alleged the defendant caused to be paid to McLemore, notwithstanding the stock had not been issued in his name. The second cause of action repeats most of the matters alleged in the first cause of action, and also alleges that when the $10,500 was paid and when Spicer promised to obtain the stock for McLemore in consideration of such payment, Spicer made such promise with no intention of performing it, but with the intention of cheating and defrauding McLemore, and that McLemore believed the promise and relied thereon to his damage in the same amount. In the third cause of action, the matters alleged in the first cause of action are repeated, and, in addition, it is alleged that Spicer pursued a course of friendly conduct for the purpose of gaining McLemore's confidence; that while McLemore was of an advanced age and Spicer was a man of about 40 years of age, Spicer made a practice of visiting McLemore in Escondido and holding long conversations with him; that on several occasions he invited McLemore to his home, took him out to lunch when he was in San Diego, gave him a visitor's card at a social club in San Diego, gave him expensive books, pretended especially to be his friend and to enjoy his society and company, and pretended a great interest in assisting him in the management of his business; and that such acts of intimacy commenced in 1924 and continued until 1927, when the actual nature of Spicer's acts was discovered. It is further alleged that these attentions on the part of Spicer were carried on in bad faith and with the fraudulent purpose of causing McLemore to intrust him with his business affairs and that, in fact, they had that effect. It is further alleged that on and prior to November 10, 1925, Spicer, with the fraudulent intent to deceive McLemore, represented to him that he would obtain for him on the advanced sale thereof and at a particularly attractive price, the said 500 shares of class A stock; that McLemore was induced thereby to pay Spicer the said $10,500 on said promise to obtain such stock for him; that on or about September 28, 1928, Spicer falsely represented to McLemore that he actually had the stock in his possession, and that on October 30, 1925, he falsely represented to McLemore that he was carrying the stock for McLemore; that these statements were made for the purpose of deceiving and did deceive McLemore; that in reliance on such statements McLemore paid the said Spicer the $10,500 to obtain the delivery of said stock; and that such statements were false, were known to have been false when made, and were willfully made in pursuance of a desire to deceive McLemore. It is further alleged that Spicer did not pay the sum of $10,500 to the San Diego Ice & Cold Storage Company for said stock, and that the various false representations were made both to deceive McLemore and to prevent his recovering from Spicer, either the stock or the money.

In his answer, Spicer admits the receipt of the money, but denies that he agreed to obtain the stock for McLemore. He sets up the subscription agreement of June, 1925, and alleges that McLemore agreed to pay to Stephens & Co. $10,500 within fifteen days after August 14, 1925; that he failed to pay the same within that time; that at his request that sum was advanced by Stephens & Co. and paid to the ice company; that at McLemore's request and to protect Stephens & Co. for such advance, Spicer executed his own note to Stephens & Co.; that thereafter, in pursuance to that arrangement, McLemore paid Spicer the $10,500 and Spicer's note to Stephens & Co. was paid in full. It is further alleged that 100 shares of class B stock were issued and delivered to McLemore, and that the 500 shares of class A stock were fully paid for to the ice company, issued by it, and held by Stephens & Co. as collateral to secure the advance by it of the purchase price of the same, all with McLemore's knowledge and consent. It is alleged that he never promised McLemore to sell the stock to him, to buy it for him, to procure it for him, or to cause it to be delivered to him; that he informed Stephens & Co. and the ice company of the interest of McLemore in the stock, and that the entire transaction was with Stephens & Co. and not with him; and that McLemore received 100 shares of class B stock and also certain interest, and three stock dividends paid by the ice company. It is further alleged that on December 29, 1926, Stephens & Co. was adjudicated a bankrupt, and that thereafter McLemore filed a claim in the bankruptcy proceeding to the effect that the money in question had been paid to Stephens & Co.; that his claim was allowed by the referee in bankruptcy; and that McLemore thereby elected to pursue his remedy against the bankrupt corporation and had no right thereafter to pursue it against Spicer individually. The answer also denied that McLemore was entirely without understanding, and denies all of the allegations as to fraudulent conduct.

The action was tried before a jury, and resulted in a verdict for the plaintiff. From the ensuing judgment, this appeal is taken. A large number of points are raised, and the case has been most ably presented by counsel on both sides. To comprehensively treat all of the points raised would make an opinion of undue length, but most of the contentions of appellant may be boiled down to two propositions, which are as follows: (1) That the plaintiff has sued the wrong party, that the appellant was merely a go-between, and that the entire transaction was with Stephens & Co. and not with the appellant personally. (2) That the evidence is not sufficient to show that McLemore was entirely without understanding as contemplated by section 38 of the Civil Code, but that, at the most, he was a person of unsound mind, and, under section 39 of the Civil Code, a recovery could not be had without a rescission and the restoration of what had been received. As appellant says in his brief: "Had the evidence shown the contract with R. D. Spicer as alleged in the pleadings, little difficulty would be encountered if the court was satisfied that McLemore was a person entirely without understanding." These two questions are largely decisive of this appeal, and, both being questions of fact, it will be necessary to further examine the evidence, as to whether it sustains the verdict of the jury.

[1] First taking up the question as to whether the transaction was entirely with Stephens & Co. It is fully apparent from the record that by June, 1925, Spicer had so won the confidence of McLemore that he took his advice on investments, exclusively. Spicer was then promoting the San Diego Ice & Cold Storage Company, of which he became the president. The underwriting agreement of June 24, 1925, did not purport to be an agreement with Stephens & Co., nor did that company sign it. It merely set forth that the parties thereto subscribed for stock in the ice company on terms stated, and that Stephens & Co. should act as syndicate manager and should receive certain stock in payment for their service. It also provided that the subscribers should pay for their stock in cash within fifteen days after August 14, 1925, "upon demand therefor by Stephens & Company." It appears that most of the subscribers received their stock in September, 1925. It appears that no stock was ever issued in the name of McLemore, but that 1,000 shares of class A stock were issued to Stephens & Co. on September 18, 1925, and 2,834 shares were issued to Spicer, although he had subscribed for but 1,500 shares. McLemore did not pay for his stock on August 29, 1925, as provided for in the subscription agreement. Spicer claims that Stephens & Co. advanced the money to pay for McLemore's stock, with others; that the stock was issued and held by Stephens & Co. as security, and that he himself gave to Stephens & Co. his note dated September 26, 1925, for $94,500, covering 4,500 shares of the stock, and that this note was later paid. However, it appears that a large portion of this stock, supposed to have been held by Stephens & Co. as security, was delivered to the various subscribers in September. While Spicer's note to Stephens & Co. was paid in full, there is no record of any payment of $10,500 on this note at any time. The first thing that appears in evidence, after the subscription agreement was signed, is Spicer's letter to McLemore dated September 28, 1925, in which he says he is sending him 100 shares of class B stock, and says: "I'm not using this stock on your note secured by class A stock so I think you better put it in your safety-deposit box." Not only would it appear that this class B stock could not have been issued unless the corresponding class A stock was also issued, in accordance with the subscription agreement, but it also would appear that the stock had been issued and was then being held by Spicer as security on a note given by McLemore. On October 29, 1925, McLemore wrote Spicer that he was sending him a check for $2,892.94 "in payment of my note and interest to date." He also mentioned collateral security on the note, and says Spicer can either send it to him or hand it to him the next time they meet. Spicer replied on October 30, 1925, acknowledging receipt of the money, returning the canceled note, and says:

"This transaction completed your payment on our note arrangement but it has nothing to do with our exchange of collateral. I am simply carrying for you 500 shares of Class A Ice stock with some of your San Diego Oil Products, that I had on a note with you, as collateral.

"As I told you the other day I am carrying the ice stock very comfortably and there is no rush about your taking it up at the end of six months. Probably sometime during the next three or four months you will want to sell some of the ice stock and at that time I will hand back your San Diego Oil Products and close up the transaction."

McLemore wrote Spicer on October 31, 1925, saying, in part, as follows: "I also note that you are carrying 500 Class 'A' Stock in San Diego Ice & Cold Storage Co. for me which I may conclude to sell in the next three or four months. In the meantime you are holding San Diego Oil Products Stock will be returned to me in case I do not sell the Ice Co. Stock."

On January 2, 1926, Spicer wrote McLemore as follows:

"I carried your stock, totaling $10,500, from September 1st to November 10th at 6% amounting to $122.50. You received from the company 7% interest on $12,500, or 500 shares of stock, being a total of $291.67. This $291.67 less the $122.50 makes a total due you of $169.17.

"In the future the stock will be issued and will be taken care of through dividends."

In the meantime, on November 10, 1925, McLemore gave Spicer a check for $10,500 payable to him personally. This was indorsed and cashed by Spicer, and the following receipt given: "Nov. 10, 1925. Received from T. J. McLemore 10500 payment dollars in full for 500 shares Class A stock San Diego Ice & Cold Storage original underwriting. $10,500 (Signed) R. D. Spicer."

It appears that no stock was ever issued to Stephens & Co., which is identified as the McLemore stock. After Stephens & Co. had gone into bankruptcy, McLemore's daughter told Spicer that they had nothing to show for the stock, and Spicer had one of the clerks in the office give her the following letter:

"Mr. T. J. McLemore, Escondido, California.

"Dear Sir: We have today received for your account 500 shares of San Diego Ice &

Cold Storage Company A common. (Signed) Stephens & Company by Clark, assistant secretary. Dated August 12, 1926."

That was handed to Miss McLemore by Spicer in February, 1927, Spicer saying: "I have had Mr. Clark write this memorandum for you in the form of a letter and dated it back to the time that the deal took place." If this was correct, it shows that Stephens & Co. did not receive the stock until nine months after McLemore had paid for it. However, the record shows that the only entry in the books of Stephens & Co. was under date of August 12, 1926, and shows that on the same day 500 shares of this class A stock was received from McLemore "as customer's security" and delivered to Spicer as customer's security. It is also significant that the final records of Stephens & Co., when they went into bankruptcy, show an entry on their books to the effect that there were "short" to Spicer 1,000 shares of this class A stock. While counsel argue that these last two items were intended to show that Stephens & Co. were short 500 shares to Spicer and 500 shares short to McLemore, the evidence does not bear out that conclusion. Spicer claimed to have carried the stock for McLemore until it was paid for. He personally collected interest during that period. He received the money personally, and gave a personal receipt for it. He claimed to be holding the stock as security for a note given by McLemore. Nothing whatever appears in the books of Stephens & Co. until nine months after the stock was paid for, and then it appears to have been delivered the same day to Spicer, and the final books show the company short to Spicer. We think that all of the evidence, with the reasonable inferences to be drawn therefrom, indicate a separate deal with Spicer, and that it cannot be held, as a matter of law, that the entire transaction was with Stephens & Co., and that Spicer acted only as a go-between in handing the McLemore money to Stephens & Co.

[2] The next question is whether the evidence is sufficient to show that McLemore was entirely without understanding. The record contains a great deal of evidence that McLemore had been failing physically and mentally for a number of years prior to this transaction, and unquestionably it appears that McLemore was, at least, a man of unsound mind. Considerable of this evidence is relied upon as showing that he was completely without understanding. His daughter, who tried to assist him in his business, testified to the things done by Spicer while gaining her father's confidence, and the various circumstances showing his growing mental weakness, and then testified that her father was insane on November 10, 1925, for several months prior thereto, and from that time continuously until his death. In giving her reasons for this opinion, she testified that he had changed entirely in regard to his consideration for and treatment of the family; that he looked blank and dull; that he had difficulty in carrying on a connected conversation; that he would say yes to anything anybody wanted him to do; that he could not remember stories while they were being read to him; that during 1925 he would laugh and cry without reason; that when he returned from a trip to Europe, where they took him with the hope of benefit, he could not tell anything about the trip; that she tried to find out about his business, but he was unable to explain things to her; that he would lose control of himself in church; that she could not trust him to go down town alone or to a bank alone, because he would drop important papers; that he could not balance himself and had to be helped in walking; that he went to Spicer's office whenever he went to San Diego; and that, after trying many other things, they called in a specialist in mental diseases in the fall of 1925. McLemore's wife testified to the same effect. Dr. Larzalere testified that he took care of McLemore from 1919 to 1925; that in 1923 and 1924 he was beginning to have senile dementia; that he was then more or less confused and his memory began to fail, and that all of these symptoms increased as time went along; that his condition was more pronounced before he went to Europe in 1924, and that after he returned his condition was worse; that he was unable to hold his urine; that the trouble was not with his bladder but was with the brain control; that in December, 1925, he advised the family to take him to a specialist in mental diseases; and that, in his opinion, McLemore was insane in the fall of 1925. As reasons for this opinion, he gave the following: That he was not able to concentrate or remember; that he could not control his bladder, the trouble being caused by degeneration of the brain; that his general appearance, gait, and facial expression indicated insanity; that he was unable to put on his clothes and couldn't think how to do it; that all of this grew worse in the fall of 1925, caused by a degeneration of the brain; and that he had senile dementia. McLemore's banker testified that his condition in 1924 was most lamentable as compared with his condition in 1919; that after he returned from Europe in the fall of 1924 his condition was much worse; that he saw McLemore frequently; that he kept getting worse during the year following his return from Europe; and that during the summer and fall of 1925 he was insane. As reasons for this opinion, he stated that he had a far-away look in his face; that he was not able to carry on an intelligent conversation; that when he started a sentence he could not complete it; that he could not express himself and would go to sleep while talking or while any one was talking to him; that while in earlier years he had frequently discussed

business matters with McLemore, in later years he did not do so because it was distressing to discuss such matters with him; that in the spring of 1924, he advised McLemore not to buy stock in Stephens & Co., and that McLemore replied, "Yes, but they guarantee me 7 per cent"; that he gave him many reasons why he should not buy the stock, but McLemore would only keep repeating the same statement; that he finally gave him up in despair because he was unable to make McLemore understand what he had been telling him (we may insert here that McLemore went ahead and invested $50,000 or $60,000 in stock in Stephens & Co.); and that on another occasion, in 1924, he talked with McLemore about an investment in the Occidental Security Company, a subsidiary company of Stephens & Co., and, in spite of what he told him, on that same day McLemore invested $42,000 in that stock. In addition, he stated he believed McLemore was insane because of his looks, general demeanor, deportment, and method of trying to converse; his inability to carry on an intelligent conversation; his inability to concentrate his mind on any thoughts; the fact that he would frequently start a conversation and be unable to complete it; that he would cry when there was nothing to cry about; and that he would pass his urine in public places and that this did not seem to embarrass him, although he had previously been a most fastidious man.

Dr. Ridley testified that he started to treat McLemore in December, 1926; that he was unable to carry on a conversation, had lost control of his bladder, and was unable to balance himself; and that he was insane from the time he first saw him until his death. As reasons for this opinion, he gave facts similar to those already narrated. H. F. Bloom testified that he had known McLemore since 1918, and that he had been a close friend; that he was insane on November 10, 1925, and from that time until his death; that his face and eyes were expressionless, and that he couldn't concentrate his thoughts or carry on a connected conversation; that he could not balance himself; that after he came back from Europe he was a stricken man; that in the fall of 1925 he appeared to have no opinion; that he would laugh and cry without reason; and that he could not carry on an intelligent conversation during the summer and fall of 1925. H. R. Greaves testified that he had known McLemore for more than fifty years and frequently saw him after 1922; that McLemore was insane from November 10, 1925, and continuously until his death; that the expression of his face was indicative of that condition; also his inability to carry on a connected conversation; that he would laugh and cry without reason; that he apparently had no interest in what was taking place around him; and that during all of the year 1925 he could not recall that he carried on an intelligent conversation on any subject. Dr. Little, a specialist in mental diseases, testified that he examined McLemore on December 1, 1925, and that he was insane at that time. He based his opinion upon the following physical neurological and mental findings from his examination: That owing to a physical condition his brain was not able to function normally; that there was a definite degeneration of the brain cells and of the nutritional carrying system to the brain. He was asked a hypothetical question embodying the evidence up to that time concerning the mental and physical condition of McLemore, and, in reply to said hypothetical question, gave his opinion that a man in that condition was insane. On cross-examination, he testified that McLemore was suffering from dementia of a type that is progressive and not curable; that the mental condition of McLemore had been progressing for many years prior to 1925, but that the change in the brain cells, as the result of the condition, had probably occurred a year or a year and a half before that time; that this dementia had been produced by degeneration in the brain; and that there had been a softening and breaking down of the actual cells in the brain. Two other doctors testified that McLemore was insane in 1926 when they examined him, giving their reasons for the opinion.

Appellant, while admitting that McLemore "had deteriorated considerably mentally," earnestly insists that he was conclusively shown to be not entirely without understanding by the fact that he served as a director of the San Diego Ice & Cold Storage Company and regularly attended directors' meetings, and more especially by certain letters written by McLemore on October 29, 1925, October 31, 1925, November 12, 1925, and May 1, 1926. In reference to the directors' meetings, there was evidence that McLemore appeared childishly flattered by being made a director; that when he attended meetings members of his family brought him to San Diego and Spicer took him by the arm and assisted him to the meetings; and that he took no part in the meetings while there. In reference to the letters, while they do not affirmatively show that he was not capable of understanding the transaction involved, they do show that he did not understand it. There is no evidence that he was not assisted in writing the letters, although he seems to have required assistance in almost everything. Dr. Little, the specialist in mental diseases, was shown these letters and asked whether, taking into consideration his own examination of McLemore on December 1, 1925, and assuming that the facts assumed in the hypothetical question previously asked him existed concerning Thomas J. McLemore, and also assuming that McLemore wrote these letters, whether or not these letters would cause him to change his answers as previously given in the case. To this he answered, "There would be nothing in the information furnished either by the letters or otherwise in the question that would give me any grounds to make a change in the opinion that is expressed at the original inquiry." In connection with the mental condition of McLemore, it is somewhat significant that, although Spicer continued to see him frequently between November 10, 1925, and January, 1927, McLemore never asked him for the stock. While there is some evidence tending to show McLemore was a person of unsound mind but not entirely without understanding, there is other evidence tending to show that he was entirely without the capacity to understand business transactions. After carefully reviewing all of the testimony, we are of the opinion that there is sufficient evidence to sustain the finding of the jury upon that question of fact. Jacks v. Estee, 139 Cal. 507, 73 P. 247.

[3] Appellant next claims that the plaintiff is estopped from prosecuting this action, the deceased having theretofore elected to pursue another remedy. This is based upon the fact that a claim was filed by McLemore in the bankruptcy proceedings of Stephens & Co., and allowed. This claim as filed, was for $28,733.75, and included 500 shares of this class A stock. Assuming that this would have been an election under ordinary circumstances, if McLemore was a person without understanding and without sufficient knowledge and understanding of the facts involved to make an election, none was in fact made, and the circumstances would not constitute an estoppel. A question of fact was here presented, which was submitted to the jury under appropriate instructions by the court. In this connection, McLemore's daughter testified that, in a conversation in Spicer's office after the bankruptcy proceedings were begun, Spicer said he was fixing up the claims for several of the creditors, and offered to prepare her father's claim if he wanted him to; that her father said nothing but yes; that he did not seem to be interested in the matter; and that he picked up a newspaper and looked at it while Spicer was talking. She further testified that the next time they came to the office, her father signed the claim, and Spicer said that a certain attorney was representing some of the creditors, and asked her father if he would like to have him file the claim for him, to which the father replied, "It will be all right." It appears that the claim was left there and Spicer attended to it; that her father did not attend any of the creditor's meetings; and that he took no further interest in the matter. In view of the other evidence as to the condition of McLemore at the time, it could well be held that Spicer was estopped from claiming any benefit from the filing of this claim.

[4, 5] A number of other points are raised which we feel it is unnecessary to discuss at any great length. It is urged that the court erred in permitting the plaintiff to file an amended complaint, as this entirely changed the cause of action. It is first claimed that an allegation in the first count of the original complaint, to the effect that the defendant agreed to purchase for and deliver to the plaintiff 500 shares of class A stock in this corporation, was so amended as to allege that the defendant agreed, in accordance with the terms of the original underwriting agreement, to obtain for McLemore 500 shares of class A stock, and that this constituted such a change in the cause of action as could not be justified as an amendment to conform with the proof. This goes to the first proposition discussed in this opinion, and is based upon appellant's theory that the entire transaction was with Stephens & Co. and that the money was paid to him only to reimburse him for what he had already paid out for the benefit of the respondent. As we have pointed out, we think the evidence shows a transaction with Spicer individually. The change was in the form of the allegation only, and not in the essential cause of action. It is also urged that the cause of action was entirely changed, in that the first cause of action alleged that McLemore was incompetent, but not that he was wholly without understanding, while the amendment alleged that he was entirely without understanding. In the original complaint, it was alleged that McLemore, during all of the times alleged, was incompetent to transact any business whatsoever. While this is more fully alleged in the amended complaint, and an entire lack of understanding is there alleged in express terms, no change in the cause of action appears. All three counts of both the original and the amended complaints apply to the same transaction, and apply for the same relief. In our opinion, no error is shown in permitting the amended complaint to be filed. Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am. St. Rep. 53; Lemon v. First National Bank of Pasadena, 191 Cal. 388, 216 P. 620; Sweet v. Hamilothoris, 84 Cal. App. 775, 258 P. 652.

[6] In a number of points it is contended that the complaint is not sufficient to raise the issue of mental incapacity upon the part of McLemore. Such mental incapacity is alleged in each cause of action in both the original and the amended complaints. The complaints are sufficient to show a cause of action for money had and received, based upon an agreement which is alleged to be void due to a lack of understanding on the part of one of the parties. The attacks made upon the complaint are in fact based upon the appellant's idea of what should have been the respondent's theory. In our opinion, both the pleadings and the evidence disclose a case where the defendant had received money, which in good conscience he ought not to be allowed to retain.

[7] It is next urged that the court erred in denying appellant's motion to require the plaintiff to elect between the three counts of the complaint. All three causes of action are for money had and received, and all have reference to the same transaction and seek recovery of the same identical sum. For this reason, the motion was properly denied. Tanforan v. Tanforan, 173 Cal. 270, 159 P. 709; Rand v. Columbian Realty Co., 13 Cal. App. 444, 110 P. 322; Goldwater v. Altman (Cal. App.) 285 P. 734.

Objection is made to the instructions given by the trial court on the ground that they are all argumentative, and many objections are raised to certain portions of individual instructions. Most of these objections are based upon the appellant's theory that it was conclusively established that the entire transaction was with Stephens & Co., and that McLemore was not a person entirely without understanding. The instructions are lengthy, and it would serve no useful purpose to set them out in full, which in itself would answer the objections made to portions thereof. We have carefully examined the instructions and, in our opinion, they exhaustively cover every point raised and submitted to the jury, and we find no error therein justifying a reversal.

The record and briefs in this case are quite voluminous, and it is impracticable in this opinion to thoroughly analyze and discuss each point raised. If we are correct in our view of the main propositions, first herein discussed, the action was fairly tried and correctly submitted to the jury.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

WEBBER et al. v. JOHNSTON. *

Civ. No. 4322.

District Court of Appeal, Third District, California.

July 23, 1931.

1. Appeal and error 🔑1171(6).

Reversal will not be ordered where appellant is not entitled to more than nominal damages.

2. Damages 🔑159(6).

In action for damages for breach of contract to purchase crushed rock, defendant's answer merely "denying each and every, all and singular," allegations contained in complaint, *held* insufficient to raise issue of damages.

> The plaintiff alleged that, had the defendant received and purchased the additional rock at contract price from plaintiff, plaintiff would have derived a profit therefrom in an amount not less than $11,843.10, and the answer that defendant denied "each any every, all and singular," allegations contained in complaint, did not constitute denial that plaintiff would not have made a profit in sum alleged if the defendant had not violated the terms of his contract.

3. Appeal and error 🔑192(1).

Questions of insufficiency of pleadings cannot be raised for first time on appeal.

4. Pleading 🔑350(1).

Motion for judgment on pleadings *held* sufficient to call court's attention to insufficiency of defendant's answer to raise issue of damages.

5. Appeal and error 🔑1178(8).

Court remanded case to permit defendant to amend answer, although plaintiff would have been entitled to judgment on pleadings if trial court had construed contract as interpreted on appeal.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

On petition for rehearing.

Petition denied.

For original opinion, see 300 P. 983.

H. A. Postlethwaite and Samuel W. Gardiner, both of San Francisco, and Daniel V. Marceau, of Stockton, for appellants.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for respondent.

PER CURIAM.

In the opinion, 300 P. 983, heretofore filed in this cause we stated that only one question really was presented for consideration, to wit, the quantity of crushed rock called for by the agreement entered into between the plaintiff and the defendant. In the opinion we stated, among other things, that the plaintiff was entitled to at least nominal damages. It should have read, "damages in a considerable sum," if the contract had been construed as we were constrained to hold.

[1, 2] It is true, as contended by respondent, that reversals will not be ordered where the appellant is not entitled to more than nominal damages. What we stated was based upon the allegations of the complaint and the admissions in the answer. Upon petition

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 5 P.2d 886.

for rehearing, the question of damages is again presented. In our opinion, we stated that the judgment could only be upheld on the theory that the respondent was not bound to take any particular quantity of crushed rock, and that the pleadings really did not present any other question, and that, if the contract was binding upon the defendant, the pleadings practically admitted damages in a considerable sum. This is shown by paragraph 9 of the first cause of action found in plaintiff's second amended complaint and the defendant's answer thereto. We quote both paragraphs in full, showing that, if the contract was a binding obligation, there is no sufficient denial, or, rather, no denial that the plaintiff was damaged in a considerable sum. Paragraph 9 of plaintiff's second amended complaint reads as follows: "That it would not have cost plaintiff to produce and deliver said remaining 14409.1 cubic yards of said crushed rock, according to his said contract and agreement with defendants, more than the sum of Ten Thousand Five Hundred ($10,500.00) dollars over and above the expenditures heretofore necessarily made in acquiring, establishing and erecting in place said rock crushing plant and in acquiring the right to quarry said rock; that by the terms of said contract defendants promised and agreed to pay for said rock the sum of Twenty-two Thousand Three Hundred thirty-four and 10/100 ($22,334.10) dollars and to pay the whole of said sum on or before the 20th day of June, 1929, being one month next succeeding the date of completion of said work and improvements; that had defendants received and purchased said additional 14409.1 cubic yards of rock at said contract price from plaintiff, plaintiff would have derived a profit therefrom in an amount not less than $11,843.10."

The respondent's answer to the above allegation found in the complaint is in these words: "Answering the allegations of paragraph 9 of the first cause of action, defendants deny each and every, all and singular, the allegations therein contained." It will thus be seen that there is no denial that the plaintiff was damaged in any sum less than the particular item mentioned of $11,843.10, nor is there any denial that he would not have made a profit in such sum if the respondent had not violated the terms of his contract. That such an answer does not raise an issue on the question of damages is amply sustained. In 21 California Jurisprudence, 154, the insufficiency of such a denial to raise an issue as to damages is thus stated: "A denial which is in the form of a negative pregnant, that is, a negative implying an affirmative, is insufficient. A denial that plaintiff suffered damage, or a denial of indebtedness, in the precise sum alleged, involves a negative pregnant and admits the damage or indebtedness, as the case may be, in any lesser amount. This is likewise true of a denial of the alleged value of property. An answer which admits the due execution and delivery of a note but denies that the alleged copy set forth in the complaint is a correct copy involves a negative pregnant in that it virtually admits the execution and delivery of a note for the amount for which the pleaded note calls. The following are likewise negatives pregnant: A denial of the doing of an act on the day alleged, of the existence and character of the particular consideration alleged, and that plaintiff duly kept and performed all the terms and conditions of a contract." Likewise, in 8 California Jurisprudence, p. 894, we find the following: "A denial that the plaintiff has suffered damages in the exact sum claimed by him, is insufficient to create an issue, and upon such a state of pleadings, no proof of damages is required." Again, as said in Huston v. T. & C. C. T. R. Co., 45 Cal. 550: "No proof of damages was required, as no issue is made upon that point. A denial that the plaintiff has suffered damage in the exact sum claimed by him is insufficient." In Johnson v. Vance, 86 Cal. 110, 24 P. 862, 863, a similar ruling was had, where it is said: "It is contended that the judgment for $1,500 cannot be sustained, because it was for unliquidated damages, and no proofs were taken as to the amount which should be allowed. But there was no issue as to the damages alleged to have been sustained by the plaintiff, and no proofs upon the subject were therefore required. It has been so held in this state from the earliest times." Hartman v. Williams, 4 Cal. 254; Patterson v. Ely, 19 Cal. 29; Dimick v. Campbell, 31 Cal. 239; Huston v. Twin & City Creek Turnpike Road Co., 45 Cal. 550. See, also, the recent case of Beetson v. Hollywood, etc., Club (Cal. App.) 293 P. 821, and the cases cited on page 824, to the effect that such a pleading does not tender an issue on the question of damages.

[3, 4] Respondent urges that questions as to the insufficiency of the pleadings cannot be raised for the first time upon appeal. This we conceive to be the law, but the record before us shows that the appellant brought this question to the attention of the trial court and moved for judgment on the pleadings. We quote from the minutes of the court, of September 20, 1930, in this cause, to wit: "This cause came on regularly for hearing this day, as per continuance, upon plaintiff's motion to correct the record, motion to vacate the judgment, and for judgment, notwithstanding the verdict upon the pleadings, and the motion for new trial." Likewise the record shows the following action of the trial court upon the plaintiff's motions (we quote from the minutes): "The motions filed in said cause, having been heretofore argued by counsel and submitted, the court this day denied said motions, to-wit: motion to correct record, motion for judgment notwithstanding the verdict, and the motion for a new trial."

[5] From what we have said it is evident that more than nominal damages are involved in this action, and while, had the trial court accepted the contract as we have found it to be, the plaintiff would have been entitled to judgment upon the pleadings, we think that the damages, if any, to which the plaintiff is entitled, can only be determined in accordance with the terms of the contract as we have construed the same to exist. For that purpose the respondent will be permitted, within such reasonable time as the trial court may allow, to amend his answer, if so advised, to tender said issue to the court.

Other questions have been presented and considered, such as defendant's technical objection that proof was not made that plaintiff was ready and willing to deliver additional crushed rock, but, as the defendant's answer is in the following words, to-wit: "Defendants admit that they refused to accept, receive or pay for any more crushed rock for plaintiff," it does not appear to us that any of such objections are of vital importance, and therefore need not be further mentioned herein.

The petition for rehearing is denied.

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115 Cal.App. 754

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7473.

District Court of Appeal, First District, Division 2, California.

Aug. 3, 1931.

Master and servant 🔑367.

Newsboy *held* not "employee," entitled to compensation, of newspaper publisher not having right to control time, place, or manner of his work.

Newsboy was permitted to sell the publisher's newspaper as a "side issue" to his work as newsboy for another newspaper publisher to whose exclusive and complete control he was subject, and for this purpose papers were delivered to him daily by the district manager, which he sold for 5 cents each, retaining 2 cents for profit and paying the district manager 3 cents for each paper sold or not returned. The newspaper publisher did not have the right at any time to control the time, place, or the manner in which the work was to be done, though it reserved the right to refuse to deliver more papers to him for sale if his services were not satisfactory.

[Ed. Note.—For other definitions of "Employee," see Words and Phrases.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by John Louis Du Grosse, employee, opposed by the San Francisco Chronicle and another, employers, and the Associated Indemnity Corporation and another, insurance carriers. To review an award of compensation by the Industrial Accident Commission, the named insurance company brings certiorari.

Award annulled in part.

Daniel W. Burbank, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

NOURSE, P. J.

The petitioner is the insurance carrier of the San Francisco Chronicle, a daily newspaper. The state compensation insurance fund is the insurance carrier of the San Francisco Examiner. John L. Du Grosse was employed by the Examiner to sell its newspapers on a designated street corner in the city and county of San Francisco. At the same time he was engaged in selling copies of the San Francisco Chronicle. While so employed he suffered an injury for which he was compensated by an award of the respondent commission which found both newspapers equally liable as his employers. The award against the carrier of the Examiner has become final and, under the terms of the compensation act, it would be entitled to contribution against petitioner on account of the award made against the Chronicle. The matter comes before us upon an original proceeding to review that portion of the award adverse to the insurance carrier of the Chronicle.

The facts are practically undisputed. The parties to this proceeding stipulated that John Du Grosse was an employee of the Examiner assigned to sell its papers at the Forest Hill station in the Twin Peaks tunnel, and that he was subject to the exclusive and complete control of the Examiner as to when, where, and by what manner and method his work was to be done. As a "side issue," Du Grosse was permitted to sell the Chronicle, and for this purpose papers were delivered to him daily by the district manager of that paper which he sold for 5 cents each, retained 2 cents for his profit, and paid to the district manager 3 cents for each Chronicle which was sold or not returned. The Chronicle did not have the right at any time to control the time, the place, or the manner in which the work was to be done, though it reserved the right to refuse to deliver more papers to him for sale if his services were not satisfactory.

Under this state of facts the case is controlled by New York Indemnity Co. et al. v. Industrial Accident Commission, 1 P.(2d) 12, 15, where, under a similar state of facts, the Supreme Court held that the relation between the newsboy and the newspaper publisher was not one of master and servant within the purview of the Workmen's Compensation Act, but was more nearly allied to the relation of a sales agent. In that case the Supreme Court, after referring to the reasoning of Hillen v. Industrial Acc. Commission, 199 Cal. 577, 250 P. 570, say: "We are constrained to hold that the limited amount of control which the publishers of these two newspapers undertook to exercise over the newsboys, who daily purchased from their district manager a specified number of copies of their daily issues for a specific sum, payable in cash or at the close of each day's sales, and who undertook the retailing of the same to such customers among the public at large as they were able to attract or procure at a specified place and price fixed by the publishers, would not as a matter of law be sufficient to constitute such newsboys the employees of the publishers of said newspapers so as to entitle them to receive compensation at the hands of the Industrial Accident Commission in the event of injuries received by them in the course of their activities in making or attempting to make individual sales of the copies of said newspapers." This language is applicable in every detail to the instant case.

The award in so far as it relates to the insurance carrier of the San Francisco Chronicle is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App. 769

ASSOCIATED INDEMNITY CORPORATION, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

Civ. 7488.

District Court of Appeal, First District,
Division 2, California.
Aug. 3, 1931.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries.

Daniel W. Burbank, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

NOURSE, P. J.

This is an original proceeding in certiorari to review an award of respondent in favor of Earl Joy and adverse to the respective insurance carriers of the San Francisco Examiner and the San Francisco Chronicle. The petitioner herein, as the insurance carrier of the Chronicle, attacks that portion of the award adverse to it.

In so far as this petition is concerned the facts are the same as those in Associated Indemnity Corp. v. Industrial Acc. Com. (Cal. App.) 2 P.(2d) 51.

For the reasons therein given the portion of the award relating to the petitioner is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App. 770

ASSOCIATED INDEMNITY CORPORATION, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

Civ. 7569.

District Court of Appeal, First District,
Division 2, California.
Aug. 3, 1931.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries.

Daniel W. Burbank, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

NOURSE, P. J.

This is an original proceeding in certiorari to review an award of respondent in favor of Frank Healy and adverse to the respective insurance carriers of the San Francisco Examiner and the San Francisco Chronicle. The nature of the proceeding and the material facts are the same as in case (Cal. App.) 2 P.(2d) 51.

For the reasons therein given the portion of the award relating to the petitioner, as the insurance carrier of the San Francisco Chronicle, is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

A. L. JAMESON & CO. v. REDFIELD.*

Civ. 6708.

District Court of Appeal, Second District,
Division 2, California.
July 24, 1931.

Rehearing Granted Aug. 21, 1931.

1. Frauds, statute of 🔑82.

Contract for sale of corporate stock of value in excess of $200 is within statute of frauds (Civ. Code, § 1624, subd. 4).

2. Frauds, statute of 🔑116(3, 4).

Broker, not having received written authority or delivery of stock, *held* without authority to bind customer in making "short sale" and buying other stock to cover up (Civ. Code, § 2309, and § 1624, subd. 4).

> Customer of broker orally directed employee of latter to make sale of certain corporate stock. Employee was not given any stock or any written order for the sale. Number of shares of stock were subsequently purchased by employee of broker without any written authority. Furthermore, there was no finding that transaction in question had been completed.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by A. L. Jameson & Co. against L. V. Redfield. Judgment for the plaintiff, and defendant appeals.

Reversed.

Culbert L. Olson, of Los Angeles, for appellant.

Moote & Longcroft, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff, a corporation, filed its complaint against defendant for a sum of money alleged to be due it as a stockbroker, stated in three separate counts upon the first of which the court made its finding in plaintiff's favor. From a judgment in favor of plaintiff, defendant has appealed.

The ledger sheets showing the alleged book account upon which the complaint is based were filed as an exhibit by plaintiff. They show a great number of transactions, running into a large sum of money. Excepting for a few minor items only three were questioned by defendant. One of these involved the "short" sale by plaintiff, acting as broker for defendant, of 100 shares of Rio Grande stock for $44.75 per share, and another was the purchase of 100 shares of the same stock, in the same capacity, to cover said "short" sale. The "short" sale of the stock mentioned is apparently the reason for quite a substantial part of defendant's loss as shown by the account. Defendant admitted an indebtedness of $3,565.80 outside of that, however, and alleged in his cross-complaint and answer that he tendered said sum to plaintiff and demanded a return of certain stock which he had deposited with the latter of the alleged value of $6,925.25, which tender was refused. He further alleged that plaintiff had converted said stock to its own use, and claimed the alleged value thereof as damages. The alleged unauthorized sale of said collateral was the third point of error in the account, as claimed by defendant. Appellant raises other points which we do not find it necessary to pass on here inasmuch as a good deal of the controversy between the parties grew out of the purchase and sale of the stock referred to.

Mr. Fastnow, an employee of plaintiff, testifying in regard to the sale in question, said that he was called off the floor of the exchange about noontime by defendant, who "asked me the price on Rio Grande, and I looked at the board and told him, and he says 'sell 100 shares'"; that defendant did not tell him at the time whether it was to be a margin or cash sale, but that he took out "a sale card and wrote down his order," went onto the floor of the exchange, and executed it. The witness also testified that defendant did not give him any stock to sell or any written sell order, and the order which was introduced in evidence does not show the signature of defendant. Defendant's testimony is in sharp conflict with that of the plaintiff as to whether any such thing happened, but that is a matter in which we are not interested on this appeal. An objection was made to the introduction of such evidence as well as a motion to strike on the ground that no stock was delivered and "no memorandum in writing" was proved, which objection was overruled and the motion denied. Appellant urges that the trial court must have been of the opinion that section 2309 of the Civil Code does not apply to a sale by a stockbroker coming within the amount prescribed by subdivision 4 of section 1624 of the same Code. Respondent admits that the sale in question was within the meaning of said section and subdivision, but urges that it does not apply here, as the transactions were completed. There is no finding by the court that the transactions were completed, and from the remark of the trial judge after the arguments were closed, viz., "as to the statute of frauds, I don't think this stock transaction comes within the statute, as set out," we are forced to the conclusion that the court was of the opinion that the statute did not apply.

[1, 2] Assuming that when the "short" sale of Rio Grande stock was made on August

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*Superseded by opinion 4 P.2d 817.

8th the stock was actually delivered by the broker to the seller, although appellant did not deliver any to the broker to sell, still we fail to see how that was a completed sale so far as appellant is concerned. The selling price of the stock, $4,452, was credited to appellant in his account; but we assume that such credit was not available to him until he first delivered 100 shares of Rio Grande stock to respondent or paid the amount so credited in some way. And as the amount is more than $200, we are of the opinion that under section 2309, Civil Code, its authority to make such sale not being in writing, respondent could not bind appellant by a mere bookkeeping entry to a sale that was not authorized by law, even if as between the broker and the purchaser the stock was actually delivered. It was not appellant's stock that was delivered. The section last cited provides: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." That a contract for the sale of shares of stock of a value in excess of $200 is within the statute of frauds there seems to be no question. Mayer v. Child, 47 Cal. 142; Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87. Under section 2309, therefore, the broker's authority to make such sale can only be given by an instrument in writing. The authority proved being only verbal, it did not authorize respondent to bind appellant in such sale, in our opinion. The same is true as to the alleged purchase of 100 shares of such stock on September 14. The memorandum of the advice of such purchase, sent by respondent to appellant, specified that such stock was bought on that day for $9,400, but the ledger sheet shows no charge against respondent of any such amount, although the item of stock is set out under that date. On the 19th of September, when the account was closed credit is given appellant for the sale of the stock deposited by him to secure his account, but no credit, that we can find, is given for any of the stock purchased on September 14, and good bookkeeping would seem to require some showing to that effect, if stock was actually bought and sold.

We see no difference in principle between an action to recover for stock furnished by a plaintiff in an unauthorized sale executed by him with a third person and an action by such third person on a contract for the purchase or sale of such stock against the defendant as an undisclosed principal, as was the case of Cooke v. Newmark Grain Co., 54 Cal. App. 283, 201 P. 615, where the court says: "The contract sued on in this case involved a consideration of more than $5,000. The defendant has not accepted or received any of the property alleged to have been sold to him, nor was any part of the purchase price paid. There is no evidence of any written authority given to the alleged agents to make the contract in question." And we may well say here, as was said there, that we may assume that the evidence would be sufficient to sustain a finding "if an oral authorization of the agency were legally sufficient for the purpose, although it may be noted that the fact of such oral authorization is warmly disputed by the defendant, which wholly disclaims that it authorized the contract in any manner whatever."

Inasmuch as in our opinion the evidence shows no written authority for respondent to make the sales questioned, and no payment of the purchase price or any part thereof or the delivery of any stock by defendant, the judgment is contrary to the evidence.

Judgment reversed.

We concur: **WORKS, P. J.; CRAIG, J.**

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115 Cal.App. 575

ARGUE v. MONTE REGIO CORPORATION et al.

Civ. 6825.

District Court of Appeal, Second District, Division 2, California.

July 22, 1931.

Rehearing Denied Aug. 21, 1931. Hearing Denied by Supreme Court Sept. 17, 1931.

1. Evidence 🔑158(23).

Oral evidence of persons having personal knowledge is best evidence of items of account not resulting from written contract.

2. Account, action on 🔑7.

Open account for legal services *held* against corporation, though charged to president as such, where corporation's name appeared in account and evidence showed resolution authorizing creation of bonded indebtedness, and that attorneys were employed to do preliminary legal work.

3. Corporations 🔑407(2).

Corporation's resolution, authorizing creation of bonded indebtedness, *held* impliedly to authorize president to employ counsel.

4. Account, action on 🔑7.

Admitting account as open book account, although principal item was entered months after services "lumped" together in item were rendered, *held* not error, absent objection.

Such entry, in absence of objection, would go to weight to be given to account as well as its credibility as evidence, rather than to plain fact of whether or not it was open book account, since it still remained book account, regardless of fact that entry was not made until some time after matter charged accrued, or regardless of fact that many matters had been lumped together in one item.

5. Appeal and error 🔑1064(1).

Book account being unquestioned, and only issue being whether services were performed for defendant or third party, instruction submitting question whether services were performed for and in behalf, and at request "or with consent" of defendant, *held* not prejudicial.

Account was introduced without objection and remained unquestioned by evidence to the end, except as to whom work was done for, was not questioned by requested instruction, and was challenged on appeal only by reason of manner of its compilation.

6. Appeal and error 🔑882(12).

Though instruction in action on account was more applicable to assumpsit, defendant could not complain; defendant's requested instruction being substantially similar.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by J. C. Argue against the Monte Regio Corporation and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

R. J. Welch, Jr., of San Jose, for appellant.

Faries & Williamson, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff, assignee of a copartnership, filed his complaint on August 14, 1928, stating two causes of action against defendant corporation and others, the first for an indebtedness of $1,000 on an open book account for legal services rendered by plaintiff's assignor, and the second an account stated for the same services and amount. The defendant Monte Regio Corporation filed its answer, and the case was tried against such defendant alone on the issues raised by said complaint and answer. The second cause of action was expressly abandoned by plaintiff during the course of the trial. The case was tried before a jury, which returned a verdict in favor of plaintiff for said sum of $1,000, and from the judgment entered thereon the answering defendant has appealed.

Appellant urges (1) that there is no evidence to establish an open book account, and (2) that the court erred in its instructions to the jury.

[1] The book account consisted of three items. Two items under the dates January 21 and May 8, 1926, aggregated $3.10, one representing the cost of a telegram and the other notary public fees. The third item, under date February 10, 1927, is for "services rendered in connection with proposal to create a bonded indebtedness, preparation of Articles of Incorporation Monterey Golf Club and numerous conferences in connection therewith," and opposite such explanation, on the debit side of the ledger, is the entry "$1000." The account was charged to "Romie C. Jacks, President of the Monte Regio Corporation, Monterey, California." The witness during the giving of whose testimony the account was introduced in evidence was one of plaintiff's assignors. He frankly stated that the last item was dictated by him on the date it bears. Prior to the introduction of said account plaintiff had examined the president of the defendant corporation under section 2055 of the Code of Civil Procedure, as well as another of plaintiff's assignors, relative to the services rendered for the corporation, as he had a right to do, "the oral evidence of persons having personal knowledge of the transactions" being "the best evidence of the items" where they are not the result of a written contract, as they were not here. Cowdery v. McChesney, 124 Cal. 363, 365, 57 P. 221; Edwards v. California S. P. Corporation, 104 Cal. App. 715, 720, 286 P. 733. All of the testimony regarding the account is found in less than 3 of the 351 pages of the reporter's transcript on appeal. Appellant made no objection to the introduction of the account nor to any of its items, nor was the statute of limitations pleaded as a defense.

The charging part of the complaint, so far as material, is: "That within four years last past * * * the defendants * * * became indebted in the sum of One Thousand Dollars ($1000.00) to said copartnership, on an open book account for services rendered as attorneys at law to said defendants, and each of them, and at the special instance and request of and for the benefit of the defendants and each of them." The answer of defendant Monte Regio Corporation to said charge is as follows: "Denies that within four years last past or at any other time or at all * * * this defendant became indebted in the sum of One Thousand ($1000) Dollars, or any other sum or amount, to said copartnership, on an open book account for services rendered by said copartnership as attorney at law for this defendant, or in any other manner whatsoever, either at the special instance and/or request of and/or for the benefit of the said defendants and each of them or otherwise or in any manner or at all." It was defendant's theory throughout the trial, and evidence was offered tending to show, that the services rendered were for the benefit of John S. Mitchell Company, a corporation for which plaintiff's assignors were attorneys, which company had contracted to float a bond issue to be secured by the properties of defendant corporation, to enable the latter to do some necessary financing.

[2, 3] 1. Appellant contends that the account proved was not against the defendant corporation, but against Romie C. Jacks, its president, and cites as authority the case of Wright v. Loaiza, 177 Cal. 605, 171 P. 311, in which case the account introduced did not disclose the defendant's name in any form and it was attempted to charge the sister of the man in whose name the account appeared, after two years (the then period of limitation) had expired. It was there held that the action could not be maintained against the sister, although she had authorized her brother to incur the indebtedness represented, for the reason that the open book account was not a charge against her, and her authorization being oral it could not be proved under the circumstances. We think the case of The Furlow Pressed Brick Co. v. Balboa Land & Water Co., 186 Cal. 754, 200 P. 625, is more applicable here. There the defendant, a partnership, was held liable on an account charged to one of the partners. The court said in that regard, on page 765 of 186 Cal., 200 P. 625, 630: "The only question involved here is whether the account in question is an open book account upon which the statute of limitations does not run for four years against the other partners where the partnership account is inadvertently, or as a matter of convenience, charged to one partner only. The reasons leading to the decision in Wright v. Loaiza, supra, as to the proof by parol of an agency to enter into the account do not apply. Here the fact of partnership may be readily proven and the circumstances showing the nature of the indebtedness are readily susceptible of proof and do not usually depend solely upon parol evidence as to the nature of the transaction. It was clearly proper to show that the indebtedness was a partnership one, and the fact that it was charged on the plaintiff's books to one of the partners was sufficient to constitute it a book account within the meaning of our Code." In the instant case the name of the corporation appears in the account, and the evidence shows that the corporation passed a resolution authorizing the creation of a bonded indebtedness and that plaintiff's assignors were employed to attend to the legal work preliminary thereto. The work was done for the defendant corporation, and the president thereof would seem to be impliedly authorized by such resolution to carry it into effect by employing counsel for the company for that purpose. Woods Lumber Co. v. Moore, 183 Cal. 497, 191 P. 905, 11 A. L. R. 549. See, also, Goodrich v. Drew, 10 Vt. 137.

[4] Appellant also urges that one essential of an open book account is that the items be entered contemporaneously with the transactions to which the same relate. There would seem to be no question but that the item complained of here was not so entered, nor indeed for several months after the services "lumped" together in the item were rendered. However, the same defect could be urged against any such charge, even if entered on the day following the rendition of the last services. There is no question as to the law on this point where objection is made to the introduction of such an account. In the case of Chandler v. Robinett, 21 Cal. App. 333, 131 P. 891, relied on by appellant, it was held that the lower court erred in admitting such an account in evidence "over the objection of defendant." It would seem, though, in the absence of an objection, that such an entry would go to the weight to be given to the account as well as its credibility as evidence, rather than to the fact of whether or not it is an open book account. It still remains a book account regardless of the fact that an entry was not made until some time after the matter charged accrued, or regardless of the fact that many matters have been lumped together in one item. In the case of Baumgardner v. Burnham, 10 W. N. Cas. (Pa.) 445, the question came before the Supreme Court of Pennsylvania in a case where an account was introduced in an action of assumpsit, to prove the amount of repairs made on an engine. The labor items, which were a large part of the cost, were all "lump" charges. A general objection to the introduction of the book was made and overruled. No evidence was introduced by plaintiff other than the account and the testimony of the bookkeeper connected with such introduction. The defendant offered no evidence. On appeal the court in affirming the judgment for the amount of the account said: "Had the objection in the Court below been specially to the lumping charges for labor, it would have been error to have admitted them. But the objection was to the books generally, and improper entries are not sufficient to exclude the whole, in which there were many entries entirely regular. Had the whole been rejected, the Court could not have been convicted of error, for though the admission of the particular items was not objected to, still they were offered with the others, and if any part of an offer be inadmissible, the rejection cannot be assigned for error. But where the evidence was admitted, there the record must show affirmatively that the inadmissible part was specially objected to, and brought to the notice of the Judge. We think the reasoning there applies equally here, where no objection either

to the account as a whole or to the objectionable item was made, and even though the account consists of only three items, two of which though not objectionable were for a small amount only and the objectionable item was practically the amount sued for. That case was referred to in Corr v. Sellers, 100 Pa. 169, 45 Am. Rep. 370, where in mentioning the cases the court said: "In Baumgardner v. Burnham, 10 W. N. [Cas. (Pa.)] 445, it is again held that lumping charges for labor are not admissible where specially objected thereto. In that case the error was cured by reason of the objection not having been so made." In the present case we are of the opinion that there was no error, because no objection was made.

As was said in the case of Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855, 858, "the mere existence of some errors, in the absence of anything showing that they were the result of fraud, would not necessarily render the books incompetent, although it would undoubtedly affect their credibility." Speaking of the requirement that an entry should be made contemporaneously with the transaction to which it relates, the court in Redlich v. Bauerlee, 98 Ill. 134, 38 Am. Rep. 87, said: "It suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived is unimpaired." In this case the witnesses testified and many exhibits were introduced as to the work done, and it would seem that the charge made was very reasonable, considering everything that was testified to, and that the delay of eight months in recording the item resulted in diminishing the charge rather than otherwise.

[5, 6] 2. Appellant requested no instruction relating to the book account, nor was any given by the court. At plaintiff's request the following instruction was given to the jury: "I instruct you that if you find that the law firm of Faries and Williamson performed legal services for the defendant, Monte Regio Corporation, at the instance and request of said defendant, or with their consent, and if you further find that such legal services are of the reasonable value of One Thousand Dollars ($1000.00) you will bring in a verdict for the plaintiff in the sum of One Thousand Dollars ($1000.00)." The following instruction, with the exception of the words italicized, was given at the request of appellant: "You are hereby instructed that unless you find by preponderance of the evidence submitted that the plaintiff's assignors performed services for and in behalf of the defendant corporation and at the request *or with the consent* of said defendant corporation, you will find for the defendant, Monte Regio Corporation." It appears from the record that the latter instruction was modified by the court by inserting therein the words italicized. Appellant contends that in view of the fact that the services rendered by plaintiff's assignors were admittedly performed with the consent of the defendant corporation—and it was the contention of the latter "that while it consented to the performance of such services it did so upon the belief and the understanding and agreement that the attorneys were acting for and on behalf of the Mitchell Company in doing this preliminary work"—the use of the words "or with the consent" in said two instructions told the jury in effect that if the services were performed "with the consent of the defendant then the verdict should be for the plaintiff, without regard to the fact that the complaint alleged, and to sustain a verdict for the plaintiff the jury should also have found, that the open book account charged to the defendant, with all essentials, actually existed." Both instructions would seem to harmonize better with an action of assumpsit than one based upon an open book account, but inasmuch as the account was introduced without objection, and remained unquestioned by the evidence to the end, except as to whom the work was done for, and is only challenged on appeal by reason of the manner of its compilation, it would seem that in the face of defendant's theory of its lack of liability to the plaintiff's assignors the issue raised by the evidence as to whether the services were performed for the defendant or for the Mitchell Company was the only question before the jury. If the jury decided that the services were performed "for the defendant" and at its instance and request, or with its consent, and also found such services to be of the reasonable value of $1,000, then their verdict should be for the plaintiff; otherwise for the defendant. Such seems to be the essence of both instructions quoted, and in view of the fact that the book account was not questioned by defendant, either by objection or requested instruction, we fail to see where it was prejudiced by either instruction. Both leave the question of whether or not the employment was "for or on behalf of defendant" to the jury, and that was the question presented for decision by both parties. Even though both instructions seem more applicable to an action of assumpsit, in view of the fact that the one requested by defendant is substantially similar to that of plaintiff's in that regard, we do not see how appellant can complain. Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

115 Cal.App. 651

FALL v. LINCOLN MORTGAGE CO.

Civ. 4289.

District Court of Appeal, Third District, California.

July 27, 1931.

Rehearing Denied Aug. 26, 1931. Hearing Denied by Supreme Court Sept. 24, 1931.

1. Limitation of actions ⇨199(1).

When defendant pleads limitations, nonsuit should be granted, if evidence shows that plaintiff's action is barred.

2. Limitation of actions ⇨23(1).

Action for money had and received must ordinarily be commenced within two years after money is received (Code Civ. Proc. § 339, subd. 1).

3. Limitation of actions ⇨66(15).

Demand necessary to commencement of suit must be made within reasonable time, which is time provided in statute for barring action.

4. Limitation of actions ⇨28(2).

Action commenced in 1927 for money had and received in 1923 for stock subscription, return of which plaintiff did not demand until 1927, although he knew of basis for demand in 1923, *held* barred (Code Civ. Proc. § 339, subd. 1).

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Lucius M. Fall against the Lincoln Mortgage Company. From an adverse judgment, plaintiff appeals.

Affirmed.

Fall & Fall, of Los Angeles, for appellant.

Fickeisen & Richardson and J. E. Haley, all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This is an action for money had and received. Defendant answered denying the allegations of the complaint and setting up the provisions of sections 337, subd. 1, 338, subd. 4, and 339, subd. 1, of the Code of Civil Procedure in bar of the plaintiff's cause of action.

At the close of plaintiff's evidence defendant moved for a nonsuit, which the court did not pass upon until after defendant had produced his evidence and after the evidence of both plaintiff and defendant was all in. Thereupon the court granted the motion for a nonsuit and rendered judgment in favor of defendant. From this judgment plaintiff has appealed.

In December, 1922, the corporation commissioner issued a permit to respondent to sell a certain number of its shares of capital stock and this action grew out of a subscription by appellant for 2,000 shares of the preferred and common stock so authorized to be sold.

The contention of appellant is that he has the right to recover the money for which he sues upon two grounds: (1) Failure of consideration in that respondent failed to advance the price of units as agreed; (2) Because of the violation of the provisions of the Corporate Securities Act, which rendered the sale of the stock void. And he claims that the trial court erred in granting the motion for a nonsuit for the reason that there was substantial evidence to support his case.

H. J. Mallen & Co. was the fiscal agent of respondent and was handling the sale of the said stock for respondent, and one S. L. Vance was a salesman employed by it to sell the said stock.

Plaintiff testified that Vance called at his residence, where he was confined by illness, and represented to him that the first issue of respondent's said stock was being sold at $12.50 a unit, a unit consisting of one share of preferred stock valued at $10 and one share of common stock valued at $2.50; that the said stock was selling rapidly, and that the first issue was almost exhausted, and that as soon as the first issue was sold another issue would be put on sale, and then the common stock would sell for $5 per share; that as a matter of fact, as appellant learned later, the permit authorizing the sale of this stock did not place any separate value on the said common stock, but authorized the sale of said stock in units at $12.50 per unit, a unit of said stock consisted of 1 share each of preferred and common stock. Nor did the new issue of said stock, for which a permit was granted in April, 1923, place any separate value on said common stock, nor authorize it to be sold for $5 per share nor in any other way except as a unit in conjunction with one share of said preferred stock for $12.50 per unit; that upon and after said new issue of stock the said common stock was not worth $5 per share.

The permit, under which this stock was sold to appellant, provides that the shares of stock shall be sold for cash, or upon payments of not less than 25 per cent. in cash and the balance in not more than fifteen monthly payments; that the applicant shall agree with the purchaser of each share authorized; that no share shall be sold outside of the state of California on terms more favorable to any subscriber or purchaser thereof than the terms upon which said shares are authorized to be sold, and that a true copy of the permit shall be exhibited and delivered to each prospective purchaser before his subscription shall be taken or any sale made to him.

The evidence of appellant is to the effect that none of these requirements of the permit were complied with, and that therefore, under the provisions of the Corporate Securities Act (St. 1917, § 673 as amended), the sale of the stock to him was void. Respondent, at the time when the subscription for stock was made, to wit, March 31, 1923, was engaged in the business of loaning money on real estate. An application for a loan of $6,250 was made to it by appellant and wife and a note dated April 4, 1923, for this amount, secured by a deed of trust and executed by appellant and wife to respondent, was placed in escrow by appellant with the Los Angeles Title & Insurance Company on April 4, 1923.

On this same date appellant and wife joined in a letter to said Los Angeles Title & Insurance Company, in which they stated: "We have given a trust deed and a promissory note to the Lincoln Mortgage Company for $6,250. This will be placed in escrow with you. When escrow is completed you are hereby instructed to deliver the entire amount of $6,250 direct to H. J. Mallen & Company, Inc., Merritt Building this city." On April 6, 1923, respondent deposited in escrow with the Los Angeles Title & Trust Company its check for $6,250. On April 13, 1923, H. J. Mallen & Co. directed the escrow holder to pay the $6,250 to S. L. Vance. On April 18, 1923, the subscription of appellant for the 2,000 shares of stock was received by respondent, together with cash amounting to $6,250, being the initial payment of 25 per cent. on the purchase price of said stock.

While the appellant testified that the note and deed of trust were accepted by Vance in payment for the 25 per cent. of the purchase price of said stock, and that at no time had any money been paid to him, the uncontradicted evidence is to the effect that he placed the note and deed of trust in escrow with instructions to the escrow holder to pay the $6,250 to H. J. Mallen & Co., and they in turn directed payment of same to be made to Vance, and after this payment was made to Vance the subscription of appellant for the 2,000 shares of stock, with a cash payment thereon of $6,250, was deposited with respondent and accepted by it.

One of the grounds for the motion for nonsuit was that appellant was barred by limitation.

[1] When the defendant pleads the statute of limitations a motion for a nonsuit should be granted if the evidence shows that plaintiff's cause of action is barred. Carter v. Canty, 181 Cal. 749, 186 P. 346; Patterson v. Doe, 130 Cal. 333, 62 P. 569; Bass v. Hueter, 205 Cal. 284, 270 P. 958.

[2, 3] Ordinarily an action for money had and received must be commenced within two years after the money is received. Section 339, subd. 1, Code Civ. Proc.; County of San Luis Obispo v. Farnum, 108 Cal. 567, 41 P. 447. The money was received by respondent between the 13th and 20th of April, 1923. This action was commenced by filing the complaint on December 6, 1927. On April 2, 1927, appellant made demand on respondent for return of said money and as ground for that demand stated that he was induced to purchase the said stock upon promises made by respondent and its agents that the price of the units would be increased to $15 per unit on the second issue and sale of the stock, but that respondent had failed to carry out said promise. Where a demand is necessary to be made before suit can be commenced, it must be made within a reasonable time, which is uniformly held to be a period coincident with that provided in the statute for barring the action. 17 Cal. Jur. 623; Thomas v. Pacific Beach Co., 115 Cal. 136, 46 P. 899; Vickrey v. Maier, 164 Cal. 384, 129 P. 273.

[4] It is admitted by appellant that within thirty days after making his subscription for the purchase of said stock he knew that the second issue of respondent's stock had not advanced the price of the common stock nor of the unit, and that respondent had not complied with its alleged promise that upon such new issue the units would be worth $15. Appellant testified that he was an attorney at law and had been practicing his profession for the past forty years. Such being the case, he must have been fully conversant with his rights relating to this transaction, and must have known that he was sleeping upon these rights when he waited four and a half years before commencing his action. In bringing this action he has proceeded upon the theory that the money sued for was received by respondent when the note was paid on December 17, 1925, but as a matter of fact the undisputed evidence is that respondent received the money through its agent, Vance, in April, 1923.

In the case of Bannister v. Los Angeles Railway Corporation, 203 Cal. 427, 264 P. 756, 757, Mr. Justice Richards said: "The rule governing the power and propriety on the part of the trial judge in the matter of granting a nonsuit at the conclusion of the whole testimony in the case is clearly and correctly stated in the Matter of Estate of Caspar, 172 Cal. 147 [155 P. 631], wherein it is declared to be the rule that the right of the court to direct a verdict and the right of the court to grant a nonsuit at the conclusion of the evidence in the case are absolutely the same, and that the court may grant such a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given."

A review of the undisputed evidence in this case clearly shows that appellant's cause of action is barred by limitation.

The judgment is affirmed.

We concur: **PRESTON, P. J.; THOMPSON, J.**

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119 Cal.App.(Supp.) 770

PEOPLE v. WOLIN.

Cr. A. 681.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 3, 1931.

1. Food 🔑14.

Sale of adulterated fluid extract of ginger to agent of state board of health, who announced his authority and desire to take sample, *held* not criminal offense (St. 1907, p. 230, § 1; p. 232, §§ 9, 11; Pen. Code, § 26, subd. 6).

2. Food 🔑20(5).

One cannot be convicted of keeping adulterated ginger for sale under complaint charging that he did "hold out for sale" such ginger (St. 1907, p. 230, § 1).

Phrase "hold out for sale" is not equivalent of "keep for sale," but means only "offer for sale."

3. Indictment and information 🔑171.

Conviction of one offense cannot be upheld on proof of commission of another distinct offense.

Appeal from Municipal Court of Los Angeles; Ellis A. Eagan, Judge.

J. Wolin was convicted of selling and offering for sale adulterated fluid extract of ginger, and he appeals.

Reversed and remanded.

Leo V. Silverstein, of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, Joe W. Matherly, and John L. Bland, Deputy City Prosecutors, all of Los Angeles, for the People.

SHAW, Acting P. J.

[1] The complaint charges that defendant did "sell and offer for sale and hold out for sale and offer to deliver" adulterated fluid extract of ginger. The statute (St. 1907, p. 230, § 1) makes it unlawful to "sell or offer for sale, or keep for sale," any adulterated drug, and so defines "drug" as to include fluid extract of ginger. There is no such offense as "holding out for sale," nor (except in case of imported drugs, which is not the charge here) any such offense as "offering to deliver." The conviction must therefore rest for support on the charge of selling and offering for sale. No offer is shown by the evidence. The sale proved was one made to an agent of the state board of health, who announced his authority to defendant, and stated that he wished to take officially a sample of the ginger. Thereupon defendant delivered to the agent four bottles of the ginger, for which the agent paid him $1.

We do not regard such a transaction as a violation of the statute. Section 9 provides that any agent of the state board of health shall have the right to purchase any drug suspected of being adulterated, or, if a sale be refused, to take samples thereof; and section 11 makes it a misdemeanor for any person to refuse to sell such a sample to such an agent. We cannot ascribe to the Legislature an intention to punish as a crime an act the refusal to do which is also made criminal; and yet an affirmance of this conviction must rest on such a construction of the statute. In Ohio a similar statute relating to oleomargarine was apparently so construed in State v. Rippeth, 71 Ohio St. 85, 72 N. E. 298. The point is not mentioned at all in the majority opinion, but, as appears from the dissenting opinion of Crew, J., it was necessarily involved in the case. We are in accord with the reasoning of this dissenting opinion, and refer to it for a fuller expression of our views. We quote from it as follows:

"Such furnishing and delivery" (of a sample for analysis) "was, by force of the provisions of section 4200–7, made compulsory, and such furnishing would not, therefore, in legal intendment amount to or constitute a sale, inasmuch as in such transaction one of the essential elements of the contract of sale is wanting, viz: the voluntary assent of the seller. * * * The statute having made the furnishing of a sample, for the purpose of analysis, obligatory and compulsory, a furnishing for such purpose is not a crime, and cannot rightfully be made a predicate for the criminal prosecution of the person so furnishing said sample. * * * The legislature is without right to make unlawful and criminal the doing of the very thing which by positive enactment it commands and enjoins to be done. A construction that gives to this statute such an effect and produces such a result, offends against reason and good conscience, renders the statute invalid, and should therefore not be adopted."

In Lansing v. State, 73 Neb. 124, 127, 102 N. W. 254, a similar statute concerning the sale of adulterated milk was considered, and, while the court there held that the evidence did not show a sale under the compulsory provisions (section 4) of the statute, it said: "There is no doubt that, if the sale was made in pursuance of section 4 of the act, the defendant could not be prosecuted for a sale which he was compelled by law to make."

The case appears also to be at least within the spirit of subdivision 6 of section 26 of the Penal Code, which relieves from criminal responsibility "persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." Certainly the defendant, acting under legal compulsion, could have had no evil design, intention, or culpable negligence, and it is not going far, if at all, beyond the facts to say that he made the sale by misfortune.

[2, 3] Under the circumstances of this case perhaps the defendant might properly have been convicted on a charge of keeping the adulterated ginger for sale; but no such charge was made against him. The phrase "hold out for sale," used in the complaint, is not the equivalent of "keep for sale," but can mean, when applied to such a subject-matter, nothing other than "offer for sale." See definitions of "hold out" in both Webster's Dictionary and the Standard Dictionary. A conviction of one offense cannot be upheld on proof of the commission of some other distinct offense. People v. Mitchell, 74 Cal. App. 164, 169, 240 P. 36.

The judgment is reversed, and the cause is remanded for a new trial.

I concur: YANKWICH, Judge pro tem.

213 Cal. 351

WINTHROP v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 12758.

Supreme Court of California.

Aug. 8, 1931.

Rehearing Denied Aug. 31, 1931.

1. Master and servant ⚷405(4).

Evidence *held* to show that twisting of pedicle of employee's ovarian tumor was caused by fall in course of employment (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 911; St. 1917, p. 877, § 69).

2. Master and servant ⚷378.

Employee's failure to attribute severe abdominal pains to fall, which caused twisting of pedicle of ovarian tumor, *held* not to preclude recovery of compensation (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 911).

SHENK, J., WASTE, C. J., and LANGDON, J., dissenting.

In Bank.

Proceeding for compensation under the Workmen's Compensation Act by Fannette Winthrop, employee, opposed by the Wetherby Kayser Shoe Company, employer, and the Associated Indemnity Corporation, insurer. To review an order of the Industrial Accident Commission denying compensation, claimant brings certiorari.

Order annulled.

Rehearing denied; WASTE, C. J., and SHENK and LANGDON, JJ., dissenting.

Goldman & Lieberman, of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

SEAWELL, J.

This is a proceeding to review an order of the Industrial Accident Commission denying compensation to the petitioner, Fannette Winthrop, on the ground that the disability complained of was not caused by the injury suffered by said petitioner in the course of her employment by respondent Wetherby Kayser Shoe Company.

Petitioner, a woman thirty years of age, was employed as a hosiery clerk in a shoe store operated by respondent Wetherby Kayser Company in the city of Los Angeles. While waiting on a customer she climbed upon a stool to reach merchandise on a shelf. The stool tipped and she fell backwards onto the floor. Some uncertainty exists as to the date of the fall. Petitioner fixed it as January 13, 1930, in her application for compensation, and upon the hearing before the commission she testified that it occurred on January 13 or 14. She admitted, however, that she was not positive as to the exact date. Her lack of a more certain recollection is explainable as due to the circumstance that she did not for a time attribute her disabilities to the fall. The employer, in a report to its insurance carrier, which was introduced as an exhibit, stated that the fall took place between January 2 and 5. There is no other evidence as to said dates being correct. Petitioner testified that she was sure it could not have been as early as January 2.

A fellow employee assisted petitioner to rise, and she finished waiting on her customer, although she felt dazed after the fall. She continued to work until January 18. On January 25 she called her personal physician; on January 27 she was taken to the hospital, suffering acute pain in the lower abdominal region, and on January 31 she was operated on and a large ovarian tumor and her left ovary were removed. At the time she left work she did not know the exact cause of her illness. She did not then attribute it to the fall, and made no demand upon her employer for compensation or medical treatment. The operation revealed that the pedicle or stem by which the tumor was attached to the tissues of the body had become twisted in two places, thereby cutting off the blood supply to the tumor and causing a gangrenous condition, with extreme toxicity, which rendered imperative an immediate operation to save the life of petitioner. It is conceded by the commission that the highly toxic condition and the acute symptoms of pain and distress which immediately preceded the operation resulted from the twisting of the pedicle of the tumor. The question to be determined is whether the twisting of the pedicle was produced by the fall, or, as the commission impliedly held, was a natural development which took place as the tumor grew in size. If the result of the fall, petitioner is entitled to compensation under section 3, subdivision 4, of the Workmen's Compensation Act, which provides: "In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury." Stats. 1917, p. 833, as amended by Stats. 1919, p. 911.

[1] The evidence, in addition to the testimony of petitioner, consists of letters from physicians which were introduced in the case as exhibits. The petitioner's personal physician, Dr. Segall, and two physicians called in consultation upon her case, all of whom were present at or assisted in performing the operation, gave it as their opinion that the fall produced the twisting of the pedicle of the tumor. On the other hand, Dr. Bond, who examined petitioner on March 27, almost two months after the operation, at the request of the employer, and Dr. Boller, acting for the employer's insurance carrier, were of the view that the fall did not cause the twisting. Dr. Jones, medical umpire for the commission, who expressed the same opinion, stated in his letter report that as an ovarian tumor increases in size it slips out of the pelvis into the abdominal cavity, and that due to the contour of the rim of the pelvis the pedicle may become twisted, causing a strangulation of the tumor. But neither the letter of Dr. Jones nor those of the other medical men holding to the same view denied that a fall could produce a twisting of the pedicle. Rather, we think, all recognize a fall as a factor capable of producing such a result, but were of the view that it was not indicated to be the cause in the case herein, for the reason that the severe pain and other symptoms did not develop sufficiently soon after the fall.

The reports of the physicians upon whom the commission relied were not based upon a first-hand observation of petitioner's symptoms. She herself testified at the hearing before the commission that she felt ill "right along after the fall," and seemed to get worse and worse; that she stayed until the Saturday after the fall to enable her employer to get some one to take her place; that she had intermittent abdominal pains between the time of the fall and the time she quit work; that the first bad attack took place about a couple of days after the fall; that she used every atom of strength she had to "stick it through" until Saturday night; and that thereafter the pains became excruciating. The hospital report of her condition between January 27 and 31, preceding the operation, also indicates a condition of intense abdominal pain, fever, and delirium. The soreness of her abdominal region hindered the doctors from making a complete examination, and it was not until after they had operated that they were able to make an exact diagnosis. In view of the fact that the symptoms were produced by a gangrenous condition due to the cutting off of the blood supply to the tumor, her distress must of necessity have been less at the inception of the condition than after gangrene had poisoned the system.

The uncontradicted evidence shows that symptoms of which petitioner was free at the time of the fall began to develop almost immediately thereafter, becoming increasingly acute until the operation was performed. All medical experts whose reports appear recognize expressly or impliedly that a fall may cause twisting of the pedicle of a tumor. Those who observed petitioner's symptoms within a short time after the fall were of the view that the fall was the cause. Those who held to the contrary view did not see her until after the operation, and based their opinions largely on the premise that the preoperative symptoms did not appear sufficiently soon to indicate a connection. While neither the cause of the twisting of the pedicle nor the time it occurred is capable of exact demonstration, the physicians who attended petitioner and physically observed the position and condition of the tumor and contiguous organs and tissues were in a better position to judge the length of time the condition had been developing than were those whose calculations were based upon related facts. The case does not present a true conflict of evidence. The opinions of the doctors who were of the view that the fall did not produce the twisting of the pedicle, as stated in their letter reports, were based on the theory that severe symptoms did not appear until some time after the fall. The evidence, on the other hand, shows that petitioner suffered severe abdominal pains almost immediately thereafter, although her condition naturally became aggravated as time elapsed. Said opinions, being based on a state of facts not shown by the record to exist, are not in conflict with the opinions of the doctors whose statements were based on the facts actually shown to exist by the evidence of petitioner and the doctors who attended her.

[2] Respondents make much of the circumstance that petitioner did not at once attribute her symptoms to the fall, and did not even tell her physicians of it until after she had been at the hospital two days. A failure on the part of the employee to attribute her severe pains to the fall would not conclude her from recovering compensation if the fall was either the origin or accelerating cause of incapacity. She had suffered previous attacks of abdominal pain, although she was unaware that she had a tumor. Her physicians were not absolutely certain of the existence of a tumor until she was operated upon. A recurrence of the abdominal pains may have indicated to her a return of the old complaint rather than a changed pathological condition arising from the fall. An employee is not to be deprived of compensation because he fails to make a correct medical diagnosis. See Singer v. Industrial Accident Commission, 105 Cal. App. 374, 287 P. 567. Nothing appears to impeach the good faith or veracity of petitioner. Respondents do not dispute her having fallen from the stool.

The physicians who made physical examination of the internal abdominal area affected and treated petitioner had before them original evidence which was not before the physicians who gave their opinions based on a statement of facts without opportunity to investigate the original condition attempted to be described. Giving the statute the liberal construction which section 69 (Stats. 1917, p. 877) enjoins upon courts, we are of the view that petitioner is entitled to industrial compensation.

The order denying compensation to petitioner is annulled.

We concur: RICHARDS, J.; CURTIS, J.; PRESTON, J.

SHENK, J.

I dissent. On the record presented I cannot avoid the conclusion that the court has invaded the field of the fact-finding body, and, by weighing the evidence, has erroneously concluded that there is no substantial evidence to support the findings of the commission. The question of fact before the board was whether the accident was the causal or contributing agent in bringing about the twisting of the pre-existent tumor. On this issue the evidence before the board was the expert testimony of physicians and surgeons. The conclusions of these experts were divergent; one group of experts testifying that it was and another group testifying that it was not. The credibility of neither group was impeached nor reflected upon, and the conclusions of one group would seem to rest upon as substantial foundation as the other. This is true, at least to such an extent as that the court as matter of law should not compel the acceptance of the conclusions of one as against the other. The commission is the exclusive judge of the weight of the evidence before it, and this exclusive function would apply to expert testimony as well as any other. I think the order should be affirmed.

We concur: WASTE, C. J.; LANGDON, J.

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213 Cal. 250

LIEBELT v. CARNEY.

S. F. 13671.

Supreme Court of California.

July 30, 1931.

Rehearing Denied Aug. 27, 1931.

1. Usury ⟹31.

Creditor's advancement to debtor, who retained trucks but conveyed title for security, *held* usurious loan (Deering's Gen. Laws 1923, Act 3757, § 3).

> Evidence showed that creditor advanced money to pay balance due by debtor to third person for purchase of trucks under conditional sales contract, and that creditor, for security, took assignment of such contract from third person, together with bill of sale from debtor, and then issued

inflated conditional sales contracts, which he immediately assigned to others, to whom debtor made payment.

2. Usury 🔑141.

Borrower could not recover statutory usury penalty from lender, who, guaranteeing performance thereof, transferred nonnegotiable conditional sales contracts, representing loan, to assignee, to whom borrower made all payments (Deering's Gen. Laws 1923, Act 3757, § 3).

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by E. H. Liebelt against Thomas Carney, sometimes known as the Thomas Carney Company. Judgment for defendant, and plaintiff appeals.

Judgment of superior court affirmed.

Superseding opinion of District Court of Appeal in 289 P. 872. For former opinion herewith adopted in part see 295 P. 815.

Edison MacLeod, of Oakland, for appellant.

John M. Dvorin, of Los Angeles, for respondent.

PRESTON, J.

This cause is now before us on rehearing. We have carefully re-examined the cause, and find ourselves unable to reach any other conclusion than that heretofore announced. We adopt a portion of our former opinion, as follows:

Action to recover the statutory penalty provided by section 3 of the Usury Act (St. 1919, p. lxxxiii, Act 3757, Deering's General Laws). Defendant had judgment; plaintiff has appealed.

[1] The transaction took the form of an advancement by defendant of the sum of $1,624.31, to discharge the final payments due from plaintiff to General Motors Acceptance Corporation for the purchase of two trucks under a conditional sales contract. Defendant to secure repayment of the sum advanced took from the Acceptance Corporation an assignment of the conditional sales contract; procured registration of the trucks in his own name as owner; then took a bill of sale of the trucks from plaintiff; then issued to plaintiff an inflated conditional sales contract, dated December 16, 1926, naming the sum of $3,531.88, reciting, however, the fictitious payment of $1,000 on account thereof, leaving the true amount claimed by defendant from plaintiff for said advancement as $2,531.88, which was to be paid in monthly installments over a period of approximately one year. Immediately upon the execution of this additional sales contract, defendant assigned it to Commercial Securities Corporation, Cons., with a written guaranty to said purchaser of all the covenants therein to be kept and performed by plaintiff. Plaintiff made all the payments due under this contract except the last one of $931.88, which fell due December 16, 1927. To take care of this payment, the above-described process was repeated; the $931.88 became $1,131.88; a new conditional sales contract to cover another twelve months' period was issued for this item and immediately assigned by defendant to the Merchants' Security Company.

It must be noted that the possession of the trucks never at any time passed from the plaintiff to defendant. Title was conveyed to the latter at all times for the purpose of security. Stripping the transaction of its entanglements, it is too clear for controversy that it was but a thinly disguised loan heavily charged with usury. Rosemead Co. v. Shipley Company, 207 Cal. 414, 278 P. 1038; Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674; San Joaquin Finance Corp. v. Allen, 102 Cal. App. 400, 283 P. 117.

[2] But the foregoing observations do not entitle plaintiff to recover from the defendant, for the evidence shows that, immediately upon execution of said two contracts, the assignments above noted were made. The evidence also shows without conflict that each and every payment called for under said contracts was made to one or the other of the above-mentioned corporations and not to the defendant. This fact prevents the plaintiff from recovering, and such holding follows from the plain construction of the act itself, which provides that the penalties may be collected from the person "who shall have taken or received" the payment. We cannot say that the written guaranty made by the defendant should alter this rule. There was no showing of collusion or relation of any other kind between defendant and either of the assignees.

Appellant urges that only three cases could be found on this subject, and that these cases hold that the penalty may be collected from the party who makes the contract; they are Sanford v. Kane, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. Rep. 602; Taulbee v. Hargis, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A, 762; Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145. We have examined each of these cases, and, without stopping to discuss them, we would say in passing that they are not parallel to any extent with the situation we have before us. Upon our own volition, however, we have found a number of cases giving to statutes and Constitutions, which read almost identically with our statute, the construction here given. In Anderson v. Tatro, 44 Okl. 219, 144 P. 360, 361, the court construed a provision of the Constitution of that state which allowed the recovery of double the amount of interest paid "from the person, firm, or corporation taking or receiving the same" (Const. Okl., art. 14, § 3), and it was there held that, where payments were made to the assignee, such assignee alone must answer to the penalties and that the maker of the usurious obligation was not a proper party to the action.

This doctrine was followed again by the Oklahoma Court in the case of First Nat. Bank v. Sensebaugh, 58 Okl. 462, 160 P. 455, wherein the court construed section 5198 of the United States Revised Statutes (U. S. Comp. Stats. 1913, § 9759 [12 USCA § 86]); the wording of this statute being similar to the Oklahoma constitutional provision above mentioned and to our own statute. It was there again held that, inasmuch as the interest was paid to the assignee, the maker of the contract was not a proper party to the action. To the same effect, see Webb v. Galveston, etc., Co., 32 Tex. Civ. App. 515, 75 S. W. 355, and Western Bank & Trust Co. v. Ogden, 42 Tex. Civ. App. 465, 93 S.W. 1102.

Further search discloses additional authority to the same effect and no authority to the contrary. The rule is stated in 39 Cyc. 1038, as follows: "The proper party defendant is the person who has received the usury. It is not necessary that a third person to whom the notes executed for the usurious loan were made payable should be joined if he received no part of the usury. But when the usurious note has been transferred to a holder in due course, to whom the maker is compelled to make payment, the original payee is the proper party defendant." This authority cites in support of the text Snyder v. Crutcher, 137 Mo. App. 121, 118 S. W. 489.

The only exception found anywhere to the general rule is that in some jurisdictions the payee of a usurious negotiable note may be sued to recover the usury paid where the instrument has been transferred to an innocent purchaser for value and the maker's right to plead usury as a defense to the note has been thereby destroyed. Schlesinger v. Lehmaier, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591; Culver v. Osborne, 231 Ill. 104, 83 N. E. 110, 121 Am. St. Rep. 302; Harbaugh v. Tanner, supra; and Kock v. Block, 29 Ohio St. 565.

39 Cyc. 1035 notes the exception as follows: "The person who has knowingly exacted the usury is the person compelled by the law to repay it. But when a negotiable note which includes usury comes into the hands of a holder in due course, who, under the statute, may compel payment in full, the maker is generally allowed to recover the usury thus paid to the innocent indorsee from the usurer-payee." Under this text reference is found to a North Dakota statute and also to the Minnesota General Statute 1894, § 2214, which reads in part: "In any case, however, where the original holder of an usurious note sells the same to an innocent purchaser, the maker of said note, or his representatives, shall have the right to recover back from the said original holder the amount of principal and interest paid by him on said note."

In Fredin v. Richards, 61 Minn. 490, 63 N. W. 1031, construing this statute, is found a holding which casts much light upon the question before us here. In that case the decision bears out the statement in the syllabus that, "where a usurious note, payable to the order of a particular party, is transferred by the original holder without indorsement, the transferee, although he takes it for value and without notice, is not an innocent purchaser of the note; and if the maker pays it to him he cannot maintain an action, under the statute, against such original holder, to recover the amount so paid." In other words, in said case the debtor undertook to hold the original payee for usury paid the assignee of the note, and the court held that, inasmuch as the assignee was not an innocent purchaser, the debtor could have pleaded usury in defense to the note, and for that reason should not be allowed to sue the original payee.

It is not pretended that the contract involved in this action was a negotiable instrument. The plaintiff could at any time have set up usury in defense of an action upon said contract. He has simply sued the wrong party. He could have maintained against the assignee the cause of action provided for under said section 3.

The words "directly or indirectly" found in section 2 do not change or qualify the plain meaning of the provisions of section 3 of the act. Section 2 declares void the contract to pay interest to any extent if usury is provided for. It also provides that the nonpayment of interest shall not accelerate the maturity date of the obligation. The act, in a later section, also provides for a criminal prosecution under certain circumstances. But section 3, by its terms, limits the suit for penalties to a debtor who has paid, against the party who is entitled to receive, and does actually receive, the payment from him.

The judgment is affirmed.

We concur: WASTE, C. J; SEAWELL, J.; RICHARDS, J.; SHENK, J.

213 Cal. 219

FRASCH v. LONDON & LANCASHIRE FIRE INS. CO.

S. F. 13482.

Supreme Court of California.
July 28, 1931.

1. Appeal and error 🔑854(3).

Where one of several grounds of demurrer is well taken, judgment sustaining demurrer must be affirmed.

2. Insurance 🔑634(1).

Allegation that premium had been paid to insurance solicitor while he was acting as agent for insurer *held* good as against general demurrer.

The allegation was good against general demurrer raising point that complaint failed to allege that solicitor was insurer's agent for collection of premium.

3. Insurance 🔑78.

Generally, powers of insurance agent are governed by general law of agency.

4. Insurance 🔑78.

Insurance agent possesses such powers as have been conferred by insurer, or as third persons have a right to assume that he possesses under circumstances.

5. Insurance 🔑78.

Generally, powers of insurance agent are determined by nature of business intrusted to him, and are prima facie coextensive with its requirements.

6. Insurance 🔑137(3).

That insurance solicitor came to insured with policy issued by insurer, together with statement of premium made out on insurer's regular form, authorized inference that solicitor was authorized agent to deliver policy and collect premium.

7. Pleading 🔑205(2).

As against general demurrer, only ultimate facts need be alleged.

8. Insurance 🔑640(2).

On question whether solicitor was insurer's agent for collection of premium, any limitation on solicitor's authority, of which insured was charged with knowledge, constituted matter of defense.

9. Insurance 🔑137(3).

That insurance solicitor was acting without license did not absolve insurer from liability, where insured was unaware of fact and insurer had knowledge thereof (Pol. Code, § 633).

10. Pleading 🔑214(1).

Allegations of complaint must be taken as true on demurrer.

11. Insurance 🔑631.

Where question involved was propriety of insured's payment of premium to insurance solicitor, insured *held* not required to plead policy or attach it as exhibit to complaint.

12. Action 🔑6.

Where complaint alleged facts showing controversy whether insured's payment of premium to solicitor constituted payment to insurer, case *held* proper one for declaratory relief, notwithstanding the policy might contain clause permitting insurer to cancel policy.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action for declaratory relief by Otto R. Frasch against the London & Lancashire Fire Insurance Company. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

McEnerney, Reagh & Morris, of San Francisco, for appellant.

Percy V. Long, and Bert W. Levit, both of San Francisco, for respondent.

WASTE, C. J.

This is an appeal from a judgment entered in defendant's favor when the plaintiff refused to amend upon the sustaining of a demurrer to the first amended complaint.

[1] The action is one for declaratory relief. Plaintiff is seeking to have it determined that the defendant company is bound by and liable under the terms and conditions of a certain policy of fire insurance alleged to have been issued by it. It appears from the complaint that the person who solicited the insurance and delivered the policy, collected and receipted for the premium and absconded with the money, whereupon the defendant denied all liability under the policy, unless plaintiff again paid the premium. In addition to its general demurrer challenging the sufficiency of the complaint to state a cause of action, the defendant demurred specially on the threefold ground that it could not be determined what the terms of the policy were, whether or not it was a standard form of policy, and whether or not Booth, the absconding agent, was an agent of the defendant for the collection of the premium If one of these several grounds of demurrer is well taken, the judgment must be affirmed.

Aalwyn v. Cobe, 168 Cal. 165, 173, 142 P. 79; Robinson v. Godfrey, 78 Cal. App. 284, 288, 248 P. 268.

In support of its general demurrer, the respondent insurance company urges that the complaint is fatally defective because it fails to allege that plaintiff had paid the premium to the respondent either directly or through the medium of a duly authorized agent. In substance, the complaint alleges that in May of 1927, Booth solicited plaintiff to purchase fire insurance protection on his home; that on May 23, 1927, Booth delivered to plaintiff a policy of fire insurance duly issued by the defendant company, covering plaintiff's home against loss by fire to the extent of $10,000; that at the time of delivery of the policy Booth presented a bill or statement of premium issued by the defendant company on one of its regular printed bill forms; that plaintiff thereupon paid the amount of the premium ($70) to Booth, who receipted the bill; that at all of these times, and to the defendant's knowledge, though unknown to plaintiff, Booth was negotiating policies of insurance for parties other than himself without having first obtained the necessary license; that Booth subsequently absconded "with a large sum of money, including the premium paid to him by plaintiff, while he, the said Booth, was acting as agent for defendant"; that approximately three months thereafter the defendant denied all liability under the policy unless plaintiff again paid the premium asserted to be due thereon; and that defendant refused to return the premium or to acknowledge any obligation under the policy, wherefore plaintiff prays for a declaration of his rights thereunder.

[2] In our opinion, the complaint is good against general demurrer, for in addition to the direct allegation of the ultimate fact that the premium had been paid to Booth while "he was acting as agent for defendant," the complaint also contains allegations which, if proven upon the trial, would amount to at least a prima facie showing of an ostensible authority in Booth to receive and receipt for the premium.

[3-6] As a general rule, the powers of an agent of an insurance company are governed by the general law of agency. His powers are varied by the character of the functions he is employed to perform. He may be a general agent with general powers, or his powers may be limited by the company; or he may be a special agent with authority limited to a specific transaction. In any event, an insurance agent, whether general or special, possesses such powers as have been conferred by the company, or as third persons have a right to assume that he possesses under the circumstances of the case; and as a general rule his powers, as to those dealing with him, are determined by the nature of the business intrusted to him, and are prima facie coextensive with its requirements. Silverberg v. Phenix Ins. Co., 67 Cal. 41, 7 P. 38; Marderosian v. National Cas. Co., 96 Cal. App. 295, 302, 273 P. 1093; 14 Cal. Jur. 454, §§ 32 and 33; 32 C. J. 1062, § 139. The fact that Booth came to the plaintiff armed with a policy of insurance duly issued by the defendant company, together with a bill or statement of the premium due thereon made out on one of the defendant's regular printed bill forms, immediately gives rise to the inference that Booth was authorized to deliver the policy and to collect and receipt for the premium. In Arthurholt v. Susquehanna Mut. Ins. Co., 159 Pa. 1, 28 A. 197, 200, 39 Am. St. Rep. 659, it is intimated that "by the very fact of issuing a policy which requires, apparently, nothing but delivery and payment of premium to put it in force, the company arms every man, into whose hands it may come, with the power to receive its money." It is concluded in Terry v. Provident Fund Soc., 13 Ind. App. 1, 41 N. E. 18, 55 Am. St. Rep. 217, that if an unauthorized person solicits an application for insurance, and the insurance company recognizes the regularity of the application, it thereby recognizes such person as its agent, at least for that particular transaction, and the payment of the first premium to him is payment to the company and estops it to deny such payment. The case of Lauze v. N. Y. Life Ins. Co., 74 N. H. 334, 68 A. 31, 33, states that "it is not unreasonable to make the company responsible for any payments made by the person on account of the premium due at the inception of the contract to the party who acted in negotiating the contract, whether he so acted by previous arrangement with the company or was a mere volunteer."

[7] The foregoing declarations are cited merely to indicate the trend of the authorities. Without expressing any opinion at this time as to the correctness of the views therein announced, we are satisfied, as already stated, that the complaint in this action contains not only evidentiary facts, which, if proven upon the trial, would authorize the court in finding the ultimate fact of agency, but also contains a direct averment of the ultimate fact that the premium was paid by plaintiff to Booth while the latter "was acting as agent for defendant." As against a general demurrer, it is only necessary that the ultimate facts be alleged. McCaughey v. Schuette, 117 Cal. 223, 46 P. 666, 48 P. 1088, 59 Am. St. Rep. 176. There is no merit in the point that this ultimate fact of agency is alleged merely by way of recital or inference. What we have said sufficiently disposes of the general demurrer and also the special demurrer, in so far as the latter raises the point that the complaint fails to al-

lege that Booth was respondent's agent for the collection of the premium.

[8-10] Any limitation on Booth's authority to act as agent, of which the plaintiff had knowledge or is charged therewith, constitutes matter of defense and is not now before us. That Booth may have been soliciting insurance, without having first obtained the license provided for in section 633 of the Political Code, does not mitigate against plaintiff's case, for the complaint alleges, and for purposes of demurrer it must be taken to be true, that plaintiff was unaware of such fact, though it was within the defendant's knowledge at the time it issued the policy upon the application procured by Booth. It has been held that the Code section was enacted for the protection of the public as well as of the insurance companies, and that an insurance company may not absolve itself from liability for a contract that it has authorized or ratified, although the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute. Goldstone v. Columbia Life, 33 Cal. App. 119, 122, 164 P. 416; Marderosian v. National Cas. Co., supra, 96 Cal. App. 302, 273 P. 1093.

[11] The remaining two grounds of special demurrer are also without merit. As the sole point involved in the action has to do principally with the propriety of the payment of the premium to Booth, it is not necessary that the plaintiff set out the policy at length or attach it as an exhibit to his complaint. The provisions of the policy and whether or not it is a standard form of policy are not pertinent to the inquiry. As already intimated, anything in the policy or in the application filed in connection therewith tending in any way to diminish or destroy plaintiff's cause of action or rights under the policy, is purely a matter of defense.

[12] In conclusion, it may be added that this is a proper case for declaratory relief. The complaint contains all the averments necessary to show that an "actual controversy" exists between the parties hereto with regard to their respective rights and duties under a written instrument or contract, and plaintiff requests that these rights and duties be adjudged by the court. Oldham v. Moodie, 94 Cal. App. 88, 89, 270 P. 688. The fact that the policy may subsequently be found to contain a clause authorizing its cancellation by the defendant company upon five days' written notice to the assured need not destroy plaintiff's right to an adjudication of the question here involved, for should it be found that plaintiff had properly made payment to Booth as agent for the defendant company then, in the event of such suggested cancellation, he would unquestionably be entitled to a pro rata return of the premium. On the other hand, should it be determined upon the trial that Booth was not in fact the agent of the defendant company and that plaintiff had therefore paid the premium to him without warrant, the defendant company would be absolved from all liability under the policy, and need not return any portion of that which it never received.

The judgment is reversed with directions to the court below to overrule the demurrer.

We concur: PRESTON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem.

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213 Cal. 186

BARTON v. STATE BAR OF CALIFORNIA.
S. F. 14101.

Supreme Court of California.
July 25, 1931.

Rehearing Denied Aug. 24, 1931.

1. Constitutional law ⚷70(3).

Court must enforce valid law without regard to policy thereof.

2. Attorney and client ⚷58.

Facts showing that attorney accepted fees in bankruptcy proceedings, and that clients took paupers' oath and filed petition stating that no attorney's fees had been paid, justified attorney's suspension from practice for six months.

In Bank.

Petition by Daniel Barton to review recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred.

Petitioner suspended from practice of law for six months.

Daniel Barton, in propria persona, of San Francisco, for petitioner.

Herbert W. Erskine and Keyes & Erskine, all of San Francisco, for respondent.

SEAWELL, J.

Charges were preferred against petitioner, a member of the State Bar of California, and a citation was duly issued thereon directing him to appear before the local administrative committee of San Francisco, No. 2, the State Bar of California, and show cause why he should not be disbarred, suspended, or reproved by reason of his conduct, alleged to involve moral turpitude, dishonesty and corruption, and the violation of the rules of professional conduct adopted by the board of governors of said State Bar.

The particular reprehensible conduct recited in the order to show cause, and which will hereafter appear, arose from a bankruptcy proceeding pending in the United States District Court, Southern Division, Northern District of California, which petitioner had engaged himself to institute and conduct to the procurement of the final order of discharge for an agreed fee. His clients, Victor Rose and Hilda Rose, husband and wife, had formerly conducted a copartnership business under the name of Rose Bros., and said copartnership being unable to meet its obligations, it was forced into insolvency by the petition of its creditors. The copartnership in the course of time received a final discharge, but later said Victor and Hilda Rose discovered that the order discharging the copartnership did not inure to their benefit as individuals, and they therefore petitioned to be adjudged bankrupts. It is in this proceeding that the petitioner was employed. The committee found, and the evidence amply sustains the finding, that petitioner agreed to put both individuals through insolvency upon payment to him of the sum of $200, petitioner herein to pay the costs of both proceedings. With the intent of salvaging as much as possible of said sum, which would ordinarily have been paid on account of costs, petitioner herein advised said petitioners in bankruptcy to take the paupers' oath. In such cases the clerk's fee, in the sum of $30 for each proceeding, is not exacted. This fee, however, in the absence of the filing of said oath, is payable upon filing the petition and schedules. A fee in the sum of $12.50 is necessary in each case to take care of the publications and expense of calling the first meeting of creditors, which must be paid in every case. The petitioner, who was to be paid $50 at the time of employment, $50 at the time of the first hearing of creditors, and $100 upon the making of the orders of discharge, paid only the fees which must be paid in all cases, to wit, $12.50 in each case for expenses of calling of the first meeting of creditors, and none other, until it subsequently developed that he had received his second installment of $50 on account of his agreement with his clients. The petitioner in bankruptcy is required to answer under oath in his schedule an interrogatory as to what sum or sums have been paid to counsel, and to whom for services rendered in the bankruptcy proceedings. The answers given to said questions in each schedule was, "None." The value of such information for the just administration of the bankrupt's estate is obvious. Besides, the payment of a fee to an attorney is material to and an important element for consideration in determining whether or not petitioner is entitled to have his petition and schedule filed without the payment of said clerk's filing fees.

At the first meeting of creditors, held April 28, 1930, interrogatories propounded to Victor Rose developed the fact that he had, contrary to the averment contained in his schedule, paid petitioner herein before or at the time the petition in bankruptcy was filed, to wit, April 4, 1930, the sum of $50, and again on or before the time said meeting of creditors was held he was paid an additional sum of $50. Upon the development of these facts petitioner herein, on the same day and after said discoveries were made, paid to John O. England, clerk of the bankruptcy court in which said matters were pending, the sum of $50, $25 of which was applied to the credit of each matter, thus still leaving a balance of $5 due on account of each filing charge.

Petitioner herein made no statement under oath at the hearing of the proceeding taken against him, and argues in his brief that he did not make up the bankrupt's schedules, but that they were prepared by one of said bankrupts, Victor Rose, and his daughter, and he should not be held accountable for their inadvertence. The petitions and schedules were in the possession and care and under the scrutiny of the petitioner herein, and he caused a notary public to affix his jurat and seal to the paupers' oath in the absence of and without obtaining the personal acknowledgment of the alleged affiants, and likewise as to the petitions and schedules filed upon the representation that said oath in forma pauperis had been duly administered. That such a concatenation of significant events could have escaped the attention of counsel in his investigation and preparation appears exceedingly improbable, and it would not be surprising if the examining board in its consideration of the accusations on their merits gave but little, if any, weight to such a defense offered in avoidance of indisputable facts.

Petitioner in his brief intimates that besides the two $12.50 cost items and the $50 payment on account of filing fees other sums were paid out by him for notarial fees and on account of other costs. The notary was a witness in the proceeding, but he was not asked by petitioner whether he had been paid anything on account of notarial fees, and no showing was made at the hearing that any other sums had been paid by him for any purpose whatsoever.

We have read the evidence in the case carefully, and we are of the view that no wholesome purpose would be served by an analysis of the same. Petitioner has not met the issue as squarely in his brief as the importance of the charges seems to merit, but seeks in a somewhat caustic style to minimize its accusatory effect. He seems to be laboring in the belief that the governors of the State Bar of California and those who have anything to do with its machinery are plotting his undoing. As an illustration, he points to the proceeding Barton v. State Bar, 209 Cal. 677, 289 P. 818, wherein said State Bar recommended his suspension for a period of three months for the violation of rule 2, Rules of Professional Conduct of the State Bar, which prohibits the solicitation of employment by advertisement, and this court substituted in lieu of said recommendation a reprimand for his misconduct. We see no evidence from our examination of the record that there exists the slightest grounds for the apparent belief that any one of the fifteen or more of his brethren in the profession who compose the committee has any purpose or intent to oppress petitioner or to deal unjustly with him. It rather appears that petitioner denies the right and resents the effort of the State Bar to regulate the practice of the law on the theory that all laws which purport to confer such powers are invalid for reasons which have been argued over and over to this court with the result that the bar acts have been upheld.

[1, 2] The policy of the acts is something with which we are not concerned, that being a matter which rests largely with the will of the lawyers of the state to remedy if in their judgment there exists any need of change. It is our duty to enforce the law and impose such penalties as will bring about a compliance with the rules as they have been made by competent authority.

The local administrative committee found the accused guilty of the first offense charged and herein set out, and also guilty of a violation of the provisions of sections 278, 282, and 287, Code of Civil Procedure, and recommended as disciplinary action that he be suspended from the practice of the law for a period not less than three months. The matter coming regularly before the governors of the State Bar, that body, on August 14, 1930, adopted the findings of said local administrative committee and recommended to this court that the accused be disbarred from the practice of the law in the state of California.

Upon a full consideration of the matter, this court is of the view that a suspension from the practice of the law as defined by the decisions of the appellate courts of this state for a period of six months would not be disproportionate to the misconduct herein reviewed. It is made the order of this court that he is hereby suspended from the practice of the law in all the courts of this state for said period of six months, said suspension to become effective thirty days from the service of notice of the within order, said service to be made upon him by the clerk of this court by means of the United States registered mail.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.

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213 Cal. 287

CARLSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14230.

Supreme Court of California.
July 30, 1931.

Rehearing Denied Aug. 27, 1931.

1. Landlord and tenant 🔑18(2).

Testimony as to inception of ambiguous agreement and parties' understanding and subsequent practical construction thereof *held* competent on question whether it was lease or employment contract.

2. Master and servant 🔑417(7).

Supreme Court cannot disturb Industrial Accident Commission's finding, supported by evidence with reasonable inferences therefrom, that deceased was employee, not tenant.

3. Master and servant 🔑405(2).

Evidence *held* to justify Industrial Accident Commission's finding that deceased was employee, not tenant.

4. Master and servant 🔑361.

Provision of purported lease that lessee should obtain workmen's compensation insurance *held* not to show that he was tenant, rather than employee (St. 1917, p. 858, § 30 (a), as amended by St. 1929, p. 1167, § 1).

> The provision was inserted by laymen, and lessee allowed his policy to lapse, and lessor took out policy in reliance on representations of insurer's district manager to officers and members of fruit growers' association that ranch owners were proper parties to take out insurance.

In Bank.

Proceeding under the Workmen's Compensation Act by Belle Cecelia Rodgers and another to recover compensation for the death of Manuel Rodgers, employee, opposed by Addie Carlson, employer, and the Columbia Casualty Company, insurer. To review an order of the Industrial Accident Commission awarding compensation, the employer and insurer bring certiorari.

Award affirmed.

Superseding opinion of District Court of Appeal in 294 P. 399.

R. P. Wisecarver and Redman, Alexander & Bacon, all of San Francisco, for petitioners.

Edward O. Allen and George C. Faulkner, both of San Francisco, for respondents.

PER CURIAM.

This is a petition to review an award of the Industrial Accident Commission. On February 13, 1930, Manuel Rodgers was killed while blasting trees on a fruit ranch owned by Mrs. Addie Carlson. His wife and daughter applied for a death benefit, and the commission found that they were wholly dependent upon him. The commission also found that Rodgers died from injuries sustained in the course of and arising out of his employment, and made an award in the sum of $5,150. The petition is by Mrs. Carlson and Columbia Casualty Company, her insurance carrier. It is claimed that Rodgers was, at the time of his death, not an employee of Mrs. Carlson, but a tenant under a lease given by her.

A written instrument, executed by Mrs. Carlson and Rodgers, was introduced in evidence. This instrument, it is contended, is in form a lease and conclusively establishes the status of Rodgers as a tenant. There is no question but that it contains language suggestive of a lease. It commences with the statement that "in consideration of the covenants and agreements herein contained * * * the said Mrs. Addie Carlson does hereby lease and farmlet unto the said Manuel Rodgers, for a term of five (5) years * * * her orchard." It further speaks of "the premises leased herewith"; and it contains an agreement by the party of the second part "that he will not let * * * the premises leased hereby, without first getting the written consent of the party of the first part." It also provides that, upon violation of its terms, the party of the first part "may then at her option terminate this lease." However, the use of such terminology is not conclusive. The instrument does not use the term "rent"; it provides that the party of the second part shall "occupy and work the premises" and "employ a sufficient number of good and skillful farm-hands" to do the work; the party of the first part agrees to furnish materials and equipment; one-half the net proceeds of the crop is to be paid by the party of the first part to the party of the second part; and the party of the second part is subject to supervision to an extent which suggests that he was employed as a foreman to manage the ranch. The ambiguity in this document requires careful construction, and the effect of its provisions is of more importance than the manner of their statement.

[1] Examining those provisions, we find several which establish such an extensive control by Mrs. Carlson and her agents over the activities of Rodgers that, were they taken alone, there would be little doubt that the relationship was that of employer and employee. Under these circumstances, it becomes necessary to interpret, and, if possible, to reconcile the provisions. This the commission proceeded to do; and to that end testimony was taken to show the inception of the agreement, the understanding of its purport by the party who drafted it and the various parties concerned with it, and the practical construction thereof by such parties in their subsequent acts. The competency of such evidence cannot be questioned. As the court said in Luckie v. Diamond Coal Co., 41 Cal. App. 468, 478, 183 P. 178, 182: "We do not think that the relation of master and servant, and none other, is conclusively established by the written contract of employment. But even if it were, that would not prevent the parties from changing that contractual relation and establishing another. Where the parties to a written contract of employment, *by mutual consent inferred from their subsequent conduct*, have modified their contract and have acted upon it as thus modified, it is valid, in the modified form, to the extent and during the period it was so acted upon and carried out. As between a third party and either party to the contract, such change or modification unquestionably could be shown by parol. In an action between a party to a contract and a third party, the rule that parol evidence cannot be received to contradict or vary a written contract does not apply, as the estoppel on which the rule rests must be mutual, and, since the third person is not bound by the contract as written, neither is his adversary in the action. * * * Accordingly, it has been held that, in an action of this character, while, prima facie, the relation of the parties to a written contract of employment is that which is expressed by the terms of their writing, nevertheless, in order to determine their true relation, such contract should be considered in view, not only of the *circumstances under which it was made*, but of the *conduct of the parties while the work is being performed*." (Italics ours.) See, also, Tennant v. Wilde, 98 Cal. App. 437, 277 P. 137.

[2] The conclusion of the commission, as we have said, was that Rodgers was an employee engaged to produce a crop and receive his compensation in the form of a share of the profits. Petitioners, in attacking this conclusion, assert that the issue in this case, and the only issue, is whether the *instrument* in question is a lease. But the real issue, as we have indicated, is whether the *relationship* of the parties was that of landlord and tenant, or employer and employee. In determining that question, the commission should naturally look first to the agreement; but the language of the agreement was sufficiently uncertain to call for construction, and the acts of the parties were such as to justify the consideration of extrinsic evidence. Hence our inquiry cannot be restricted to the question whether this written instrument was a lease or a contract of employment. The question before us is whether there is any evidence to support the finding of the commission that Rodgers was the employee of Mrs. Carlson. If the record contains evidence which, coupled with reasonable inferences, offers some support for the finding, we have no power to disturb it. Hillen v. Industrial Accident Com-

mission, 199 Cal. 577, 250 P. 570; Union Oil Co. v. Industrial Accident Commission (Cal. Sup.) 295 P. 513; Galè v. Industrial Accident Commission (Cal. Sup.) 294 P. 391.

[3] The record shows that Mrs. Carlson, who lived in San Francisco, owned a fruit ranch of some forty acres, near Newcastle, Cal. She was a member of the Newcastle Fruit Growers' Association, which acted as her agent in connection with her ranch property. Some time in 1927 she had a conference with Rodgers, C. G. Werner, manager of the association, and George C. Henny, its field man. At this conference an agreement was reached between Mrs. Carlson and Rodgers, and Werner drew up the document, which we have discussed, to embody the terms of that agreement. Neither of the parties thereto was represented by counsel, and Werner was not an attorney. This in itself suggests that the strict legal significance of the terms used in the instrument should not be permitted to prevail over the intention of the parties as disclosed by the evidence.

Of the various elements which tend to show employment, the most significant in all cases is that of control; and there is abundant indication in this case, both in the instrument itself and in the testimony, of an authoritative control contemplated and exercised by Mrs. Carlson and her agent, the association, over the work of Rodgers. The second paragraph of the agreement provides "that all work of every description shall be done under the *supervision* of the party of the first part, her agent or representative, and *in strict accordance with her wishes, ideas, and instructions,* and the different lines of work must be carried out in their proper time and season, *as directed* by the party of the first part." (Italics ours.) Werner, who drew the agreement, testified that the association, as agent of Mrs. Carlson, "had power to go in there and tell him what lines of work to perform at certain times." With respect to the above-quoted provision, Werner stated that Rodgers "had a thorough understanding of that paragraph, and many times he would come in and ask us for advice or instructions on certain things and we would give it to him, and other times if it was something that was rather doubtful we would take it up with Mrs. Carlson, personally, and with our field man." He testified further as follows:

"Q. Did you have the power under the provisions of this agreement to tell Rodgers how to do his work and when to do his work, and whether to do it at all? A. Yes, sir.

"Q. You had full power under those provisions? A. Yes, sir.

"Q. Did you have power under that provision to tell Rodgers to quit work altogether? A. Well, of course, I suppose in one way, but I would not do that without first taking it up with Mrs. Carlson. If she told me, I certainly would."

Henny, fieldman for the association, testified that it was his duty to supervise the operation of the ranches of owners who were away, and to see that they were properly managed; that he had such powers in connection with the Carlson ranch; that with respect to Rodgers, he had the right to direct "the work that he had to do, and when to do it in regard to picking, spraying, plowing and all other necessary operations in conducting the ranch and making sure it was carried out." He stated that Rodgers consulted him, and that he instructed him in his work. He further testified as follows:

"Q. Suppose if you had given him an order to respray a ranch, to respray this particular ranch and he had refused to do it, what were your powers? A. I would simply go in there with men and do the work over his head."

Certainly this was evidence of a type of control normally to be exercised only by an employer.

The other factor which we deem of importance is the manner in which Rodgers was to receive the reward for his labors. We find nothing in the instrument or in the rest of the record which indicates that he had title to the crops or any part thereof, without which he could hardly be deemed a lessee. The agreement provides: "All of the fruits produced upon the premises * * * must be picked and packed * * * according to the standardization rules and delivered to the Newcastle Fruit Growers' Association at its shipping house in Newcastle *for the account of and in the name of the party of the first part.*" Any attempt by the party of the second part (Rodgers) to sell any of the fruit without the written consent of the party of the first part is made grounds for termination of the agreement. It is finally provided that the net proceeds from the sale of the fruit shall be equally divided between the parties, "the party of the first part hereby agreeing to account for and *pay to the party of the second part his proportion of the net proceeds.*" (Italics ours.) It is a reasonable inference from these provisions that the ownership of the crop was to remain in Mrs. Carlson, who had previously, by becoming a member of the association, contracted for its sale through the association; and that, upon the sale by her of the crop, she would pay compensation to Rodgers measured by one-half the net proceeds.

Another provision of the contract authorized Mrs. Carlson's agent, the association, to advance to Rodgers "from time to time a reasonable amount for labor." Mrs. Carlson testified that this provision was included so that Rodgers could get money to pay the help which he would have to hire; that she thought she was responsible for such payments; that she had agreed with Rodgers to furnish the money for this purpose, and had guaranteed to pay for *his labor* in the event of a failure of the crop.

It also appears that various materials and supplies, such as a tractor, powder for blasting, etc., were obtained from the association under the terms of the agreement, and were charged by the association to Mrs. Carlson's account. Henny testified that they were not to be paid for by Rodgers, but were deducted from Mrs. Carlson's share of the proceeds.

The foregoing discussion leads to the inevitable conclusion that there was evidence before the commission upon which it might, with the aid of permissible inferences, find that the relationship of employer and employee existed between Mrs. Carlson and Rodgers. That is all that we are called upon or permitted to decide. It may be conceded that the document signed by the parties contains many provisions characteristic of a lease, and also that a consideration of the document itself, without other evidence, might have led to a contrary result. We do not state these provisions in detail. It is unnecessary to do so because their existence is undisputed and their effect is clear. Admittedly they created a substantial conflict in the evidence. The commission has resolved that conflict in favor of the applicants for the award. The only legal question presented to us is whether the evidence of control, title to crops, and the other factors are sufficient to justify the finding of employment. We think they are, and authority is not lacking for our conclusion. See Hardeman v. Arthurs, 144 Ark. 289, 222 S. W. 20; Chickasha Gas & Electric Co. v. Linn, 80 Okl. 233, 195 P. 769; 1 Tiffany, Landlord and Tenant, 185, § 20; 2 Thompson on Real Property, 95, § 1031.

[4] Petitioners make much of the fact that the instrument contained an agreement on the part of Rodgers to obtain workmen's compensation insurance. They say that to exact such an agreement from an employee would be a misdemeanor under section 30(a) of the act (St. 1929, p. 1167, § 1), and that it is clear that the parties fully understood that the relationship was that of lessor and lessee. Such a provision inserted by laymen is of course no more conclusive than the other language to which we have referred. But in this connection the record contains matter of considerable interest. It appears that some time after the instrument was executed C. W. Smith, district manager of Columbia Casualty Company, petitioner herein, solicited the members of the association to embark upon a plan of group insurance, and represented to the officers and members thereof, and to others, that the proper party to take out the insurance was the owner of the ranch. Many of the ranches were operating under agreements similar to the Carlson-Rodgers contract, and a number of policies were secured in reliance upon Smith's advice. Acting upon it, Rodgers allowed his policy to lapse, and Mrs. Carlson at that time took out coverage for herself. Werner testified that the parties considered the paragraph on insurance to have been stricken out from that time on. We agree with petitioners that the representations by Smith would not change the legal status of the parties, but the subsequent actions of the parties pursuant to their understanding reached at that time causes the insurance provision to lose its significance as an indication of that relationship.

Counsel for petitioners assert that this case presents the question whether a member of a growers' association, bound by contract to produce and deliver fruit in accordance with its requirements, can make a valid lease of a ranch. That is not the question at all. There is nothing to prevent a party in the situation of Mrs. Carlson from leasing a ranch. But she cannot reserve in a so-called lease the rights of an employer without becoming liable as one. It is the nature of the agreement and not its formal appearance which is controlling; and while, in the instant case, the proper characterization of the relationship of the parties is a difficult task, we think the finding and award of the commission is supported by the evidence.

The award is affirmed.

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213 Cal. 295

CARLSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14231.

Supreme Court of California.

July 30, 1931.

Rehearing Denied Aug. 27, 1931.

Master and servant ⚷405(2).

Evidence *held* to sustain Industrial Accident Commission's finding that compensation claimant was employee of one against whom compensation award was made.

> There was evidence that claimant was hired by ranch foreman under agreement requiring him to employ sufficient number of farm hands to do work and paid wages through advances to such foreman by fruit growers' association, of which ranch owner was member, and latter testified that she considered herself responsible for wages of laborers on ranch.

In Bank.

Proceeding for compensation under the Workmen's Compensation Act by Manuel

Gomez, employee, opposed by Addie Carlson, employer, and the Columbia Casualty Company, insurer. To review an order of the Industrial Accident Commission awarding compensation, the employer and insurer bring certiorari.

Affirmed.

Superseding opinion of District Court of Appeal in 294 P. 403.

R. P. Wisecarver and Redman, Alexander & Bacon, all of San Francisco, for petitioners.

Edward O. Allen and George C. Faulkner, both of San Francisco, for respondents.

PER CURIAM.

This proceeding arises out of the same facts as Carlson v. Industrial Accident Commission (Cal. Sup.) 2 P.(2d) 151, this day decided. In that case we upheld the finding of the Industrial Accident Commission that the deceased, Manuel Rodgers, was the employee of Mrs. Carlson, and sustained the award to his dependents. The respondent Manuel Gomez was hired by Rodgers in accordance with his authority and duty under the terms of the agreement with Mrs. Carlson, which required him to "employ a sufficient number of good and skillful farmhands" to do the work. Gomez was the only employee thus hired. In the explosion which killed Rodgers, Gomez was seriously injured. The parties have stipulated that the evidence taken in the Rodgers Case shall be applicable to this proceeding. The review of that evidence, which we have heretofore made, leads to a similar result in this case. The evidence supports the inference that Gomez was employed by Rodgers, who was acting as Mrs. Carlson's foreman. His wages were paid through advances made to Rodgers by Mrs. Carlson's agent, the Newcastle Fruit Growers' Association; and she testified that she considered herself responsible for the wages of laborers hired to work on the ranch.

The award is affirmed.

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213 Cal. 389

BABCOCK et al. v. C. W. CLARKE CO. et al.

Sac. 4444.

Supreme Court of California.
Aug. 15, 1931.

Rehearing Denied Sept. 14, 1931.

1. Waters and water courses 🔑217.

Whether water appropriator is in charge of public use depends on whether he has expressly or impliedly held himself out as engaged in business of supplying water to public generally.

2. Waters and water courses 🔑217.

Evidence warranted judgment that water appropriators were in charge of public use and had dedicated water right to plaintiffs' lands.

Evidence showed that the water appropriators referred to had intention to divert waters into certain canal for agricultural and domestic purposes, and that they had carried out this intention continuously for 26 years.

3. Dedication 🔑41.

Court should be cautious in declaring that property right has been dedicated to public use.

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by A. Babcock and others against the C. W. Clarke Company and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Rehearing denied; LANGDON, J., dissenting.

Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for appellants.

N. J. Barry, of Susanville, and Oscar Gibbons and A. K. Wylie, both of Alturas, for respondents.

PRESTON, J.

Upon this appeal an attack is made upon the judgment as a whole; hence our discussion need not deal with any provision thereof in particular. The sole question is the sufficiency of the evidence to show a dedication to plaintiff's lands of a water right. The action is to have such dedication declared, the right, when found to exist, measured and the service theretofore existing restored by writ of mandate. Estoppel on the part of defendants to deny dedication is also pleaded. The answer puts in issue both the question of dedication and estoppel. The court below heard the cause and gave judgment for plaintiffs as prayed. This appeal by defendants on the full record followed.

Plaintiffs are landowners in the southern part of Big Valley in Lassen county, owning in the aggregate tillable acreage, susceptible of irrigation, and actually heretofore irrigated, of some 600 acres. These lands are of a semiarid character, very productive under irrigation, but of small value without it. Defendant Clarke corporation owns in Modoc and Lassen counties about 4,500 acres of swamp land, over and across which Ash creek, rising in the Warner mountains in Modoc county, flows westerly through a natural channel and finds its way in its march toward the sea, into said Big Valley and later into the Pit river. The Clarke lands are all riparian to this stream, but in a state of nature they are too swampy to cut hay crops therefrom, and drainage is necessary if this practice is to be employed instead of using them as grazing areas.

Accordingly, in 1897 or 1898, C. W. Clarke and Fredk. Cox, the immediate predecessors in interest of said corporation, entered upon section 27, township 39 N., R. 8 E., M. D. M., and upstream on said Ash creek, a distance of about three-fourths of a mile from their lands, established headgates, and constructed from that point, on an irregular course, a canal several miles in length, sixteen feet in width at the bottom and three feet in depth, meeting the Pit river several miles below the point where the said stream naturally finds said river. Rights of way by deeds for the canal were secured from the various property owners whose lands were traversed thereby, many of whom were predecessors of some or all of plaintiffs. An outlay of some $7,000 was made, and some several months were consumed in developing these diversion works. At the point of intake to said canal, said Clarke and Cox duly posted a notice of appropriation on July 29, 1898, and recorded it in the manner prescribed by law. This notice is not only the required notice of appropriation then prescribed by law, but it reveals the intention of the appropriators to divert 7,000 inches of the stream and thereafter sell the waters to the public. This notice is in words and figures as follows: "Notice is hereby given, that we, the undersigned, claim seven thousand inches of the waters flowing in Ash Creek measured under a four-inch pressure at the point where this notice is posted, for the uses and purposes hereinafter specified. We intend to divert said water from said creek by means of headgates upon the northeast quarter of the southeast quarter of section 27, Tp. 39 N., R. 8 E. M. D. M., and into a ditch 25 feet wide and 5 feet deep, running from said headgates in a southerly direction to and upon all of the lands between said headgates and the lower end of Big Valley, and to such other places as may hereafter be selected, there to be sold and used for agricultural, domestic, and mechanical purposes. We intend to use said water each year upon lands other than those above described, for irrigation until the season for irrigation thereon shall have passed, and thereafter we intend to divert said water into said ditch as hereinafter specified, and sell and distribute the same as aforesaid. Dated July 29, 1898. Fredk. Cox C. W. Clarke by Fredk. Cox."

Following completion of said canal in November, 1897, the predecessors of said Clarke Corporation diverted 1,000 inches of water measured under a 4-inch pressure, and began in 1898 supplying the lands owned by plaintiffs with the quantities of water necessary for their irrigation in order to make them productive at an annual charge of $1 per acre. The waters were diverted into said canal about the 20th of June of each year and kept therein until early September, after which the headgates were closed and the waters returned to the natural stream bed, with the exception that a small amount of water was allowed to continue down said canal for domestic use and stock watering by said ranchowners. This practice was continued by defendant Clarke Corporation after it succeeded to said swamp area for more than twenty years, to wit, until the season of 1924. In that year defendant Menzel Company, a corporation, having leased said swamp lands, and not desiring to cut crops of hay therefrom, intentionally omitted to divert the said stream into said canal, and thereupon plaintiffs were deprived of their customary water supply, and this dispute arose, which has apparently continued since said time.

[1] The above facts being undisputed, the question is: Does this showing yield sufficient evidence to sustain the finding of the court below that the defendants are in charge of a public use and a water right has been dedicated by them to the lands of plaintiffs of such strength and character that it entitles them as of right to continue to receive said water service? "The test to be applied is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them." Van Hoosear v. Railroad Commission, 184 Cal. 553, 554, 194 P. 1003, 1004.

[2] Examination of this notice of appropriation will disclose that it was not the intention of the appropriators to abandon the water after the same was diverted into said canal, but, on the contrary, it was their purpose to retain dominion over it and supply all that portion of the public, particularly in Big Valley, as were so situated as to avail themselves of the water supply afforded by said canal. The intention is specific that the waters are "to be sold and used for agricultural, domestic and mechanical purposes." The period of the year at which such sale was to be made was specified, and it was specified that, after use on the swamp area, the waters were then to be diverted into said canal and sold and distributed as theretofore announced. This intent, coupled with the actual carrying out thereof for a continuous period

of twenty-six years, makes out a clear case of amply sufficient evidence to warrant the conclusion reached by the court below.

[3] There is no basis for the contention that these were waste waters nor for the contention that the charge made to the ranchowners was merely nominal and for the purpose of preventing plaintiffs from acquiring a vested interest therein. In coming to this conclusion, we are not unmindful of the caution with which we should proceed to declare that a property right has been dedicated to a public use, as enjoined by such language as this: "'To hold that property has been dedicated to a public use is "not a trivial thing" (San Francisco v. Grote, 120 Cal. 60, 65 Am. St. Rep. 155, 41 L. R. A. 335, 52 P. 127), and such dedication is never presumed "without evidence of unequivocal intention" (Niles v. City of Los Angeles, 125 Cal. 572, 58 P. 190). * * *'" Allen v. Railroad Commission, 179 Cal. 68, 85, 175 P. 466, 473, 8 A. L. R. 249. See, also, Van Hoosear v. Railroad Commission, supra, and Richardson v. Railroad Commission, 191 Cal. 716, 721, 218 P. 418. We are entirely satisfied, however, that the facts before us here remove this cause from the zone of influence exerted by those cases.

This conclusion makes it unnecessary to discuss the question of estoppel.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

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213 Cal. 226

ADVANCE RUMELY THRESHER CO., Inc., v. McCOY.

S. F. 13463.

Supreme Court of California.

July 30, 1931.

As Modified on Denial of Rehearing Aug. 27, 1931.

1. Sales ⇨447.

Finding that seller of harvester breached warranty to furnish repairs and keep on hand adequate supply of repair parts *held* not fatally inconsistent with finding that buyer elected to rescind.

> Finding that seller breached warranty to furnish repairs and keep on hand adequate supply of repair parts cannot as matter of law be said to be equivalent to finding that buyer elected to retain harvesters, in face of express finding that buyer elected to rescind.

2. Sales ⇨288(3).

Retention by buyer at seller's instance to give seller opportunity to remedy defects does not operate as waiver by buyer of benefits of warranty.

3. Sales ⇨441(1, 3).

Evidence *held* to support finding of breach of warranty in contract for sale of harvesters, and that opportunity given seller to remedy defects did not constitute waiver of buyer's right to rescind.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Advance Rumely Thresher Company, Inc., against George W. McCoy. Judgment for defendant, and plaintiff appeals.

Affirmed.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for appellant.

F. W. Docker, of Fresno, for respondent.

PER CURIAM.

This is an appeal from a judgment in favor of the defendant on his cross-complaint in an action to recover on two promissory notes given to secure payment of the purchase price of two 16-foot cut Hillside combined harvesters delivered to the defendant by the plaintiff. The defendant by answer denied the indebtedness, and by cross-complaint sought to have the notes canceled on the ground of fraud and deception, alleged a cause of action based on breach of warranty, and prayed for a judgment of rescission and damages.

The defendant is the owner of a large acreage of farm land near Helm in Fresno county, on which is raised principally wheat and barley. During March, 1927, the local agents of the plaintiff, which has its factory and principal office at La Porte, Ind., opened negotiations with J. E. O'Neill, the defendant's representative at Helm, for the sale to the defendant of Rumely harvesters. After the plaintiff's agents had looked over the defendant's acreage and after further conferences, on March 28, 1927, the defendant signed a printed order for two harvesters of the type described. In the printed form of order, signed by the defendant, there was inserted the sentence: "These machines are guaranteed to give complete and efficient service under existing conditions in this locality." The order contained the further provisions that the machinery is warranted to be well made and of good material, and, with proper use, capable of doing as good work as any other machine of the same kind, size, and rated capacity, working under like conditions; that the machines are guaranteed against all defects in material or workmanship, and such defects shall be repaired free of charge for the year 1927, and that the vendor will carry adequate supply of repair parts with the dealer. There was also the provision that the "purchaser shall not be entitled to rely upon any breach of above warranty or to rescind this contract or to any claim or setoff against the vendor because of any breach, unless: (a) Notice of the defect or breach, particularly describing the same and specifying the time of discovery thereof, is given by registered letter addressed to vendor at its head office, posted within four days after such discovery; (b) such defect appears within ten (10) days after the first use of the goods; (c) the vendor fails to remedy such defect or breach by substitution of parts or otherwise within a reasonable time after receipt of such notice, which substitution it shall have the right to make. Purchaser shall render necessary and friendly assistance to vendor in and about remedying the defect. If vendor fails to remedy the defect purchaser shall have the right immediately to return the defective goods or parts in as good condition as when received by him to the place from which they were received and shall thereafter give vendor immediate written notice of such return by a registered letter addressed and mailed to vendor at its head office." The contract also contained the provision that there are no representations, warranties, or conditions, express or implied, statutory or otherwise, except those contained in the written agreement.

This order was sent to the plaintiff's principal office, but was rejected by the plaintiff's agents in Indiana because of the inclusion therein of the sentence warranting complete and efficient service under existing conditions in the locality. The evidence is not disputed that the terrain in the locality was extremely rough and uneven, but this fact is not shown to have been known to the plaintiff's agents in Indiana. Although no Rumely harvester had ever been used by any one in the vicinity of Helm and on terrain of the character existing there, nevertheless the plaintiff's local agents at Helm represented that the Rumely harvester, while under the existing conditions would be put to an extreme test, would do the work efficiently.

After further consultation with the plaintiff's local agents, at which the defendant and his agents with the exception of his representative O'Neill were present, and on April 16, 1927, the defendant signed the following certificate which was added to the previously signed offer: "This is to certify that the sentence 'These machines are guaranteed to give complete and efficient service under existing conditions in this locality,' is hereby accepted as null and void and having no part in the contract of March 28th, 1927, between the Rumely Thresher Company and Geo. W. McCoy, Los Angeles, California, for the purchase of two 16 foot Cut Combine Harvesters, Hillside Type. It is understood that this in no way modifies nor changes the rest of the contract as written."

Pursuant to the contract as finally executed, the harvesters were delivered at the railroad station at Helm on May 5, 1927, and on May 6th the defendant executed and delivered the notes in suit. One of the harvesters was immediately taken to Mendota, a distance of about 20 miles, where operations were commenced to cut the grain on 500 acres there owned by the defendant. The harvester developed defects, began immediately to give trouble, breakdowns occurred, and the machine was continuously laid up for repairs. It also appears that parts could not be obtained from the local dealer, that some parts were taken from the harvester standing at Helm, and others had to be procured elsewhere. About May 27, 1927, the defendant by telegram and registered letter notified the plaintiff at its head office in Indiana that the harvesters were not capable of doing the work as represented or warranted nor as agreed by its representatives, and that he elected to rescind the contract and return the machines, to which no reply was made or received. Subsequently the plaintiff's agents made repeated unsuccessful attempts by reconstruction and repairs to put the harvester into satisfactory working condition. On June 9th, C. C. Clark, the plaintiff's local dealer, telegraphed to the plaintiff at La Porte as follows: "McCoy Farms machines apparently not able to work without continual breakdowns during past three weeks stop Has been necessary keep one machine laid up practically all time in order to furnish parts keep other running stop Sufficient supply parts have not been furnished stop. First service man not satisfactory second man furnished satisfactory but taken away and for more than week no company man on job stop Parts broken and ordered from San Francisco more than week ago not yet received stop Lost sale of third machine to Holt account lack service stop McCoy willing cooperate if machines can be made do satisfactory work at once willing carry out contract stop Under circumstances failure on part your company fulfill contract will mean loss of sale through no fault mine therefore will expect collect my commission stop Failure on your part acknowledge McCoy telegram or letter and further failure on part San Francisco office give immediate relief very unbusinesslike answer wire Helm C. C. Clark."

In the meantime, both harvesters had been moved to the Helm ranch, and thereafter two days were spent in an attempt to put them into serviceable condition, at the completion of which the plaintiff's agent stated to O'Neill that he was sure the harvesters would now do the work, and requested payment of the first note, then past due, to which O'Neill replied that, as the machines had given so much trouble, he desired first to try them for another week. The evidence is that the machines again immediately continued to break down, and on June 25, 1927, the defendant sent the following telegram to the plaintiff: "Referring to our conversation when in our office last, regret to advise your two combine harvesters continue to give much trouble during past week. Machines laid up for repairs more than half time. Have not harvested more than fifty acres with each machine during past week. Under circumstances we positively cannot accept. Suggest you advise if you desire continue use of machines with view of getting adjusted to do satisfactory work, which we do not now believe possible—or should we discontinue using same. McCoy Farms." No response was received to this telegram. The defendant purchased another harvester of a different make but similar in kind, size, and rated capacity as the Rumely, which was placed in operation in the fields in which the Rumely harvesters were attempted to be kept in operation. It clearly appears from the record that the third harvester gave efficient and satisfactory service under the same conditions under which the Rumely harvesters continued to break down. The Rumely harvesters were kept in the fields until after the commencement of the action, but attempts to operate them were abandoned before the end of the harvesting season, and the third machine was used to complete the harvesting of the crop.

On July 7th, the present action was brought to recover on the promissory notes which represented the purchase price of the two Rumely harvesters. After a trial on the issues framed by the pleadings, the court found the facts in substance as hereinbefore sttaed, and upon which it concluded that the plaintiff had breached its agreement to furnish all necessary repairs free of charge and keep on hand an adequate supply of repair parts with the local dealer; also its warranty that said machines were capable with proper use of doing as good work as any other machine of the same kind, size, and rated capacity working under like conditions. The court further found that the plaintiff attempted to remedy the defects in said harvesters, but failed to do so within a reasonable time after notice, or at all. The court also found in favor of the defendant on the issues of fraud and deception, and rendered judgment accordingly.

The contentions made on this appeal are that the evidence does not support the findings; that the findings are inconsistent and do not support the judgment. The main portion of the briefs of the plaintiff is devoted to its contention that the evidence does not support the findings of fraud and deception either in the inception of the contract or in inducing the defendant to execute the certificate appended to the original offer. It may be held for the purposes of this case that the evidence is insufficient to support the findings of deception and fraud in respect to both of these phases. But this holding does not require or justify a reversal.

[1] The basis of the claim that the findings are inconsistent on the issue of breach of warranty and do not support the judgment is the contention that the finding that the defendant elected to rescind is directly in conflict with the finding that the plaintiff breached its contract to furnish free repair work and to keep on hand sufficient repair parts. The argument is that the latter finding infers a finding that the defendant elected to keep the harvesters and avail himself of the privilege offered by the agreement to furnish the repair work and parts; therefore that the inconsistent findings that the defendant elected to rescind the contract and that he elected to retain the harvesters and perform the contract cannot support a judgment of rescission and cancellation. The finding that the plaintiff breached its warranty to furnish repairs and to keep on hand an adequate supply of repair parts cannot as a matter of law be said to be equivalent to a finding that the defendant elected to retain the harvesters, in the face of the express finding that the defendant did elect to rescind. The findings are therefore not fatally inconsistent. Both may be true and the defendant be entitled to the rescission, if under the authorities and upon a proper construction of the contract he would be entitled to rescind for breach of warranty.

[2] It is contended that there is not sufficient evidence in the record to support the finding on the only remaining issue of breach of warranty entitling the defendant to a judgment of rescission, because the only conclusion which can reasonably be drawn from the evidence is that the defendant did in fact, by continuous possession of the harvesters to the time of the commencement of the present action, waive his right to rescind for breach of that warranty, and that the only cause of action, if any, left to him was the right to recover for damages for breach of the agreement to furnish repair work and keep on hand an adequate supply of parts. The answer to this contention is that the record clearly shows that the continued attempts, after repeated breakdowns, to place the harvesters in condition to perform the work for which they were designed either were at the instance of the plaintiff's agents or were with the combined efforts of the plaintiff and the co-operation of the defendant, as required by the terms of the contract. It has been held that retention at the instance

of the vendor for the purpose of giving the seller or his agent an opportunity to remedy defects does not operate as a waiver of the benefits of the warranty (Williams v. Bullock Tractor Co., 186 Cal. 32, 198 P. 780; Ventura Mfg., etc., Co. v. Warfield, 37 Cal. App. 147, 174 P. 382; Lichtenthaler v. Samson Iron Works, 32 Cal. App. 220, 162 P. 441; Sherman v. Ayers, 20 Cal. App. 733, 130 P. 163; Luitweiler, etc., Co. v. Ukiah, etc., Co., 16 Cal. App. 198, 116 P. 707, 712), and the terms of the contract indicate a recognition of that well-established rule of law, and the same was incorporated in the contract, we may assume, for the plaintiff's own benefit and protection. The record establishes that, each time the defendant gave notice to the plaintiff that he refused to accept the harvesters because of breakdowns and defects, the agents of the seller attempted to reconstruct and repair the machines in an endeavor to put them in a satisfactory condition so as to obtain an acceptance by the defendant. We cannot say on the record that the trial court was not justified under the authorities cited and under the terms of the contract in concluding that the evidence did not disclose such operation of the harvesters by the defendant as would constitute an acceptance.

[3] We are of the opinion that the record supports a finding of a breach of the warranty contained in the written contract, and that the opportunity given by the defendant to the plaintiff or its agents to remedy the defects in the harvesters did not constitute a waiver of the defendant's right to rescind. The findings on that issue are supported by the evidence, and in turn support the judgment.

Judgment affirmed.

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213 Cal. 382

THOMPSON v. PRICE et al.

L. A. 11275.

Supreme Court of California.

Aug. 14, 1931.

Appeal and error ⚿**1010(1).**

Findings supported by sufficient evidence will not be disturbed on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by W. F. Thompson against Emil Price, Murrel Price, and others. Judgment for plaintiff, and defendants named appeal. Affirmed.

Frank M. Smith, of Los Angeles, for appellant.

George B. Ross, of Los Angeles, for respondent.

SHENK, J.

This is an appeal from a judgment in favor of the plaintiff in an action to foreclose a mechanic's lien for architectural services rendered by the plaintiff in the matter of the construction of a residence pursuant to a contract between the defendant Emil Price, as owner, and one Harry E. Jones, as contractor.

The controversy centers about the question whether the plaintiff was regularly in the employ of the contractor, Harry E. Jones, as draftsman or otherwise, or was an independent contractor and one of the persons described by section 1183 of the Code of Civil Procedure as entitled to file a mechanic's lien.

The defendants base their appeal upon the contention that the evidence bears only the construction that the owner was not informed that the contractor intended to or did contract for the architectural services on said building; also that the plaintiff was not an independent contractor, but was a draftsman regularly in the employ of the contractor Jones and was not a contractor or architect within the meaning of section 1183 of the Code of Civil Procedure, which "provides, inter alia, that architects and all persons of every class bestowing skill or other necessary services to be used in the construction of a building are entitled to a lien, whether at the instance of the owner or of any other person acting by his authority or under him as contractor, and further that every architect having charge of the construction, either in whole or in part, of any building, shall be held to be the agent of the owner for the purposes of the lien law. It follows that the employment of plaintiff [who furnished the engineering designs for the building] by the architects is equivalent to his employment by the owner." Hornlein v. Bohlig, 37 Cal. App. 646, 647, 174 P. 697, 698.

The defendants in support of their contention quote portions of the testimony and point to inferences which, if drawn by the trial court and believed, would seem to uphold the position taken by them. But they do not quote all of the testimony bearing upon the point in controversy, nor have they apparently considered conflicting inferences which may reasonably be drawn from the evidence quoted by them and appearing in the record. On the other hand, the record contains evidence which sufficiently supports a conclusion that the defendant Emil Price knew that the contractor intended to and did let the contract for architectural services to the plaintiff for a consideration of 3 per cent. of the contract price; that the plaintiff contracted to perform such services as an independent contractor and was not an employee or draftsman or otherwise regularly in the employ of the contractor Jones.

The findings are supported by sufficient evidence.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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213 Cal. 277

LINDENBAUM v. BARBOUR.

L. A. 10704.

Supreme Court of California.
July 30, 1931.

1. Appeal and error 🔑930(1).

Verdict being for plaintiff, evidence most favorable to plaintiff must be taken as true upon appeal.

2. Automobiles 🔑171(4).

Statute gives right of way to driver first entering intersection, if traveling at lawful speed (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15).

3. Automobiles 🔑171(4).

General statute regulating right of way does not fix invariable rule to extent of permitting motorist to proceed across intersection with impunity, notwithstanding failure to stop at stop signal (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15; St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

4. Highways 🔑165.

Rule that power of local authorities to regulate traffic yields to general state laws is inapplicable, where same general law expressly makes local regulations paramount under certain conditions.

5. Highways 🔑165.

County supervisors *held* impliedly authorized to regulate right of way of vehicles at intersections of streets designated "boulevards" with streets properly posted with stop signs (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15; St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

> St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17, authorizes boards of supervisors to designate certain public highways as boulevards, and require that all vehicles shall be stopped before entering or crossing such boulevards, provided boulevards are clearly marked or signposted to give notice of such fact.

6. Automobiles 🔑244(36).

Finding that proximate cause of automobile collision was defendant's violation of ordinance requiring him to stop at stop sign before entering boulevard *held* justified, although defendant entered intersection first (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15; St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

7. Automobiles 🔑242(1).

In absence of question at trial as to validity of stop sign at boulevard intersection, plaintiff *held* not required to prove official authorization for erection of sign (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15; St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

8. Trial 🔑253(4).

Instruction that plaintiff, if establishing case as charged in complaint, would be entitled to damages *held* erroneous in not considering contributory negligence question.

> Court instructed jury that in deciding case they should take into consideration all facts and circumstances proven in case and all reasonable inferences that might be drawn therefrom, and that if, after so doing, they found that plaintiff had established her case as charged in complaint, jury should find damages in favor of plaintiff.

9. Automobiles 🔑246(23).

Instruction that contributory negligence to exonerate defendant must contribute "directly" and proximately to accident *held* erroneous in not considering that cause of injuries, although proximate, may be indirect.

10. Trial 🔑296(3).

Reference to negligence of plaintiff rather than plaintiff's driver *held* cured by other instruction.

> This error was corrected by court, inasmuch as in another instruction jury were instructed that if they found that collision was caused by recklessness, carelessness, and negligence of plaintiff's driver, their verdict must be for defendant.

11. Trial 🔑295(1).

Instructions must be considered as whole.

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Sarah Lindenbaum against L. P. Barbour. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Superseding opinion of District Court of Appeal, reported in 293 P. 829.

Culver & Nourse, of Los Angeles, and Swing & Wilson and Fred A. Wilson, all of San Bernardino, for appellant.

Duckworth & Harrison, of San Bernardino, for respondent.

PER CURIAM.

This action was instituted by plaintiff against defendant to recover damages for personal injuries sustained by her in a collision between an automobile in which she was riding, owned by her husband and operated by her twenty-one year old son, and an automobile owned and operated by the defendant. The jury returned a verdict of $2,500 in favor of plaintiff, and defendant has appealed.

The collision occurred at the intersection of Linden street and Foothill boulevard, in the county of San Bernardino, near the town of Rialto. Foothill boulevard is a public highway running in a general easterly and westerly direction, and intersects Linden street at right angles. According to the map of the intersection at which the accident occurred, Foothill boulevard is 82.5 feet in width with a concrete pavement 18 feet in width in the center thereof, and Linden street is 60 feet in width, and is improved with an oil roadway 12 feet in width in the center. A boulevard stop sign was erected at the northwest corner of the intersection. At the time of the accident, the car in which plaintiff was riding was proceeding across Foothill boulevard in an easterly direction and the defendant, approaching the intersection on Linden street from the north, was attempting to cross Foothill boulevard.

[1] There is a decided conflict in the evidence with reference to several factors of the situation, but the verdict of the jury being in favor of the respondent, the evidence most favorable to respondent must of course, be taken as true upon appeal. Julius Lindenbaum, the twenty-one year old son of respondent, who was driving the car in which respondent was riding, testified that he was driving along Foothill boulevard at about twenty-five or thirty miles an hour; that when he was about 60 feet from the west line of the intersection he first saw the appellant's car on Linden street approaching the intersection; that he reduced the speed of his car as he entered the intersection to fifteen miles an hour; that he expected the appellant to stop at the stop sign before entering the boulevard; that when he entered the intersection the front wheels of appellant's car were upon or just approaching the north edge of the paved portion of Foothill boulevard; that appellant did not stop his car opposite the stop sign; that in order to avoid the collision he slowed up and swerved to the right, but that the front left fender of his car came into collision with the right side of appellant's car just to the rear of the door, damaging both cars considerably, and injuring respondent. The following facts must therefore be taken as true: That both the driver of the respondent's car and the appellant were driving at a lawful rate of speed when they entered the intersection; that appellant was already within the intersection about 32 feet south of the northerly intersection line at the time respondent's car entered the intersection; and that appellant did not stop at the boulevard stop sign.

[2-4] Appellant contends that the judgment should be reversed for the following reasons: (1) The evidence does not establish negligence on the part of the appellant; (2) any negligence of the appellant was not the proximate cause of respondent's injuries; (3) the evidence establishes contributory negligence on the part of respondent's agent; and (4) the court erroneously instructed the jury to the prejudice of the appellant.

The first three grounds are predicated upon the theory that as appellant first entered the intersection, traveling at a lawful rate of speed, he was entitled to the right of way under section 131 of the California Vehicle Act, and that the negligence which was the true proximate cause of the accident was the failure of respondent's driver to yield the right of way to him.

Section 131 of the California Vehicle Act (Stats. 1925, pp. 398, 412, § 15), in force at the time of the accident, reads as follows: "Right of way. (a) When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed. (b) The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on said public highway."

This section of the California Vehicle Act has been uniformly interpreted as giving the right of way to the driver who first enters the intersection, providing he is traveling at a lawful speed. Keyes v. Hawley, 100 Cal. App. 53, 279 P. 674; Lipp v. Moon, 100 Cal. App. 618, 280 P. 710; Enz v. Johns (Cal. App.) 296 P. 115; Couchman v. Snelling (Cal. App.) 295 P. 845. Unless, therefore, some other provision of the law changed the rule, the appellant was correct in his assumption that he was entitled to the right of way and that a verdict of the jury predicated upon the theory that he was not entitled to it was erroneous.

It is to be noted, however, that at none of the intersections involved in these cases, was a stop sign maintained. We do not believe that the rule of the right of way as embodied in section 131 of the California Vehicle Act is an invariable rule to the extent that whoever reaches the intersection first thereby automatically secures the right of way and may with impunity proceed across the intersection upon the theory that, irrespective of whether or not he has gained the right of way by failing to stop at a stop signal, he is entitled to the right of way under the general law, and whoever fails to yield to him the right of way is guilty of negligence. We are of the opinion that the Legislature by section 145 of the California Vehicle Act (Stats. 1925, pp. 398, 414, § 17), gave recognition to the fact that, by reason of congested traffic conditions in certain areas, public safety and convenience may demand some additional regulation of the traffic not found in the state law, and, in order to provide for such elasticity in the traffic regulations, left with the local authorities the power to regulate traffic at certain intersections when local conditions justified it.

Said section 145 of the California Vehicle Act, in so far as it is pertinent to this discussion, reads as follows: "Powers of boards of supervisors and legislative bodies of cities. Nothing in this act contained shall be so construed as to prevent boards of supervisors in their respective counties and the legislative bodies of incorporated cities from providing by ordinance for the regulation of traffic by means of traffic or crossing officers or semaphores or other signaling devices on any portion of the public highways where the traffic is heavy and continuous, nor from designating certain public highways as boulevards and requiring that all vehicles shall be stopped before entering or crossing such boulevards, provided all such boulevards are clearly marked or signposted to give notice of such fact. * * *"

Pursuant to this provision of the California Vehicle Act, the board of supervisors of San Bernardino county passed an ordinance, designated as ordinance No. 261, for the purpose of regulating traffic along and upon certain boulevards in said county. The pertinent parts of said ordinance are as follows:

"Ordinance No. 261. Adopted November 9, 1925; effective December 9, 1925. An Ordinance of the County of San Bernardino regulating motor traffic upon certain highways in the County of San Bernardino and fixing a penalty for the violation thereof.

"Section 1. That * * * all motor vehicles driven upon Foothill boulevard shall have the right of way over vehicles driven on Riverside avenue, Etiwanda avenue, Turner avenue, Archibald avenue and Hellman avenue, * * *

"Section 2. And that all motor vehicles being driven on said * * * Foothill boulevard, * * * shall have the right of way at all intersections of all other roads not herein mentioned when a stop sign is maintained at the side of the roadway near such intersection.

"Section 3. That any and all persons driving and operating motor vehicles and approaching said * * * Foothill boulevard * * * at the intersection hereinabove mentioned in section 1 hereof, and at other intersections upon which a stop sign is maintained shall come to a full stop at a point outside the boundary line of said highways and within 30 feet thereof, and shall not again move until the intersection being approached is clear of traffic and there is sufficient space clear of motor vehicle traffic on either side of said intersection to permit such persons so approaching said intersections to cross same without in any way interfering with the traffic upon said highways so approached as aforesaid."

It is at once apparent that the right of way provisions in this ordinance are in direct conflict with the provisions of section 131 of the California Vehicle Act in force at the time of the accident, in that it gives the right of way to vehicles proceeding along Foothill boulevard at certain specified intersections irrespective of whether or not such vehicles reach the intersection first. And while it is the general rule as stated in Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172, and reaffirmed in Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334, that the power of local authorities over the regulation of traffic upon the streets within their jurisdiction is subordinate to the state Legislature and is subject to the general laws of the state, this rule, of course, has no application where, as here, a provision of the same general law expressly stipulates that the general law shall not govern over local regulations, but that the local regulations shall be paramount under certain conditions.

[5, 6] Appellant, however, contends that the board of supervisors exceed the authorization of said section 145 of the California Vehicle Act when it purported to regulate the right of way upon said Foothill boulevard. According to his theory, section 145, in addition to authorizing the local authorities to regulate traffic at intersections by means of traffic officers and mechanical signal devices, authorized the local authorities to do two things and only two things: To designate certain public highways as boulevards, and to require vehicles to stop before entering or crossing the same, provided such boulevards are properly signposted. In other words, appellant admits that, in so far as the ordinance purports to be a "stop ordinance," it is valid under section 145 of the California Vehicle Act, but insists that in so far as it is a "right of way ordinance" at a boulevard intersection it exceeds the authorization of said section, and is to that extent invalid.

We do not think such position is tenable. The patent purpose of designating certain streets as boulevards and requiring vehicles to stop before entering upon such boulevards is to facilitate travel along and upon such streets. Having in mind this purpose, we do not believe that it was the legislative intent to limit the scope of the power of the boards of supervisors to a bare right to designate certain streets as boulevards and to require vehicles to stop before entering thereon. The power to require vehicles to stop before entering a designated street without the right to designate how long the vehicle shall stop before entering, or the right to designate that after stopping the vehicles must enter the boulevard in such a manner as not to interfere with traffic along the boulevard, would be a futile power. If the driver of a vehicle could stop at a stop signal and then immediately proceed into the intersection without regard to the traffic coming down the boulevard except that already in the intersection, the act of stopping would be an idle act, for those using the boulevard would be in no more advantageous position than if there were no stop signs, as they would have to be constantly yielding the right of way to drivers crossing the intersection. We are of the opinion, therefore, that the power to regulate the right of way at intersections of boulevards with streets properly posted with stop signs is a necessary concomitant of the power to designate certain streets as boulevards, and to require vehicles to stop before entering such boulevards, which power was intended to be reserved to boards of supervisors by section 145 of the California Vehicle Act, hereinbefore quoted.

This being so, it follows that the right of way in the instant case was controlled by ordinance 261 of the county of San Bernardino in obedience to which the appellant was required to stop at the stop sign maintained at the intersection, thereby yielding the right of way to the respondent's car. This being so, it further follows that from the evidence hereinbefore set out the jury was justified in finding that the proximate cause of the collision was the failure of the appellant to stop at the stop sign.

[7] It is suggested that inasmuch as there was not introduced in evidence any official authorization by the board of supervisors of San Bernardino county to any one to erect the stop sign at the intersection in question, that the stop sign was without legal significance and the defendant was under no duty to stop at such stop sign. The only testimony in the record with reference to the erection of the stop sign was the testimony of a witness in answer to the question, "There is one of those stop signs there at that intersection?" "Yes, put up by the Automobile Club." Apparently no question was raised in the trial court as to whether or not the stop sign was properly at the intersection, and neither respondent nor appellant attempted to prove or disprove that an authorization had been given to the automobile club by the board of supervisors to erect stop signs along Foothill boulevard. In the absence of any question as to the validity of the stop sign at the trial by the appellant, or any controversy as to whether it was properly at the intersection, we do not think it was incumbent upon the respondent to offer in evidence the official authorization for the erection of the sign, and her failure to do so under such circumstances would not justify us in reversing a verdict in her favor.

We are also unable to agree with appellant's contention that the judgment should be reversed by reason of the fact that the court erroneously instructed the jury to the prejudice of the defendant. Appellant objects to an instruction which states that the defendant was "bound to anticipate that he might meet persons at any point on the highway and he must, in order to avoid a charge of negligence, keep a proper lookout for them. * * *" He argues that the obligation to keep a proper lookout placed a burden upon the defendant which under the facts he was not required to bear, inasmuch as this obligation was inconsistent with the rights flowing from the right of way rule. It is apparent that in complaining of this instruction appellant is presuming that he was entitled to the right of way at the intersection. As we have before indicated, he was not entitled to the right of way, and this is not, therefore, a valid objection to this particular instruction nor to the other instructions complained of, which complaints involve the same assumption.

[8-11] It is true that several of the instructions given are subject to criticism. This is true of the instruction that, "You are instructed that in deciding this case you will take into consideration all facts and circumstances proven in the case and all reasonable inferences that may be drawn therefrom, and, if, after doing so, you find that the plaintiff has established her case as charged in the complaint, then you will find damages in favor of plaintiff and against the defendant." It is also true of the instruction that before the jury could find in favor of the defendant on the issue of contributory negligence it must believe from the preponderance of the evidence that "such contributory negligence, if any, contributed directly and proximately to the happening of the accident. * * *" The former instruction, standing alone, is erroneous for the reason that it does not take into consideration the question of contributory negligence; the latter is erroneous in that it does not take into consideration the fact that the cause of the injuries, although proximate, may be indirect. But considered in conjunction with the other instructions

given, we do not feel that they were prejudicial. Appellant also complains that in several instructions the negligence was referred to as the negligence of the plaintiff rather than the negligence of the plaintiff's driver. Inasmuch as in another instruction the jury was instructed that if they found that the collision was caused by the recklessness, carelessness, and negligence of said J. Lindenbaum (plaintiff's driver) that their verdict must be for the defendant, this error was corrected.

It is, of course, well established that the instructions must be read and considered as a whole. After a careful examination of the entire instructions, we are of the opinion that whatever errors are to be found therein did not to any appreciable extent prejudice the rights of the appellant. They were, therefore, not sufficient to justify a reversal of the judgment.

The judgment is affirmed.

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213 Cal. 269

WILLIAMS v. SILVERSTEIN et al.

S. F. 14171.

Supreme Court of California.

July 30, 1931.

Rehearing Denied Aug. 27, 1931.

1. Bills and notes ⚷519.

Evidence *held* insufficient to sustain finding that signers executed note as joint makers.

2. Bills and notes ⚷539.

Finding to effect that signers on note entered into written agreement with payee to purchase lease on apartment and furniture *held* without support, where no such issue was before court.

> The verified complaint alleged that payee of note entered into contract to sell apartment house and furniture to others, which allegation was admitted in the answer, so that there was no issue before court as to the parties to agreement of sale.

3. Bills and notes ⚷165.

Negotiable instrument may be rendered nonnegotiable, where it is intended to incorporate terms of separate agreement if terms of whole agreement are incompatible with negotiability.

4. Bills and notes ⚷144.

Negotiability of note will not be affected by agreement written upon same paper, evidently not intended to be incorporated within note.

5. Bills and notes ⚷165.

Notes given as partial consideration for transfer of lease and furniture were not rendered nonnegotiable because of escrow agreement not referred to therein.

> Considering the notes and escrow agreement as constituting one transaction, nevertheless there was no intent to make payment dependent upon any contingency; the escrow agreement being in no way incompatible with terms of note and not purporting to change, limit, or modify provisions, but rather providing that payment was to be made in accordance with notes.

6. Bills and notes ⚷416.

Notice of dishonor, sent to indorser five or six days after due date, was too late (Civ. Code, §§ 3170, 3184).

7. Evidence ⚷441(11).

Admission of oral evidence of conversations taking place prior to and contemporaneous with execution of note and escrow agreement was erroneous.

8. Evidence ⚷441(11).

General rule respecting proof of contemporaneous parol declarations is applicable to attempt to prove prior or contemporaneous parol agreement affecting terms of unambiguous bill or note.

9. Bills and notes ⚷241.

That note contained words "We promise to pay" had no significance as respected liability of indorsers thereon.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Joseph Williams against Louis Silverstein and another. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

For opinion of District Court of Appeal herewith adopted, see 293 P. 102.

Edward J. Lynch, of San Francisco, for appellants.

E. B. Mering, of San Francisco, for respondents.

PER CURIAM.

A hearing was granted herein in order that we might give further consideration to the questions at issue, after decision by the District Court of Appeal in and for the First Appellate District, Division One, Jorgensen, Justice pro tem., writing the opinion. Upon such consideration, we are satisfied that the reasoning and conclusions of the appellate tribunal were correct; that the signatures of the appellants on the back of the promissory notes sued upon constituted them indorsers and not original makers or guarantors thereof; that the trial court was in error in the admission of oral evidence for the purpose of varying that relation; and that, if not in error in so doing, the evidence thus permitted to be educed showed clearly and without substantial contradiction that at the time of the execution of the instruments the plaintiff knew and was informed by his own counsel, who drew and attended to the execution thereof, that the appellants were executing the same as indorsers and not as original makers thereof, and that the plaintiff so understood that to be their relation thereto at the time he undertook to give his belated notice of dishonor.

The portion of the opinion of the appellate tribunal, which we hereby approve, reads as follows:

This is an action on a complaint in six counts, based upon two promissory notes given to plaintiff as part of the purchase price of a lease to and furniture in an apartment house in the city of San Francisco. The notes are both negotiable in form, are for $500 each, and are identical, excepting that one was payable June 10, 1926, and the other September 10, 1926.

The first and second counts appeared to charge the defendants as joint makers with one Huber on the two notes. The third and fourth counts appear to charge them as accommodation indorsers for Huber, while the fifth and sixth counts seek to hold them as indorsers. Each of the notes contained a clause "we promise to pay," etc. (the "we" being written in with a typewriter), and were signed at the end by Lee Huber only and underneath his signature are two blank lines. On the back of each note appears the signature of:

"Louis Silverstein

"Louis Sanders."

The first paragraph of each count alleges that on the 10th day of March, 1926, the plaintiff entered into an agreement to sell to one Lee Huber and Isadore Silverstein a certain lease and furniture of an apartment house on Ellis street in San Francisco for $4,850; that, on the day the sale was to be consummated, this contract was modified "by agreeing to accept $1,200.00 in cash and the balance of $1,000.00 to be paid by a promissory note executed by Lee Huber, Louis Sanders and Louis Silverstein."

It appears from the evidence that Isadore Silverstein and Lee Huber, two taxicab drivers, were desirous of acquiring an apartment house as a side line. The defendant Louis Silverstein, who was a real estate agent and builder, was a brother of Isadore Silverstein. Defendant Sanders was engaged in farming and buying and selling country lands, with headquarters at Sacramento. Defendants, Louis Silverstein and Sanders, negotiated with plaintiff, who was in the real estate business and selling leases and apartment house furniture, and who owned an apartment house lease and furniture on Ellis street in San Francisco, for the sale of said lease and furniture, and agreed to pay the plaintiff a commission for making a sale.

On March 10, 1926, the date of the notes, the plaintiff met in the office of Judge Tyrrell, plaintiff's attorney, with Lee Huber and Isadore Silverstein, the alleged purchasers, together with the defendants, Louis Sanders and Louis Silverstein, who contended that they were acting merely as brokers in the transaction, and the note was signed by Lee Huber. Plaintiff's own testimony as to what transpired in the office of his attorney is highly illuminating, in view of his contention that defendants were makers.

He testified: "Sanders and Silverstein signed on the back of the notes. I said to Judge Tyrrell, 'How about these notes? Shouldn't these be comakers?' He said that they were just as responsible on the back of the note as if they were on the front of it. I took his word for it. He said, 'Whether they are makers or comakers or endorsers, they guarantee the payment of the note and what is on the back of it is the same as the ones on the front of it.' I said, 'He ought to be a comaker.' "

He testified further: "I said, 'Tyrrell, wouldn't it be possible to have a comaker on there—an endorser?' He said, 'It doesn't make any difference one is the same as the other.' He said, 'Don't put my brother on there and I won't go on there, and we will go on the back of it.' That is what he said, 'I don't want my brother to go on the front of it on the face of the note, but let Huber go on the face of it.' That is just exactly the remark he made. I saw the notes signed and endorsed and accepted them under the advice of my attorney. My attorney, Mr. Tyrrell, said, 'The notes or the endorsements on these notes, will hold these men and make them pay if the notes are properly endorsed.' Silverstein said 'We will endorse them on the back.' I said, 'All right,' so he put Huber on the face and he and Sanders went on the back."

The attorney also drew up an escrow agreement under which plaintiff's attorney, John R. Tyrrell, was made an escrow holder, which reads as follows:

"San Francisco, March 10th, 1926.

"John R. Tyrrell, No. 995 Market Street, San Francisco.

"My Dear Sir: Enclosed herewith we hand you agreement for the sale of the rooming house, designated as No. 1622–1624 Ellis Street, San Francisco, which agreement was executed between Theodore Kupper, as the party of the first part, and A. G. Rehnstrom and A. Johannson as party of the second part, and thereafter assigned by the latter to Joseph Williams, and thereafter by the said Joseph Williams assigned to Lee Huber.

"The condition of the agreement calls for a payment of forty-eight hundred and fifty ($4,850) dollars, less an incumbrance of twenty-five hundred ($2,500.00) dollars. Of this amount thirteen hundred and fifty ($1,350.00) dollars has been paid, receipt of which is hereby acknowledged, and the further sum of one thousand ($1,000) dollars is to be paid as follows: Five hundred ($500) dollars on or before the 10th day of June, 1926, and five hundred ($500.00) dollars on or before the 10th day of September, 1926, according to the terms of the promissory note, covering said sum.

"There is also deposited with you a lease upon the said premises covering a period of five (5) years from April 1st, 1926, running in favor of Lee Huber.

"These documents you are instructed to hold as escrow holder until Lee Huber shall have paid to you the sum of ten hundred ($1,000) dollars and interest, according to the terms of the promissory note, and when such sum has been paid in full with interest you are authorized and directed to deliver to him the said lease and your services as escrow holder will then be terminated.

"Lee Huber,
"Louis Silverstein,
"Jos. Williams."

The taxicab drivers lost money in the apartment house business. The notes were not paid, and plaintiff brought a previous action seeking to hold Huber as maker and these defendants as indorsers, but these defendants were granted a nonsuit in that action because plaintiff had not made proper presentment of the notes and notice of dishonor had not been given to these defendants as indorsers.

The findings in the case were to the effect that defendants executed said note as joint makers and that plaintiff had agreed to sell the apartment house lease and furniture to defendants, Louis Sanders and Louis Silverstein. Neither of these findings are supported by the evidence.

[1] The evidence affirmatively shows that the defendants signed as indorsers and that the plaintiff accepted the notes with that understanding on the advice of his attorney. Not only his own testimony, but the testimony of the defendants are all to that effect. The plaintiff by his own acts subsequent to the execution of the notes showed that was his understanding by causing a notice of dishonor to be sent on one of the notes to one of the defendants as indorser and by instituting his first suit against them as indorsers, and there is no evidence in the record worthy of the name to show that the defendants ever signed in any other capacity.

[2] The finding to the effect that plaintiff entered into a written agreement with both the defendants, Louis Sanders and Louis Silverstein, to sell this apartment house and furniture cannot be sustained on any theory. The verified complaint alleges that plaintiff entered into a contract to sell this apartment house and furniture to Lee Huber and Isadore Silverstein. The answer admits this allegation. There was, therefore, no issue before the court as to the parties to the agreement of sale. No amendment of the complaint was even suggested. There is no written agreement between the parties in evidence to this effect or even suggesting it. The only thing upon which the court could possibly base such a finding is the escrow agreement set forth above. It certainly cannot be sustained as such an agreement. It was not signed at all by the defendant Sanders, and was signed by Silverstein, as he testified, as a matter of form as the broker in the transaction, or, as plaintiff's attorney testified, he signed more as a guarantor than as a principal. The escrow agreement shows on its face that the sale was made to Huber, and provided that the notes were to be signed by Huber and the lease was to be made out to Huber, and referred to an assignment of sale contract from the plaintiff to Huber.

[3-5] Respondent contends that the notes were nonnegotiable, and therefore defendants became liable as guarantors. At the time the notes were executed, the escrow agreement was also executed, and provided that the lease should be delivered upon the payment of the notes. It is true that a negotiable instrument may be rendered nonnegotiable where it is intended to incorporate the terms of a separate agreement with the instrument itself if the terms of the whole agreement are incompatible with negotiability. 19 Cal. Jur. p. 811. But even though the agreement be written upon the same paper that the note is written on, where it is evident that it was not intended to incorporate the terms of the agreement within the note itself, the transferability and negotiability of the note will not be affected by the agreement. Pitman v. Walker, 187 Cal. at page 671, 203 P. 739. The notes here do not refer to the escrow agreement, but contain an absolute and unconditional promise to pay at a certain time. But, considering together the notes and the es-

crow agreement as constituting one transaction, we do not discover an intention to make the payment dependent upon any contingency. The escrow agreement is in no way incompatible with the terms of the notes, nor does it purport to change, limit, or modify the provisions of the notes. On the other hand, it provides that the payment is to be made in accordance with the notes.

[6] The evidence in this case clearly shows, and the fact is undisputed, that proper presentment of the notes had not been made and notice of dishonor had not been given so as to hold defendants as indorsers of negotiable paper. It is true that notice of dishonor was sent to the defendant Sanders as indorser of the first note, but was sent five or six days after it became due, and it was therefore too late. Sections 3170 and 3184, Civ. Code.

[7] The court, over the objections of defendants, admitted oral evidence of conversations between certain of the parties which took place prior to and contemporaneous with the execution of these notes and the escrow agreement, and which tended to vary, modify, and change the terms thereof. This was prejudicial error.

[8] The general rule that proof of contemporaneous parol declarations and agreements is inadmissible to contradict, vary, or alter the terms of a written contract is applicable to an attempt to prove a prior or contemporaneous parol agreement or declaration to affect the terms of a bill or note where the bill or note is not uncertain, doubtful, or ambiguous. Uniform Laws, Annotated, vol. 5, p. 22; Citizens' Bank of Los Angeles v. Jones, 121 Cal. 32, 53 P. 354; Quatman v. Superior Court, 64 Cal. App. at page 208, 221 P. 666. If the defendants in this case had signed the note on its face below the signature of Huber, could it be said that they might show by parol evidence they signed as indorsers only? The answer is obvious. Such evidence is not admissible, whether the note be negotiable or nonnegotiable. Lindemann v. Coryell, 59 Cal. App. 788, 212 P. 47. If this were not the rule, it would lead to chaos in all business transactions.

[9] The mere fact that the notes contained the words "we promise to pay" has no significance, even though signed by only one maker, with two blank lines below his signature, in view of the state of the record in this case. The words "we promise to pay" cannot be held to include indorsers or other parties whose names are not signed as makers. Hobson v. Hassett, 76 Cal. 203, 18 P. 320, 9 Am. St. Rep. 193; Bean v. Pioneer Mining Co., 66 Cal. 451, 6 P. 86, 56 Am. Rep. 106; Farmers', etc., Bank v. Colby, 64 Cal. 352, 28 P. 118; Whitmore v. Nickerson et al., 125 Mass. 496, 28 Am. Rep. 257.

The judgment is reversed, with direction to the trial court to make and file its findings of fact and conclusions of law in conformity with the views expressed in the foregoing opinion, and thereon to render and enter its judgment in favor of the defendants and appellants herein, with costs.

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213 Cal. 335

LOS ANGELES COUNTY FLOOD CONTROL DIST. v. WRIGHT.

S. F. 14218.

Supreme Court of California.

July 31, 1931.

1. Levees and flood control ⚷15.

Construction of dam for flood control district *held* "prohibited by law," within statute, where department of public works justifiably denied permission to construct dam (St. 1915, p. 1508, § 15; St. 1929, p. 1505).

[Ed. Note.—For other definitions of "Prohibit," see Words and Phrases.]

2. Levees and flood control ⚷15.

Discovery of unstable and unsafe foundation work for abutment of dam *held* "change of conditions," within statute authorizing supervisors of flood control district to adopt new plans (St. 1915, p. 1508, § 15).

[Ed. Note.—For other definitions of "Change," see Words and Phrases.]

3. Levees and flood control ⚷34.

Provision of statute authorizing change in plans must be considered part of contract for flood control project and within knowledge of electors who voted for issuance of bonds (St. 1915, pp. 1506, 1508, 1512, §§ 8, 15, 23).

4. Levees and flood control ⚷34.

Contractual rights of landowners in flood control district who voted for improvements *held* not impaired by issuance of bonds for changed plans adopted under authority of statute (St. 1915, pp. 1506, 1508, 1512, §§ 8, 15, 23).

5. Levees and flood control ⚷34.

Recital in bonds issued by flood control district stating proposition submitted to voters *held* not rendered erroneous by change of plans for construction of dam (St. 1915, pp. 1506, 1508, 1512, §§ 8, 15, 23).

In Bank.

Proceeding by the Los Angeles County Flood Control District for writ of mandamus to be directed to Henry W. Wright, as Chairman of the Board of Supervisors of Los Angeles County and Ex Officio Chairman of the Board of Supervisors of Los Angeles County Flood Control District.

Writ granted.

Hill, Morgan & Bledsoe, Vincent Morgan, and Kenneth K. Wright, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Roy W. Dowds, Flood Control Counsel, and Ray C. McAllaster, Deputy County Counsel, all of Los Angeles, for respondent.

SHENK, J.

This is a proceeding in mandamus to compel the chairman of the board of supervisors of Los Angeles county to execute certain bonds alleged to be authorized by the electors of the Los Angeles county flood control district. The matter is submitted on a general demurrer to the petition and on a stipulation of facts made by agreement a part of the petition. The facts are therefore undisputed.

The Los Angeles county flood control district was created by an act of the Legislature in 1915 (Stats. 1915, p. 1502), and comprises, territorially, all of Los Angeles county, except those portions thereof generally known as the Antelope Valley and the islands of Santa Catalina and San Clemente. The objects and purposes of the act, as set forth in section 2 thereof, are to provide, by the creation of the district, for the control of the flood and storm waters of the district, and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining, or causing to percolate into the soil within said district, or to save or conserve in any manner, all or any of such waters, and to protect from damage from such flood or storm waters the harbors, waterways, public highways, and property in said district. The district is declared to be a body corporate and politic with perpetual succession, and, among other things, empowered to acquire land and property of every kind, and to construct, maintain, and operate any and all works and improvements within or without the district necessary or proper to carry out the objects and purposes of the act. The board of supervisors of Los Angeles county is constituted, ex officio, the board of supervisors of the district. Section 4 provides that the board shall have power to employ a competent engineer or engineers to investigate the best plan to control and conserve such waters for beneficial and useful purposes and to adopt any plan so formulated. Upon the adoption of such plan the board is authorized by ordinance to call a special election in the district for the issuance of bonds to construct the works and carry on the improvements. If a majority of the electors of the district vote in favor of the bonds, the board is authorized to issue forty-year bonds to cover the cost of the work, etc., salable at par, with interest not to exceed 6 per cent. per annum, and annually to levy and collect a tax on all of the taxable real property in the district to pay interest and principal on said bonds. The tax so to be levied was declared by this court to be a special assessment for benefits. Los Angeles County F. C. Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028.

On March 26, 1924, the board directed J. W. Reagan, who was the then chief engineer of the district, to make the investigation required by the statute and to submit a report which should show (a) a general description of the work to be done; (b) general plans, profiles, cross-sections, and general specifications of the work to be done; (c) a general description of the land and property to be acquired; (d) a map showing the location of the proposed work and improvement, and other information deemed to be necessary or useful; and (e) an estimate of the cost of the work.

On April 1, 1924, the engineer submitted a report which was found by the board to comply with the requirements of the act and the order of the board. This plan was approved, and the estimate of the costs for which bonds were to be voted was fixed at $35,300,000. According to the report of the engineer, the work to be done was divided into four parts: First, the construction of both large and small dams in the mountainous area; second, the protection of the banks of the smaller streams, together with spreading and storing of waters of these streams for beneficial use; third, the straightening and rectification, through river training and bank protection, of the major streams; and, fourth, protection to the harbor and shipping interests. Both flood control and conservation were to be combined by holding back the water in the mountains and releasing it in controllable quantities, and thus remove the flood menace to great property values and augment the water supply in the district. The plan contemplated the construction of dams in San Antonio Canyon, a dam at the mouth of Thompson's creek, north of Claremont, a dam in Big Dalton Canyon, a dam and reservoir at the "Forks Site" in San Gabriel Canyon, dams and reservoirs in Sawpit Canyon, Big Santa Anita Canyon, Eaton Canyon, Big Tujunga Canyon, and Pacoima Canyon, a flood control channel in Altadena, check dams in Little Santa Anita or Sierra Madre Canyon, Dunsmuir Canyon, Pickens Canyon, and Haines Canyon, works for the control of storm waters in the lower San Dimas wash country, in Verdugo wash and Sycamore Canyon, and works for the control of storm waters on the lower or east San Gabriel river and in the vicinity of Long Beach and at the lower end of Ballona Valley.

A special election was called by the board of supervisors and was held on May 6, 1924, for the purpose of submitting to the qualified electors of the district the proposition of incurring a bonded indebtedness in the sum of $35,300,000. The objects and purposes for which the indebtedness was proposed to be incurred were set forth in the title, preamble, and section 2 of the ordinance calling the election, and were as follows: "For the control of the flood and storm waters of said Los Angeles County Flood Control District, for the conservation of such waters for beneficial and useful purposes, by spreading, storing, retaining and causing to percolate into the soil within said district, and for the protection from damage from such flood and storm waters of the harbors, waterways, public highways and property in said district, by the correction of rivers, diversion and care of washes, and building of dikes and dams, and for the other purposes set forth in said act, all of which work is to be done in accordance with the said report of J. W. Reagan, chief engineer of said district, adopted by the board of supervisors of said district on the first day of April, 1924, and in accordance with the provisions of the Los Angeles County Flood Control Act, reference to which said report, which is on file in the office of said board of supervisors, is hereby made for particulars."

The board caused to be printed and furnished to voters who might apply for the same so much of the report of the chief engineer as covered a general description of the work to be done and also a map showing the location of the improvements to be made. The election was held, and the proposed bond issue received a favorable vote. Thereafter bonds were issued and sold to the extent of several millions of dollars, and the acquisition of property and construction work went forward. A dam in Pacoima Canyon was built, the estimated cost of which was $1,720,000. Construction work in connection with the control of the Tujunga river, involving the expenditure of some $1,600,000, is well under its way to completion. Numerous other improvements at different locations in the district have been undertaken and completed under this authorization of bonds. The major item of the proposed improvement was the construction of a dam at the Forks site in the San Gabriel Canyon. As originally proposed this dam was to be constructed to a height of 425 feet, providing thereby a reservoir capacity of 240,000 acre feet of water and estimated in round numbers to cost $25,000,000. The purpose of the improvement was to control the flood waters of the 200 square mile San Gabriel watershed so as to relieve the lands in the San Gabriel Valley, and below as far as Long Beach and the ocean, from their devastating effect; to protect the harbors of Long Beach and Los Angeles, and also to conserve such waters for irrigation and other uses. Preliminary to such work the board sought and obtained reports from numerous engineers of wide reputation, including George W. Goethals, Andrew C. Lawson, D. C. Henny, J. D. Galloway, John A. Bell, and H. Hawgood, with reference to control and conservation of flood waters, geological formations, and dam construction. Upon being advised to the effect that a safe dam of the size and design of the proposed dam could be constructed at the Forks site, the board proceeded with definite steps to enter upon construction work. It applied to the federal government, through its Department of Interior, for a permit to construct a railroad from the main-line railroad at Azusa, below the mouth of the San Gabriel Canyon, to the Forks site, a distance of about eleven miles. Opposition to the granting of this permit was filed by the city of Pasadena on the ground that the construction of the proposed railroad would interfere with the proposed construction of a dam by that city at a point about seven miles below the Forks site, and upon the further ground that another site existed for the construction of a dam by the district at a place commonly known as the "Granite Dyke Site." The Department of the Interior commissioned three engineers of that department to proceed to Los Angeles, investigate, and conduct hearings with reference to the feasibility of constructing a dam at the Forks site or the Granite Dyke site. The commissioners made a report to to the Secretary of the Interior recommending the granting of the permit. An appeal to the Secretary was ineffectual. The permit was issued by the Secretary on November 1, 1926, and a week later contracts were let by the district for the construction of the railroad. It was completed in June, 1927.

In December, 1926, upon the request of certain local organizations, the board, upon the recommendation of the Los Angeles Chapter of the National Engineering Society, employed F. H. Fowler of San Francisco, C. D. Marx of Stanford University, and C. H. Paul of Dayton, Ohio, engineers of wide repute, to investigate all matters connected with the feasibility and necessity of the construction of a dam at the Forks site and also the possibility of the construction of a dam at the Granite Dyke site. In March, 1927, those engineers submitted to the board a report condemning the Granite Dyke site as unsafe and recommending the Forks site for the construction of the dam. On April 1, 1927, J. W. Reagan resigned as chief engineer and E. C. Eaton was appointed in his place, with D. C. Henny, J. B. Lippincott, and J. W. Reagan as members of a consulting board. On May 9, 1927, plans and specifications for a dam 386 feet in height at the Forks site were submitted to and approved by the board of supervisors, and bids for the construction of the dam were called for. On August 2, 1927, all bids were rejected and the chief engineer was instructed to prepare plans and specifications for a dam 425 feet in height as set forth in the original plan. On August 20th the consulting board recommended additional exploration of the east abutment. On November 12 that board recommended that foundation elevations of the dam be lowered ten feet on slope sides. In October, 1927, a taxpayer commenced a proceeding in the superior court to compel the board of supervisors to build the 385-foot dam and to enjoin the construction of the dam according to the original plan. Numerous cities in the San Gabriel Valley also brought suit to compel the board to construct the dam in accordance with the original plan. The causes were consolidated for trial, and on July 26, 1928, the Superior Court rendered its decision granting a writ of mandate compelling the board of supervisors of the district to construct the dam proposed in the original report unless said work shall thereafter be prohibited by law or rendered contrary to the best interests of the district by change of conditions in relation thereto. On September 8, 1928, the board of supervisors again adopted plans and specifications for the dam as originally contemplated and advertised for bids. On December 7, 1928, a contract for the construction of the dam was executed. The contractor thereupon entered upon the execution of the work, which continued until September, 1929, at which time, and after the excavation of some 700,000 cubic feet of sand and rock, it was discovered that there was a possibility that a sufficiently solid foundation could not be had, whereupon the board ordered a temporary discontinuance of the work and appointed a board of engineers and geologists to further explore the foundations and bedrock as disclosed by the excavation work of the contractor. The actual construction of the dam itself had not yet been entered upon. During the years of 1926, 1927, 1928, and 1929, the district was also engaged in purchasing and condemning lands and mining claims for the railroad right of way and for the dam and reservoir site.

In 1929 the Legislature adopted an act entitled, "An act providing for the supervision of dams by the department of public works through the state engineer for the purpose of safeguarding life and property," etc. Stats. 1929, p. 1505. This statute became effective on August 14, 1929, and before the cessation of work under said contract. Section 5 of the act provides that after the effective date of the act the construction of a new dam or the enlargement of any dam shall not be commenced, and dams (as in the present case) not more than 90 per cent. completed on August 14, 1929, shall not be completed until the owner has applied for and obtained from the department written approval of plans and specifications. The application was required to set forth the area of the drainage basin, rainfall and stream flow records, and flood flow records and estimates. The department might require data concerning subsoil and foundation conditions, etc. By section 2 of the act the word "owner" was defined to include the state and any of its agencies or districts. A violation of the statute is a misdemeanor punishable by fine or imprisonment or both, and in addition the department is authorized to commence an action in the superior court to compel observance of the terms of the act or to enjoin violations thereof.

On October 26, 1929, the petitioner herein made an application to the state engineer for his approval of the construction of the dam at the Forks site. The state engineer caused an examination of said dam to be made on his own behalf and also called upon a board of engineers for an investigation and report. The board advised the state engineer, and that state official found that a dam of the size and type called for by the contract could not be safely constructed at the Forks site by reason of the existence of certain earthquake faults and insufficiently sound foundation and bedrock at that place, and that the construction of the dam as proposed would be unsafe and a severe menace to life and property. The state engineer, on November 26, 1929, denied the application for his approval. On December 2, 1929, the district canceled and terminated the construction contract and instructed the chief engineer to investigate the San Gabriel Canyon for the purpose of ascertaining whether other dams and flood control and conservation works could be constructed in said canyon to carry out the same purpose and accomplish the same results as were contemplated by the construction of the dam at the Forks site. The investigation was made, and on December 22, 1930, E. C. Eaton, the chief engineer, filed with the board a report setting forth at length plans and projects for the control and conservation of the waters of the San Gabriel river watershed. These plans provide for the construction of small check dams in the upper reaches and laterals of the river and canyon, for three large dams at different places in said canyon, for the acquisition of spreading grounds at the mouth of said canyon, and for the construction of spreading works thereon, whereby the flood waters of said canyon may be placed in the underground water basin of the San Gabriel river and be conserved for beneficial uses. In said report it was estimated that the dam and works could be constructed and the lands therefor be acquired for approximately the sum of $20,000,000, which sum represents the unexpended balance of the originally authorized bonds for the San Gabriel canyon project.

Upon the filing of said report a hearing before the board was had at which testimony was produced to the effect that a change of conditions had occurred since the bond issue was authorized, in relation to the construction of the dam of the size and design and at the site originally proposed, consisting in and showing (1) that fires occurring over a large portion of the San Gabriel watershed which would result in an increased quantity of loose material being brought down by floods and requiring the construction of check dams to aid in retarding the flow and discharge of said material; (2) that the excavation work done by the contractor for the construction of said dam had disclosed large cracks in the rock required as a foundation for the construction of said dam, and that during the course of said construction work a movement had taken place on the west abutment of the proposed dam, evidenced by a large slide which disclosed faulty and unstable foundations; (3) that in the opinion of the chief engineer a dam of the size and design of that originally proposed could not be safely constructed at the Forks site; (4) that since the voting of said bonds there had been a steadily continuing decrease in the water in the basin of the San Gabriel Valley below the canyon, and that the lowering of the water plane had increased the capacity of said basin so that spreading grounds should be acquired for the purpose of constructing therein spreading works whereby the flood waters might be discharged therein and thus be caused to percolate into the basin of the San Gabriel river and valley; (5) that the construction of a dam of the size and design and at the site originally contemplated had been prohibited by law, in that the state engineer had denied the application of the district for the construction at the Forks site and had refused to permit the construction of a dam at said site; (6) that the construction of check dams, three large dams, and the acquisition of spreading grounds at the mouth of the canyon and the construction of spreading works thereon as now contemplated would result in the accomplishment of the same purposes as were planned by the construction of a dam at the Forks site and would result in even greater conservation of flood waters for beneficial uses; and (7) that the work and improvement now planned would all be constructed for approximately the estimated sum.

On December 22, 1930, the board of supervisors adopted a resolution, by a vote of four-fifths of its members, in which it was found and determined that the construction of the dam at the Forks site is now prohibited by law and rendered contrary to the best interests of the flood control district by reason of a change in conditions in relation thereto, which prohibition by law and change of conditions have occurred since the adoption of the original report and the voting of said bonds, and that the original plans should be changed to conform to the new plans, and that the unexpended balance in the bond fund be appropriated for the work and improvement in accordance with the new plan. The chief engineer was instructed to prepare plans and specifications to that end, and the board by a four-fifths vote instructed its chairman to sign bonds in the sum of $5,000,000, the proceeds thereof to be used in the furtherance of said work.

The chairman of said board, respondent herein, alone voted in the negative on the motion to adopt the resolution above referred to, and has declined to sign said bonds on the ground, among others, that, since the modified plan contemplates the expenditure of a large sum of money, the board should be sure that the use of the funds derived from the sale of said bonds would be lawful, and that the doubts which he entertained as to the legality of such use required him to vote against said resolution and to refuse to sign said bonds. He therefore declined to sign said bonds as required by said resolution until the question of the legality of such sale be definitely settled in favor thereof.

The respondent places his refusal to sign the bonds on the premise that the Los Angeles county flood control district is in all of its essential elements a special assessment district, whose course in the proceeding to charge the lands in the district with a special assessment must be strictly construed against the district and in favor of owners of the property assessed; that the work now proposed was not included in the original plan and cannot therefore be made the subject of a special assessment to cover the cost thereof. In support of this contention, the respondent cites the case of Los Angeles County F. C. Dist. v. Hamilton, 177 Cal. 193, 169 P. 1028. That case held that the statute of 1915 was in essence a local improvement act, and that the power of the board to raise funds to discharge the obligations of the district was referable to the field of special assessments, as distinguished from that of the general taxing power. Consequently the respondent contends, under established general doctrines with reference to the levy of special assessments, that the rule of strictissima juris must be applied. This may be conceded. But when the rule is applied, the statute under which the proceeding is taken must be scrutinized to determine whether there has been a departure from the statutory requirements, having in mind that under section 21 the act and every part thereof must be liberally construed to promote its objects and to carry out its intents and purposes.

The petitioner points to the proviso in section 15 of the act as full justification for the steps pursued. If the statute authorizes the proceedings subsequently taken by the board, there is no contention advanced by the respondent that they were not properly taken. The proviso is as follows: "And provided, further, that any improvement for which bonds are voted under the provisions of this act, shall be made in conformity with the report, plans, specifications and map theretofore adopted, as above specified, unless the doing of any of such work described in said report shall be prohibited by law, or be rendered contrary to the best interests of said district by some change of conditions in relation thereto, in which event said board of supervisors may, by a vote of four-fifths of all the members thereof, order necessary changes made in such proposed work or improvements, and may cause new plans and specifications to be made and adopted therefor."

[1] The controversy is then narrowed to the questions (1) whether the doing of the work according to the original plans has been prohibited by law, and if not (2) whether the execution of the work in accordance with the original plans has been rendered contrary to the best interests of the district by some change of conditions in relation thereto. As to the first question the statute of 1929 (Stats. 1929, p. 1505) makes it a penal offense to construct a dam without the written approval of the department of public works. For a violation of its provisions the department of public works is given the right to maintain mandamus and injunction proceedings to prevent any threatened violation thereof. The approval of the department was requested for the construction of the high dam at the Forks site. The application was denied without prejudice to the filing of another application for a dam at this or any other site. No reason has been advanced and none appears why this statute should not be upheld as a valid exercise by the state of its police power. See Union Bridge Co. v. U. S., 204 U. S. 386, 27 S. Ct. 367, 51 L. Ed. 523; Gaylord v. City of Pasadena, 175 Cal. 433, 166 P. 348. By the terms of the act it is made applicable to such an agency as the Los Angeles county flood control district. No claim is made that the department of public works through its state engineer acted arbitrarily or capriciously in denying the application. On the contrary, the admitted facts in this matter show that such action was wisely exercised. The citation of authorities, which are abundant, is unnecessary to support the statement that the construction of the dam at the original site without such approval would be contrary to law and as such is prohibited by law within the meaning of the statute.

[2] There is much discussion by counsel as to whether the discovery of the unstable and unsafe foundation work for the westerly abutment of the dam as originally planned was such a change of conditions as would authorize the board to exercise its discretion in ordering new plans and specifications to accomplish the same purposes and results as contemplated by the original plans. It may be assumed that there was no physical change in the geological formation from the time the investigations as to their character began and until their actual nature was discovered by the removal of many hundred thousand cubic yards of material. But to require that a change in existing geological formation by some cataclysm of nature would be necessary in order to constitute such a change in conditions as would justify a modified plan would be to place an unreasonable and too restricted construction upon the powers of the board. The discovery of the actual formation as distinguished from the formation believed to exist after exhaustive exploration and investigation would seem to be such a change of condition as would authorize the board to modify the plans so as to carry out the main purpose of the proceeding. In other words, a discovery of the actual conditions in place of the hitherto apparent but unknown conditions would seem to satisfy the requirements of this statute. We conclude therefore that the board was authorized to modify the plans and specifications with reference to this improvement, not only because the construction in accordance with the original plan would have been unlawful, but also because the discovery of the actual conditions as distinguished from the apparent conditions constituted such a change in conditions as would justify a modification of the plans and a relocation of the means to be employed for checking and impounding the flood waters. That such a change of plans would be for the best interests of the district is not challenged. Indeed, no other course would seem to have been open to the board.

[3, 4] It is next to be considered whether such change of plans would, as respondent contends, violate any contractual rights of the landowners in the district arising by reason of the submission to the voters of the proposition to construct the improvement in accordance with the original plan. If any such contractual right would thus be violated, it would necessarily follow that further bonds could not be issued without a resubmission of the question of the issuance thereof to the electors in the district.

It may be assumed that by reason of the proposal on the part of the officers of the district and the approval of the electors therein as to the authorization and issuance of said bond issue a status analogous to a contractual relation came into being which is entitled to protection under the Constitution. The case of Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044, is authority to that effect. But, in order to determine whether a contract has been violated, it is necessary first to determine what the contract is. In this case it was the proposal to authorize the issuance of the bonds which, in accordance with the statute, set forth the objects and purposes for which the expenditures were to be made and also the assent of the electors of the district to the proposal. In determining the extent and limitations of the contract, the terms of the statute under which the proceedings were taken must be taken into consideration. The provisions of the statute were a part of the contract and must be held to have been personally known to every elector whose approval was sought and registered at the election. Peery v. City of Los Angeles, supra; Inglewood v. County of Los Angeles, 207 Cal. 697, 280 P. 360. Section 8 of the act provides that the fund derived from the sale of said bonds "shall be applied exclusively to the purposes and objects mentioned in the ordinance calling such special bond election as aforesaid, subject to the provisions in this act contained." The ordinance calling the election specified the objects and purposes for which the proceeds of the contemplated bond issue were to be used, and further provided that the indebtedness was proposed to be incurred "in accordance with the provisions of the Los Angeles County Flood Control Act." Section 23 of the act provides that the act may be designated and referred to as "Los Angeles County Flood Control Act," and that such designation and reference shall be deemed sufficient for all purposes. The proposition stated on the ballot did not refer to the statute, but it must be assumed that the ballots were cast by the electors with the terms of the statute in mind which authorized the board of supervisors to change the plans as occasion might require, but in accordance with the terms of the statute. We conclude that there has been no impairment of the contractual rights of the electors of the district by reason of the proceedings taken by the board, and that none will result by the issuance of said bonds.

[5] The respondent's brief sets forth the form of the bonds prescribed by Ordinance No. 14 adopted by the board on June 5, 1924. This form recites that the bonds are issued in conformity with said ordinance adopted June 5, 1924, and "under the authority conferred upon said board by the provisions of an act of the legislature of the State of California designated and referred to as 'The Los Angeles County Flood Control Act', approved June 12, 1915, and after a special election held in said Los Angeles County Flood Control District on the sixth day of May, 1924, at which election there was submitted to the qualified electors of said district the proposition of incurring a bonded debt in the said sum of $35,300,000.00 for the objects and purposes as stated in the ordinance of the said Los Angeles County Flood Control District on the 4th day of April, 1924, and in the report of the chief engineer of said district adopted by the board of supervisors of said district on the 1st day of April, 1924, and at which said election a majority of the votes cast were in favor of said proposition." It is urged that the recital just quoted contains an erroneous statement of fact as to the objects and purposes of the bonded debt, if the funds are to be used in accordance with the changed plans, and that the writ should therefore be denied under the authority of Municipal Improvement Co. v. Thompson, 201 Cal. 629, 258 P. 955. But there is in reality no misstatement of fact in the recital. It correctly recites the proposition submitted to the voters at the bond election which was "for the objects and purposes as stated in the ordinance" calling the election and "in the report of the chief engineer." This recital of the proposition so submitted to the voters would appear to be entirely in conformity with the facts as they have heretofore existed and do now exist.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

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PEOPLE v. HODGES et al.

Cr. 210.

District Court of Appeal, Fourth District, California.

Aug. 6, 1931.

Rehearing Denied Aug. 20, 1931.

1. Criminal law ⇨728(2, 5).

When district attorney is guilty of misconduct, defendant's counsel should call court's attention thereto and assign it as misconduct or request cautionary instruction.

2. Criminal law ⇨720(9).

In prosecution for murder committed in bomb explosion, argument of district attorney relative to "planting" of evidence by defendant *held* warranted under evidence.

> The evidence for the prosecution disclosed that defendant had prepared pipe and had secured fuse and powder, and that the pipe corresponded with that found in the barn after the explosion. Defendant had said nothing about dynamite or piece of pipe being in his house when it was searched after the explosion, but shortly before the close of the case defendant requested deputy sheriff to go to defendant's house and get piece of pipe and dynamite from closet in kitchen. While the pipe was produced from defendant's house, no cap to fit the threaded end was produced, though witnesses testified that one had been procured by defendant originally.

3. Criminal law ⇨1129(1).

Remarks of district attorney derogatory to defendant or defendant's counsel *held* not to warrant reversal where remarks were not assigned as misconduct.

4. Criminal law ⚷1171(3).

District attorney's commendatory statements in argument concerning deputy sheriff who was called by defendant as witness *held* not to require reversal.

5. Criminal law ⚷1171(3).

District attorney's argument that codefendant who took witness stand would be tried by some other jury *held* not prejudicial error, notwithstanding subsequent dismissal of charge against codefendant.

6. Criminal law ⚷1129(1).

Any error in district attorney's remark that defendant could identify pipe introduced as exhibit must be deemed waived, where remark was not assigned as misconduct.

7. Criminal law ⚷1129(1).

District attorney's argument relative to failure of defendant's wife to testify, where not connected with question of defendant's taking witness stand and where not assigned as misconduct, *held* not reversible error.

8. Criminal law ⚷1043(2).

Defendant should make plain his objections at time to avoid repeating trial.

9. Criminal law ⚷730(14).

In prosecution for murder by bombing, argument as to number of persons murdered by bomb explosions *held* not to warrant reversal where court instructed it be disregarded.

10. Homicide ⚷171(3).

In prosecution for murder by bomb explosion, testimony as to result of explosion in wounding another *held* admissible.

11. Jury ⚷136(6).

Refusal to allow defendant additional peremptory challenges, where codefendant refused to join in such additional challenges, *held* not error (Pen. Code, § 1098).

12. Criminal law ⚷1171(1).

In prosecution for murder, improper conduct of district attorney in argument *held* not ground for reversal, in view of overwhelming evidence of guilt.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

A. L. Hodges was convicted of manslaughter, and he appeals.

Affirmed.

Edward B. Patterson, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant Hodges was, jointly with Anthony W. Patton, E. T. McCoy, and G. M. Hunter, charged with the crime of murder in an indictment returned by the grand jury of Imperial county. The defendant Hunter was never apprehended, the defendant Patton was given a separate trial, and the defendants Hodges and McCoy were tried together. The jury found the defendant Hodges guilty of manslaughter, and, under an advisory instruction by the court, found the defendant McCoy not guilty. Defendant Hodges has appealed from the judgment and from an order denying his motion for a new trial.

The general facts relating to the offense of which the appellant was convicted may be briefly summarized as follows: For about a week prior to December 8, 1930, between 100 and 140 Filipinos had been living in the loft of an old barn in the city of Imperial. The presence of the Filipinos was resented by many persons in and around Imperial, to the extent that it had become a general topic of conversation on the streets and the resentment had become so pronounced that some of the talk amounted to veiled, if not open, threats against them. At about 8 o'clock on the evening of December 8, 1930, a bomb exploded in this barn, making a large hole in the dirt floor of the barn, particles of the bomb being driven through the floor of the loft and through the roof of the barn. Other particles passed through the side walls of the barn and into dwelling houses on either side thereof. One piece of the bomb was found in a service station a half block away, having passed through the galvanized iron wall of the station. One piece of the bomb was blown through the body of Arriston Lampky, one of the Filipinos occupying the loft of the barn, resulting in his death a few hours later. Other particles of the bomb wounded three other Filipinos who were in the loft. The barn had a large door 10 feet high by 18 feet wide on the front end, and two windows on the sides. One of the Filipinos testified that about 8 o'clock, or a few minutes after that time, he heard something drop on the ground, and that he saw an object there, approximately between 12 and 18 inches long, which was smoking in the middle. Another Filipino testified that he heard something heavy drop, and that later, as he approached it, it exploded. Various witnesses fixed the time elapsing between the thud of the object falling on the ground and the explosion at from three to six minutes.

Aside from the testimony of the codefendant Patton, the record shows the following evidence tending to connect the appellant with the commission of the crime. The appellant had been prominent among those discussing the question of how to get rid of the Filipinos. He had solicited funds from various persons, to some of whom he did not tell what he proposed to do with the funds, while to others he said it was "for the good of the valley." To at least one, he said it was for "explosives or dynamite—I understood him to say he wanted to scare some Filipinos out. Not that he was going to but that some other people were." A few days before the explosion appellant entered the store of C. T. Gibson in Imperial, and asked for dynamite caps. Gibson said that he did not have any, and suggested that he try the Imperial Valley Hardware Company, at El Centro. Another witness testified that several days before the explosion he heard the appellant say something about blowing up the Filipinos. Another witness testified that, some time after 3 o'clock in the afternoon of December 8, the appellant asked the witness if he would buy him a milk shake if he (the appellant) would knock the Filipinos out. One James Heath testified that about noon on December 8, 1930, he had a conversation with the appellant about some dynamite. He asked the appellant what he wanted the dynamite for and the appellant did not tell him. He told the appellant that he did not have any dynamite in his store in Imperial, but that appellant could get it at the store in El Centro. A blacksmith named Ditto testified that about 10 o'clock on the morning of December 8, 1930, the appellant came to his shop alone, looking for a piece of pipe. The witness sent him to a junk pile outside of the shop and later the appellant returned with a piece of 2½-inch pipe, 16 inches long, with threads on one end. Appellant asked the witness if he could cut some threads on the other end of the pipe or if it would be cheaper to have the other end of the pipe welded closed. The witness told him the latter would be cheaper, and that he could furnish a plug, but that he would have to take it to another blacksmith to have it welded. The witness furnished a plug cut from a piece of shafting, the plug having had threads on it and also having a center hole made by reason of its having been set up in a lathe. A plug found at the scene of the explosion, and introduced into evidence, was identified by the witness as similar to the one he had furnished. The appellant left this blacksmith shop with the pipe and plug, and some 20 or 30 minutes later returned with two other men, with the plug welded into the end of the pipe. At the request of the appellant, the witness drilled a hole about the middle of the pipe, returned it to appellant, and the men drove away. The witness asked the appellant what he wanted the pipe for, to which he replied that the witness would never know. Another blacksmith, George Merkle, testified that on December 8, 1930, a man came to his shop with a piece of pipe and a plug; that at the request of this man he welded the plug into one end of the pipe; and that later three men came and took the pipe away with them. He identified the plug found at the scene of the explosion as in all respects similar to the plug he welded into the pipe that day. He first testified that he recognized three men in the courtroom as the three who had come to his shop, then that he was unable to tell which was which, and finally, on being asked if there was any one in the courtroom whom he could identify as being one of the three men, he replied: "I haven't got no knowledge." One Traxler, employed by the Imperial Valley Hardware Company at El Centro, testified that during the afternoon of December 8 the appellant came into the store, showing a piece of pipe for which he wanted to buy a cap. The witness got a cap to fit the pipe and then sold the appellant four pounds of dynamite, and also some blasting caps. The witness testified that the pipe was between 14 and 20 inches long, plugged at one end by a welded plug and threaded on the other, and that he fitted the cap to the threaded end of the pipe. He also testified that the plug in the closed end of the pipe was similar to the one found at the scene of the explosion. This witness was corroborated by another clerk in the same store. It was established by a number of witnesses that about 7:30 o'clock in the evening of December 8, 1930, appellant went to a house about a half-mile away from the barn in question, where a man known as "Red" Hunter was playing cards with some companions. Appellant said to Red, "Are you ready?" Red answered, "No, I won't be for an hour or two." Appellant replied, "That will be too late." A block and a half directly down an alley from the barn occupied by the Filipinos were two pool halls, one on each side of the alley with their back doors opposite each other. One Peters testified that about 7 o'clock on this evening, at Salty's pool room, he played two or three games of pool with appellant, and that appellant then left the pool room. Also, that appellant reappeared at about 8 o'clock and had just started to play a game, having taken not more than two or three shots, when a man named Johnson ran through the pool room. Johnson testified that he was in Port's pool hall, across the alley from Salty's pool hall, when the explosion occurred; that he heard a kind of thud and felt some vibration; that he told Mr. Port that he believed that there had been an explosion where the Filipinos were; and that he immediately ran out the rear door of that pool hall and into the back door of the other pool hall, running on through to the street. He testified that as he ran through Salty's pool hall he bumped into the appellant, who was playing pool at one of the tables, and that this occurred within a few seconds after he heard the explosion, just time for him to run 150 or 200 feet. A witness, Sproule, testified that on the morning of December 8, 1930, he met the codefendant Patton on the street; that Patton asked him for some powder; that they both proceeded to the witness' home; and that he gave Patton some powder and also a quantity of fuse. When asked how much fuse, he replied, "It would run between 2½ and 3½ feet, somewhere along in there." He testified that he had had experience with this particular kind of fuse, and, when asked how long it would take that amount of fuse to burn, he replied, "Well now, I've never timed it up, but I would judge it would run around about a feet to a minute."

In addition to this evidence, Patton, a codefendant, testified as follows: That he first met the appellant on the evening of December 6, 1930; that around 9 o'clock on the morning of December 8, 1930, he met the appellant in front of Salty's pool hall; that they had some general conversation about what ought to be done with the Filipinos; that he and appellant then walked around several blocks, passing near the barn in question; that as they passed the barn appellant remarked that he had picked out the place where he would "throw it if nobody else did"; that the witness advised him not to throw it at that time; that when they returned to the pool hall appellant asked an old man if he still had that fuse and powder, and the old man replied yes and walked away; that the appellant then told the witness he was going to get a piece of pipe and asked the witness to go down to where the old man was standing and tell him that he (Patton) wanted to get a piece of fuse and the powder, and for him to bring the same to appellant; that he did so and went with the old man to his home, secured the fuse and powder, returned to Salty's pool hall, and gave these articles to appellant; that Red Hunter then appeared and appellant then began to solicit donations "for the good of the valley"; that, at the suggestion of appellant that they go and get a pipe which he had at the blacksmith shop, the witness, Red Hunter, and appellant went to the blacksmith shop and appellant got the pipe; that the three took the pipe over to another blacksmith shop where they had a hole drilled about the middle of the pipe; that, at Red's suggestion, they left the pipe at the blacksmith shop; that later, the witness and appellant drove in appellant's car to the blacksmith shop and the witness went in, brought out the pipe, and placed it in the car; that the witness and appellant then drove to El Centro, where the witness remained in the car and the appellant took the pipe and went away; that when appellant returned to the car, he had the pipe with a metal cap screwed on the threaded end thereof, and also had with him a small brown package; that upon their return to Imperial, they stopped at a long red building where the appellant "took the pipe and what I suppose was the dynamite in there and left it"; and that the witness then went home. He further testified that he returned to Salty's pool hall that evening; that a few minutes later he asked the codefendant McCoy to take him to El Centro in his automobile; that, as they went out of the pool hall, the appellant asked if they would take him down to where the defendant Red was playing poker; that they drove to a house on the east side of Imperial where appellant went in while the others remained in the car; that five or ten minutes later appellant returned to the car and stated that Red was loser in the poker game and would not leave; that appellant then said: "Take me home and I will get it" and also, "I will fix the thing, I will fix the bomb while you are gone"; that after they took appellant to his home they proceeded to El Centro; that they returned in a few minutes and again stopped at appellant's house and went in; and that as they entered the appellant remarked, "I have got it fixed." He then testified that appellant "reaches into the door right straight ahead from where I was standing, picks up this pipe and the fuse was doubled up in his hand at that time." The witness then testified that the three of them got into McCoy's car, taking the pipe and fuse with them, and, after driving past the barn where the Filipinos were, parked their car near the two pool halls; that when he left the car, Hodges was still sitting in the car with the bomb in his lap; that the witness went into Salty's pool hall and five or ten minutes later McCoy came in the front door and about the same time Hodges came in at the back door; that they met near the center of the pool hall, talked a minute, both went outside and later came in; that this is "the last I recollect"; and that the witness stayed in the pool hall until Johnson came running through and said he thought the Filipinos had been blown up.

A few other facts are necessary for the consideration of one of the assignments of error made by the appellant. Shortly before the close of the case, the appellant, in the presence of his attorney, requested Rodney Clark, a deputy sheriff, to go to the appellant's house and get from a closet in the kitchen a piece of pipe and some dynamite. Clark testified that he did so and produced the pipe and dynamite in court. He testified that the appellant told him to "go over there and look in the closet in the kitchen and I would find the original pipe and dynamite." He testified that he found the articles on a shelf in this closet; that there was a little dust on the shelf and nothing else in the closet; and, without objection, he testified that it appeared to him, from what he was able to observe, that these articles had been recently placed there. He also testified that he knew of his own knowledge that the place had been searched the next morning after the explosion; that, immediately after the explosion, the appellant had been taken to the same house and questioned by the witness and three others; and that the appellant had then said nothing about any dynamite or piece of pipe being in his house. An investigator from the district attorney's office testified that on December 9, 1930, he, with two others, searched every portion of the appellant's house and found no dynamite or pipe. It also appears that, after the people rested, the attorney for the appellant asked for a recess until that afternoon, stating that one of his witnesses was not present. The court told him he had a number of witnesses and required him to proceed. Thereupon, he asked for a recess of ten minutes, which was granted by the court. After the recess, counsel stated that two additional witnesses had shown up and proceeded with his case.

Appellant first complains of a portion of the district attorney's argument to the jury, as follows: "Now, you remember how fussed Mr. Patterson was the other day when the prosecution quit, and the court said to Mr. Patterson, 'Go on with your case,' and Patterson fumbled around and he hummed and hawed around and it took him half an hour to get started again. Why? Because they were up there planting the evidence at that very time, and he wasn't sure it was there, and he wanted to have a chance to get out of here and find out. It is the most disreputable thing I ever saw two attorneys pull in a courtroom. That is the reason he wanted to stall over 'till after dinner, to go over there and have this disreputable Hodges tell the sheriff they could find it, and after they got them there they found they had left some of it out. Yes. Are you going to believe that kind of stuff? Do you think there is anything to that? They put Rodney Clark on the witness stand one of the finest officers Imperial county ever had, one of the cleanest officers I have ever had anything to do with, one of the finest undoubtedly we ever had in this county and they went over and told Rodney Clark to go and get it. All right, why didn't they have some of Hodges' friends bring it in? I'll tell you why. It wouldn't look as good as to have Rodney Clark bring it in. When he said it looked as if it had been recently put there, did they cross-examine him on that? No, they dropped it. They knew they didn't dare to do it. He testified there wasn't any dust on it."

In this connection, another portion of the district attorney's argument to the jury is objected to, being as follows: "Now, there is another point of this evidence that I want to demonstrate to you. There it is, put that right on that cap. Look, that fits perfectly, absolutely the same circle, the same width, the same kind of threads, the same thickness, the same everything. That came out of that barn up there. And another thing, listen, they didn't produce this cap that they had picked up, that is what they forgot, they forgot this cap, and you have got to disbelieve Traxler and Fuller if you are going to believe this piece of concocted, damnable planted, perjured testimony."

[1, 2] It is first argued that the reference to planted or spurious evidence had nothing in the record to warrant it, and that all statements in connection therewith amount to testimony given by the district attorney. In the first place, when the first of the above statements, being the one mainly objected to, was made, no assignment of misconduct was made by the appellant. In People v. Sieber, 201 Cal. 341, 257 P. 64, 71, the court said: "The rule is that when a district attorney is guilty of misconduct in the trial of a criminal case, it is ordinarily the duty of counsel for the defense promptly to call the attention of the court thereto and assign it as misconduct, or request the court to instruct the jury to disregard it. Such assignments and requests are necessary as a foundation for a complaint to this court."

We are unable to hold that there were no facts sufficient to justify an argument that the pipe found in the appellant's house by the deputy sheriff near the close of the trial, had not been there all of the time. The evident purpose of producing this pipe, with the testimony of where it was found in appellant's kitchen, was to meet the overwhelming evidence that had been produced showing the appellant had prepared such a pipe, and to show that the same had not been used by him. While a pipe was produced, no cap to fit the threaded end was produced, although three witnesses had testified that one had been procured by the appellant originally. While the district attorney is not to be commended for the manner in which this was discussed, the facts in evidence did warrant an argument along that line. These statements by the district attorney were not testimony, but were his own argument or inferences that he drew from the evidence. Nor do we think the jury could have understood them otherwise. In People v. Molina, 126 Cal. 505, 59 P. 34, 35, the court quotes with approval from another case, as follows: "The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury, it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination."

[3] In reference to that portion of the district attorney's remarks to the jury above quoted, which reflects upon the attorneys for the defendant, it may again be observed that these remarks were not assigned as misconduct at the time they were made, or, in fact, at any time. Shortly thereafter, when the remarks were made about the cap not being produced, counsel for appellant objected to that statement and assigned it as misconduct, and then said, "I asked the court to instruct the jury to disregard all of the statements as to perjured testimony. That cap is over there, fit that cap there on these * * *," whereupon the court instructed the jury: "The jury will rely upon their own recollection of the evidence and not the assertions of either counsel." It would have been improper to instruct the jury to disregard all of the reference to the finding of the pipe in appellant's house, its completeness, and the conditions under which it was found. While the remarks of the district attorney contained improper language, and some that should not have been used, any assignment of misconduct should have been definitely called to the attention of the court. Under the circumstances shown by this record, we do not feel that these remarks justify a reversal of the judgment. People v. Charlie, 34 Cal. App. 411, 167 P. 703.

[4] In connection with the remarks of the district attorney to the jury, above quoted, appellant also insists that the commendatory statements about Rodney Clark, the deputy sheriff, constituted reversible error. Appellant relies upon People v. Frank, 71 Cal. App. 575, 236 P. 189. In that case, it was held that certain commendatory remarks made by the trial judge and a deputy district attorney concerning certain witnesses, without whose testimony a conviction would have been impossible, was erroneous. In the case before us, if the remarks made be considered as going to the credibility of the witness, it was in favor of the appellant, as the witness had been put on the stand by him, and any inference that could be drawn in favor of the credibility of the witness was therefore favorable to appellant. Moreover, the reference to the officer was more in the nature of a reference to his general standing than a comment upon his credibility, and was a part of the argument made in connection with the line of defense, in support of which this witness had been called. While it had much better been left unsaid, there was an element or argument in it, based, at least in part, upon facts before the jury, and, in our opinion, no sufficient error or prejudice appears to warrant a reversal.

[5] Appellant next complains of the following remark from the argument of the district attorney to the jury: "Well, as I said before Patton will be tried by some other jury, and you don't need to worry about that, you are trying these two men, and not Patton."

The record shows that when the codefendant Patton was on the witness stand an effort was made to get him to admit that he had been promised immunity if he would take the stand as a witness. He maintained throughout that he had been promised nothing by any one. Appellant sets forth in his brief that, subsequently, the case against Patton was dismissed on motion of the district attorney. It is strenuously argued that appellant could not have been convicted without the testimony of Patton; that, if the jury had known the case against Patton would be dismissed, they would not have believed his evidence; and that the district attorney misled the jury in the statement above quoted, thereby committing prejudicial misconduct. At this point we may refer to the fact that, after the briefs were filed in this case, the appellant filed in this court a notice of motion for an order requiring the clerk of the trial court to transmit to this court a certain affidavit filed in that court by counsel for appellant, together with certain records of the trial court. This motion was taken under submission and is being considered in connection with the appeal in this case. By the records sought to be transmitted to this court, it appears that, twelve days after the appellant's motion for a new trial was denied, a motion was made to dismiss the charges against the defendant Patton, which motion was by the court denied. Also, that five days later, in another department of the same court, a motion to dismiss the charge against defendant Patton was granted. In connection with this motion to transmit evidence to this court, and also in connection with appellant's contention that the remarks of the district attorney above quoted constituted prejudicial misconduct, it is argued that, at the time those remarks were made, the district attorney had no intention of trying the codefendant Patton. No evidence of any such fact is presented, and nothing appears to justify such a contention other than the fact that the action was later dismissed as against Patton.

Not only did the dismissal of the action against Patton occur after judgment had been entered in this case, but these subsequent events are by no means so connected up with the remark made by the district attorney as to show prejudicial misconduct. Appellant's application to have this subsequent record transmitted to this court is denied. In addition, it may be said that the evidence is not only sufficient to sustain the judgment against the appellant without reference to Patton's testimony, but his evidence stands uncontradicted and to a large extent corroborated by other evidence, and it would not appear from the record that, as claimed by the appellant, the jury would not have believed Patton even had they known that the case against him was not to be tried.

[6] The next assignment of misconduct on the part of the district attorney is in connection with a remark made when counsel for appellant was attempting to identify the pipe which the deputy sheriff had brought from appellant's house shortly before the close of the trial. The court asked counsel if he had any further identification, to which counsel replied that he knew of none, and the district attorney remarked "the defendant could identify it." The pipe in question was admitted in evidence. This statement of the district attorney is objected to as an indirect reference to the fact that the appellant did not take the witness stand on his own behalf. At that time it did not appear whether or not the defendant would take the witness stand. In any event, the making of the remark was not assigned as misconduct, and any error must be deemed to have been waived.

[7, 8] The next assignment of error relates to the following excerpt from the argument of the district attorney: "And another thing, you women on this jury, if your husbands were sitting over there where that defendant is sitting, and eight pieces of dynamite had been in your cupboard where you kept your dishes and pans and cooking utensils, and there was a piece of pipe as big as that, you women sitting here on this jury now in all fairness, if your husband was sitting where that man is, wouldn't you get on the witness stand and testify that that pipe and dynamite had been there ever since that time? Why, of course you would."

It is argued that this, in effect, was a comment on the fact that the appellant did not take the stand on his own behalf, and was also a comment that he did not call his wife to testify for him. In support of this contention, appellant cites the cases of People v. Tufts, 167 Cal. 266, 139 P. 78, and People v. Terramorse, 30 Cal. App. 267, 157 P. 1134. Both of those cases refer to comment by the district attorney on the fact that the defendant objected to his wife's testifying. In this case, the defendant sought to prove that the pipe he was shown to have prepared was still at his home unused. He had himself begun this proof, and it appears to us that the comment on the fact that he did not complete such proof in an obvious manner is considerably different from commenting on the fact that a defendant has exercised a right given him by law, as was the situation in the cases cited. But the remarks had no connection with or reference to the fact that the appellant did not take the stand. If it be conceded that the remarks were improper, it neither appears that they were sufficiently prejudicial to require a new trial, nor that the objection now made was presented to the court and assigned as misconduct. When asked what he claimed was misconduct, counsel for appellant said it was "about the defendant not putting on any witnesses on his behalf." When his attention was called by the court to the fact that no such statement had been made by the district attorney, but that he had referred to the failure to call appellant's wife, counsel for appellant made no correction and no further assignment of error. In a long drawn-out trial of this nature, where many things are apt to occur in the stress of the moment, it is only reasonable that a defendant should be required to make plain his objections to the court at the time, when they may be corrected, in order to avoid the time and expense in repeating the entire proceeding. We think that no reversible error is shown. People v. Moore (Cal. App.) 295 P. 1039. In this connection, it may be observed that the court instructed the jury that the neglect or refusal of the defendant to be a witness could not in any manner prejudice him, nor be used against him.

[9] Prejudicial misconduct is claimed because in his argument to the jury the district attorney said: "Now I want to say this: Do you know how many persons have been murdered in the United States since the first of January, 1930, by explosions of bombs? Have you any idea? Well, there have just been one hundred and eighty-two, that's what. * * *"

In support thereof appellant cites People v. Wong Loung, 159 Cal. 520, 114 P. 829. Not only does this statement fall within the class referred to in People v. Molina, supra, but the record shows that the statement was objected to and cited as misconduct, and the court instructed the jury to disregard it. In addition, the court gave a general instruction that all statements of counsel, if they were not supported by evidence, should be wholly disregarded by the jury.

[10] The next point raised by appellant is that the court erred in permitting one Norbe to testify that he was in the barn on the night of the explosion, that he was wounded, and that his dog was killed. It was maintained that this constituted evidence of another crime. One of the issues in this case was whether Lampky came to his death because of this explosion, or by some other means. Testimony as to the effect and result of the explosion, and how pieces of the bomb were driven through the walls, flooring, and into other persons, including the deceased, was pertinent to the issue. People v. Cooper, 86 Cal. App. 441, 260 P. 886.

[11] The last point raised is that the court erred in refusing to allow peremptory challenges to the appellant because the codefendant refused to join in said challenges. It ap-

pears that each codefendant was allowed five peremptory challenges, and in addition they were allowed twenty peremptory challenges in which they might join. After appellant's five peremptory challenges were exhausted, one juror remained to whom he desired to make a peremptory challenge, in which his codefendant refused to join. The only argument made is that section 1098 of the Penal Code is unconstitutional. However, the particular portions of the Constitution which it is claimed are violated by this section are not pointed out. The precise questions here raised were decided adversely to appellant in the case of People v. Dowell, 204 Cal. 109, 266 P. 807.

[12] The crime with which appellant is charged was a peculiarly atrocious one, endangering the lives of scores of innocent people in addition to the one who was killed. Most of the points raised by the appellant are addressed to misconduct on the part of the district attorney. The fact that the trial lasted eight days, with the bitterness shown by the record, may explain, but does not excuse, some of the matters complained of. The language used by the district attorney in some instances is certainly not to be commended, and some other things said had much better been left unsaid. In some cases a succession of errors might justify a reversal where the individual instances were not sufficiently prejudicial to require that action. However, in the instant case, where the evidence of appellant's guilt was so overwhelming and where it does not seem possible that the improper language used could have changed the result, we are of the opinion that, under all of the circumstances shown, such errors as appear are not sufficient to justify a reversal of the judgment.

For the reasons given the order and judgment appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

DODWELL & CO., Limited, v. LOS ANGELES WAREHOUSE CO. *

Civ. 6886.

District Court of Appeal, Second District, Division 2, California.

July 28, 1931.

Rehearing Granted Aug. 27, 1931.

1. Warehousemen ⚷34(5).

Warehouseman storing and issuing receipt for rugs, and failing to deliver rugs when receipt was surrendered, had burden of proving that rugs were not taken from warehouse because of warehouseman's negligence.

2. Warehousemen ⚷34(7).

Evidence *held* to support finding that warehouseman exercised due care and diligence in storing stolen rugs, precluding bailor's recovery for failure to deliver rugs and for conversion of rugs.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Dodwell & Co., Limited, against the Los Angeles Warehouse Company. From an adverse judgment, plaintiff appeals.

Affirmed.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for appellant.

Muhleman, Anderson & Palmer and C. Sherman Anderson, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal by plaintiff from a judgment in favor of defendant after trial before the court.

February 17, 1925, plaintiff delivered to Los Angeles Steamship Company, at San Francisco, four cases containing thirty-four Chinese rugs consigned to plaintiff at Los Angeles. The evidence shows that Cyrus A. Hasty arranged with plaintiff for the shipment, and that the cases were to be put in a warehouse belonging to defendant upon arrival and a warehouse receipt issued to plaintiff. The latter expected they would be so warehoused as to make it possible for Hasty to display the rugs to prospective customers, and, if a sale was made, Hasty was to get a delivery order from plaintiff, it being understood that the rugs would be sold for cash, or, if on credit, it was to be subject to plaintiff's approval of the purchaser. Hasty was to pay the storage charges, under his verbal arrangement with plaintiff. Pursuant to this plan, Hasty conducted the negotiations with defendant under which the warehousing was done. In some way not disclosed by the evidence, but evidently with plaintiff's consent, in view of the fact that the goods were consigned to it and the bill of lading was its own, Hasty warehoused the goods on March 6, 1925, in accordance with his verbal agreement with plaintiff, without notice to defendant that plaintiff was the owner of the shipment. The "in sheet" of defendant shows that the rugs were received from Cyrus A. Hasty & Co., and presumably were stored for such company. The next day, however, a warehouse receipt was issued covering the rugs and delivered to Hasty, showing that they were received in storage by defendant "for the account of Dodwell & Company, Ltd., pledgee, Ex Cyrus A. Hasty & Co." The rugs

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 6 P.2d 990.

were stored, so that they could be displayed, in a room designated as No. 533, in which room Hasty had theretofore officed and which was in a part of the warehouse where offices were rented by various parties. In some way unknown to either plaintiff or defendant, except in one instance disclosed by the evidence, the rugs were removed by Hasty from said room prior to January 6, 1926. On the latter date the original warehouse receipt was canceled by Mr. Berbower, who was the office manager of defendant, and who passed away prior to the date of trial. The evidence shows that it was mailed to Los Angeles by plaintiff on January 4, 1926. On January 6 defendant's general manager was told by representatives of plaintiff that the rugs had been stolen from the warehouse and sold by Hasty, and upon investigation defendant found that they had been removed. Hasty was not present at the trial, and apparently was desired as a witness by both parties. Defendant did not know until January 6, 1926, that plaintiff was the owner of the rugs.

The complaint contained two counts, the first for damages for failure to deliver the goods as provided in said warehouse receipt and the second for damages for conversion of the goods stored.

Defendant, in addition to a general denial of the matters alleged in the complaint, alleged as separate defenses that in storing and safeguarding the rugs in question it at all times exercised such care and diligence as a reasonable and careful owner of similar goods would have exercised under the same circumstances, that in employing its servants and agents it made diligent inquiry as to their honesty and integrity, and that to the best of its knowledge during the period such rugs were so stored it had only honest and faithful employees, who carefully and prudently looked after and cared for them.

The court's findings are very voluminous, but among them are the following: "VIII. During all the time said rugs were stored with defendant they were kept in defendant's warehouse in a locked room, access to which could be gained only by unlocking the door thereof with a key securely kept in the possession of the defendant, and it had instructed its employees not to allow said Cyrus A. Hasty, or any person or persons other than employees of defendant, to enter said room unless accompanied by one or more of defendant's employees. That defendant's employees were instructed by defendant not to inspect or handle any goods stored with the defendant, except in the ordinary course of business, and defendant never, at any time, had any knowledge of any violation of any instructions; and in the storing and safeguarding of said goods defendant at all times exercised such care and diligence as a reasonable and careful owner of similar goods would have exercised under the same or similar circumstances. IX. In employing its servants and agents, defendant at all times made diligent inquiry as to the honesty and integrity of such applicants, and, to the best of defendant's knowledge, it had in its employ during said period from March 6, 1925, to January 6, 1926, honest and faithful employees only."

Many points are urged by appellant as error, questioning various findings as not supported by the evidence, among which is finding No. VIII quoted above. In our opinion, if there is evidence supporting such finding, the judgment must be affirmed, even though we might conclude that other findings had no such support or were otherwise improper.

[1] Defendant, both by its answer and in the evidence produced by it, took upon itself the burden of proving that the rugs were not taken from the warehouse by reason of its negligence, and we are of the opinion that it properly had such burden by reason of the production of the warehouse receipt introduced in evidence and the fact that defendant did not have the rugs to deliver when the receipt was surrendered to it. Such proof would seem to make a prima facie case under the first cause of action alleged, as no showing was even attempted that the deliveries were made on the order of plaintiff or upon production of such receipt, which the evidence shows remained at all times in plaintiff's possession from shortly after its issuance until it was mailed to Los Angeles on January 4, 1926.

In placing the rugs in a room where they could be displayed to prospective customers, defendant carried out the arrangement made between Hasty and the plaintiff. Mr. Turner, defendant's general manager, testified that the display room was kept locked and the key to it retained in Mr. Berbower's desk in defendant's main office; that Hasty did not have a key to the room, and that, in order to enter such room, it was necessary for him "to get in touch with Mr. Berbower, who would send a man with him with a key, and they would go to the room and open it up"; that he knew of no instance when Mr. Hasty was not compelled to go through that procedure to obtain access to the room; that their instruction to employees was that no one was to be allowed in any of the buildings without one of the employees being with them; that the only keys that he knew of to the room in question were one "with the night janitor; there would be a key with the superintendent and I carry a pass key, and the original key"; and that the original key was "kept in Mr. Berbower's desk." The witness also testified that there was one window in the room opening on a sheer drop of five stories; that there was no fire escape nor any ladder or other means of gaining access to the room other than through the doors and window; that a day and night watchman were kept on duty at the warehouse; that at the time the rugs were in storage a watchman was maintained so that people could not get onto the fifth floor, where the rugs were, without the knowledge of the watchman; that during such period the first floor of the building was occupied by the Los Angeles Furniture Mart, and no one could get in or out of the building unless they had an office there and were known to the telephone operator or the manager on the first floor, or unless they came through the main office at 315 Commercial street; that the Los Angeles Furniture Mart closed its office about 6 p. m., when the night watchman locked the door, both inside and out; that it was not possible for any one to enter the building through the first floor. Turner further stated that he had no knowledge of any of the employees being dishonest, and that it never came to his attention that any of the goods in question had been stolen from the warehouse or removed until January 6, 1926.

The superintendent of defendant testified that, while that portion of its building in which room 533 is located was used by the public, everyone was required to have an order, whether a tenant or whether it was a storage account, before removing anything from the building; that any one who wanted to see the various tenants, at that time, could not go up the elevator entering from San Pedro street at all; that during the day one or more persons were on duty in the lobby all of the time until 5:30 p. m., when the place was "locked up"; that the Los Angeles Furniture Mart was operated by defendant, and its watchman and clerical employees were in the employ of defendant. The witness also said that he had no personal knowledge of any goods ever having been lost through theft except the rugs in question and in 1926, when the watchman was bound and gagged and some six or seven hundred cases of whisky were taken.

The finding as to the diligence used by defendant in selecting its servants and agents and as to the employees being honest and faithful is not questioned, and the evidence seems to support it. It is true that one witness, a tenant of the building by the name of Hartog, testified that he went with Hasty to room 533, and that on his first visit he entered through a connecting door from room 531, which was next to it, and that he bought one of the rugs from Hasty and carried it out through the hall door of room 533 and out of the building without being questioned. The witness also testified that he had frequently been in room 531, and that the door opening into room 533 "was open most of the time"; also that he had observed other tenants on the fifth floor going out with bundles, and had not seen them stopped, and that on other occasions he himself had carried "samples or small packages" out of the building. He was asked: "Were you ever stopped?" to which he replied: "No; I was a tenant and everybody knew me." A witness who worked for the occupant of room 531 testified that Mr. Hasty had room 533 for a while, but could not remember whether it was in 1923, 1924, or 1925; that there was a roll of rugs against the wall, but she did not know what kind they were; also some pongee silk; that the door between the rooms was left open on numerous occasions, and she answered Mr. Hasty's telephone calls during his absence; that the latter had a desk in his room; that she never saw him carrying any goods out of the room, although she had seen him in the room alone. No witness testified to removing or seeing any rugs removed except Mr. Hartog.

[2] We have not attempted to refer to all of the evidence which tends to support finding No. VIII, but we cannot say that such finding is unsupported, although there is very persuasive evidence conflicting therewith. It is no part of our duty, however, to weigh the evidence, and, as we cannot say that the trial court could not draw the inference which it did in the finding referred to, from the evidence in the case, there seems to be nothing for us to consider. Runkle v. Southern Pacific Milling Co., 184 Cal. 715, 195 P. 398, 16 A. L. R. 275.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

WORKS, P. J.

Whereas, this court, on August 27, 1931, made and entered in the above-entitled cause an order which read, "Rehearing denied," and

Whereas, all the justices of this court had theretofore agreed that the petition for rehearing theretofore pending in said cause should be granted, and said order "Rehearing denied" was entered through mistake and inadvertence and in direct opposition to the order agreed upon by said Justices,

Now, therefore, said order "Rehearing denied" is hereby amended and corrected, nunc pro tunc as of August 27, 1931, to the end that it may speak the truth, so that it shall read "Rehearing granted."

This order is made upon the authority of Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313.

115 Cal.App. 607

LANE v. McALPINE et ux.

Civ. 4342.

District Court of Appeal, Third District, California.

July 23, 1931.

Rehearing Denied Aug. 22, 1931. Hearing Denied by Supreme Court Sept. 21, 1931.

1. Husband and wife ⇨232(3).

In action against husband and wife for rent, finding that each agreed to pay *held* supported.

2. Appeal and error ⇨931(1).

Where judgment was for plaintiff, appellate court must assume that court resolved conflicts in evidence in plaintiff's favor.

3. Husband and wife ⇨4.

Parent and child ⇨3(1).

Generally, duty is imposed on husband to maintain wife and children.

4. Husband and wife ⇨19(11).

Generally, where wife living with husband obtains on credit shelter or supplies needed in conduct of common domestic enterprise, wife is husband's agent and incurs no personal liability.

5. Husband and wife ⇨19(11).

Where proof is clear and convincing that wife, although living with husband, contracted debt in her own behalf, she is personally liable, although debt be for necessaries.

6. Appeal and error ⇨1010(1).

Whether proof is sufficiently convincing to establish that wife, living with husband, intended to contract debt for necessaries in her own behalf, is primarily for trial court.

7. Appeal and error ⇨1012(1).

Appellate court must accept as conclusive trial court's determination on whether proof is sufficiently strong and convincing to show wife bound her separate property for debts for necessaries.

8. Husband and wife ⇨151(6).

Where both husband and wife had agreed to pay rent, wife's separate property could be subjected to payment thereof as "necessary" furnished family while living with husband (Civ. Code, §§ 158, 171).

[Ed. Note.—For other definitions of "Necessary," see Words and Phrases.]

9. Appeal and error ⇨1011(1).

Finding based on conflicting evidence is conclusive on appeal.

10. Husband and wife ⇨154.

In action against husband and wife for rent, finding that each agreed to pay rent constituted finding that wife agreed to pay, making obligation joint and several (Code Civ. Proc. § 414).

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Martha J. Lane against Walter H. McAlpine and Minnie M. McAlpine. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL and SHENK, JJ., dissenting.

Warren Steel and Homer Lingenfelter, both of Marysville, for appellant.

Rich & Weis, of Marysville, for respondent.

W. E. Davies, of Marysville, for defendant Walter H. McAlpine.

PRESTON, P. J.

Plaintiff, Martha J. Lane, brought this action against the defendants Walter H. McAlpine and Minnie M. McAlpine, his wife, to recover rental of a certain house used as a residence by said defendants in the city of Marysville.

The action was tried by the court without a jury, and resulted in a judgment in favor of the plaintiff for $1,077 against both defendants. The judgment also provided that the separate property of the wife Minnie M. McAlpine was liable in satisfaction of said judgment. From this judgment, Mrs. Minnie M. McAlpine alone appeals.

The court found that the plaintiff rented the house in question "to each and both of said defendants, at their special instance and request, * * * and each of them agreed to and with plaintiff to pay plaintiff the sum of $75.00 per month for the rental of said house. * * *"

The court also found that the agreement to pay said rental was the personal contract of said appellant Minnie M. McAlpine as well as the personal contract of said defendant Walter H. McAlpine. The court further found that the money attached by plaintiff was money acquired by appellant Minnie M. McAlpine after her marriage "by devise or succession from the estate of her deceased mother."

[1, 2] The evidence as to who made the contract of hiring with plaintiff is conflicting. There is, however, substantial evidence in the record, which in and of itself will support the finding of the trial court. We must assume the court resolved the conflict in favor of plaintiff. Therefore, we will simply epitomize enough of the record to show that the findings have substantial support in the

evidence given by plaintiff and her witnesses, which the court accepted as the true version of the transaction between the parties.

Mrs. Lauritzen, a daughter of plaintiff, testified that Mr. McAlpine came to see her in Sacramento and inquired if her mother's house in Marysville was going to be vacant. Mrs. Lauritzen replied that the home was vacant and for rent. Thereupon McAlpine stated: "I will tell you, I will have to take it up with my wife because she is the one that is renting the house and she is the one that is going to be in the house most of the time. * * * You know she wears the pants in our house." To this Mrs. Lauritzen said: "It is mother's house and she lives in Oakland, I think it would be best for mother to go over and see Mrs. McAlpine and talk with her, and I will write to my mother and tell her."

Mrs. Lane, the plaintiff and mother of Mrs. Lauritzen, testified that she called upon Mrs. McAlpine, who was at that time living in an apartment on Van Ness avenue in San Francisco, and had a conversation with her about renting the Marysville house, in which Mrs. McAlpine said: "She would rent the house and take good care of it. That the rent would be $75 per month payable in advance." Soon after this conversation, Mr. and Mrs. McAlpine moved from San Francisco to Marysville and took possession of the home in question, and remained there until the commencement of this action.

They both admit the rent was not paid, and that the amount claimed by plaintiff is the correct amount due her.

Appellant contends that the court erred in subjecting her separate property in satisfaction of said judgment. In support of this contention, learned counsel for appellant argue "that the evidence merely shows an ordinary contract for a family necessary in which there was no express agreement on the part of the wife to bind herself individually for the payment of the rent, nor any agreement on her part that her separate property acquired from the estate of her mother should be so bound."

[3, 4] The general rule is that upon the husband is imposed the duty to maintain his wife and children, and, where the wife living with her husband obtains on credit shelter or supplies needed in the conduct of this common domestic enterprise, she is his agent and incurs no personal liability.

[5] There is, however, a well-recognized exception to this general rule, and it is this: Where the proof is clear and convincing that the wife, although living with her husband, contracted the debt in her own behalf, or intended to bind her separate property for its payment, she will be held personally liable, even though the debt be for necessaries of life for herself and husband while living together. Chaffee v. Browne, 109 Cal. 211, 41 P. 1028.

[6, 7] Counsel also insists that the proof in the case at bar falls far short of being of that "clear and convincing character" necessary to show that Mrs. McAlpine agreed to pay the rent. The rule, however, is well settled that in a case of this character, as in others, the question whether the proof is sufficiently strong and convincing is primarily addressed to the trial court, and this court must accept the determination of the trial court thereon as conclusive. Brison v. Brison, 90 Cal. 334, 27 P. 186; Couts v. Winston, 153 Cal. 688, 96 P. 357; Wadleigh v. Phelps, 149 Cal. 637, 87 P. 93; Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360, 364; Grass v. Rindge Co., 84 Cal. App. 750–771, 258 P. 673; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Steinberger v. Young, 175 Cal. 81, 165 P. 432; De Kahn v. Chase, 177 Cal. 281, 170 P. 608; Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092.

In Title Ins. & Trust Co. v. Ingersoll, supra, on this question, the court said: "The rule 'does not mean that the evidence in the record must be entirely plain and convincing to an appellate court. * * * It will not disturb the finding of the trial court * * * where there is substantial evidence warranting a clear and satisfactory conviction to that effect.' Wadleigh v. Phelps, 149 Cal. 637, 87 P. 93. We cannot here give a statement of all the evidence upon which the trial court gave its decision. It was doubtless based in part on the demeanor of the defendant as a witness on the trial. It is sufficient to say that we cannot say that the trial court disregarded this rule in making its findings."

[8, 9] Appellant apparently admits that the joint and several judgment rendered against herself and husband was proper, but contends said judgment should have been restricted in its application to conform to the limitations of section 171 of the Civil Code.

The difficulty of this position is that under the evidence the trial court has found that Mrs. McAlpine should be charged for the rent upon her own contract, irrespective of her husband's liability, and irrespective of said section 171. Wisnom v. McCarthy, 48 Cal. App. 697, 192 P. 337; Ackley v. Maggi, 86 Cal. App. 631, 261 P. 311.

Under section 158 of the Civil Code, Mrs. McAlpine had power to contract to pay the rent of the house in question, whether it be considered a necessary or not, and, the court having found upon conflicting evidence that she did agree to rent the house and pay the rent therefor, such finding is conclusive on appeal. Therefore, by these findings, the case at bar is removed from the limitations prescribed in section 171 of the Civil Code, as construed in the case of Evans v. Noonan, 20 Cal. App. 288, 128 P. 794.

[10] As above stated, the court found that the defendants and each of them agreed to pay the rent. Therefore, there is no merit in the contention of appellant that there is no finding that "she expressly agreed to pay the rent." Under the finding, the obligation is made several as well as joint, and under a joint and several obligation each of the obligees is individually liable. Plaintiff might have sued only Mrs. McAlpine. This has long been the rule in California. Stearns v. Aguirre, 6 Cal. 176; Callahan v. Danziger, 32 Cal. App. 405, 163 P. 65; Wisnom v. McCarthy, supra; section 414, Code Civ. Proc.

We think the judgment should be affirmed, and it is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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115 Cal.App. 718

PEOPLE v. CLAPPER.

Cr. 122.

District Court of Appeal, Fourth District, California.

July 30, 1931.

1. Forgery 🔑44(½).

Evidence *held* to support conviction of forgery by issuing check knowing it to be forged.

2. Criminal law 🔑829(1).

Refusing instruction, pertinent parts of which were covered in court's instruction, *held* not error.

3. Criminal law 🔑823(6).

In prosecution for forgery, instruction complained of, considered with other instructions, *held* sufficient to cover question whether signing of checks had been authorized.

> The court instructed that, in a crime of the nature involved, certain elements were necessary to be established, and, before jury could convict defendant, they must decide certain questions, one of which was whether defendant knew that he had no authority to sign name of other persons to checks.

4. Criminal law 🔑822(1).

Instruction complained of must be read and considered with all other instructions.

5. Criminal law 🔑763, 764(13).

In prosecution for forgery, court's instruction, including statement that acts constituting crime could be proved by circumstances, *held* not erroneous as being on weight of evidence.

> The court instructed that to warrant conviction the proof need not be the direct evidence of persons who saw the offense committed, but that acts constituting the crime could be proved by circumstances, and that circumstantial evidence was legal and competent in criminal cases, and, if it was of such character as to exclude every reasonable hypothesis other than that the defendant was guilty, it was entitled to same weight as direct testimony.

6. Forgery 🔑34(2).

In prosecution for forgery, no variance existed between information and proofs that defendant had no authority from any persons with similar names to sign checks.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

T. C. Clapper was convicted of forgery, and was also found to have suffered three prior convictions of a felony, and he appeals.

Affirmed.

Burns & Watkins, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was charged with two separate crimes of forgery, as alleged in two counts of an information filed by the district attorney of Fresno county. The first count charges that on or about October 18, 1930, with the intent to defraud, the defendant falsely uttered, forged, and passed a check, a copy of which is set forth, purporting to be a check on the Fresno Branch of the Bank of America, payable to cash, for $7, and signed "W. B. More," knowing the same to be altered and forged. In the second count it is charged that with intent to defraud, he uttered, forged, and passed a check dated October 24, 1930, a copy of which is set forth, drawn on the Fresno Branch of the Bank of Italy, payable to cash, for $6, and signed "H. H. Haropp," knowing the same to be altered and forged. He is further charged with three prior convictions. By the verdict of a jury, he was found guilty on both counts of the information, and was also found to have suffered three prior convictions of a felony, as set forth in the information. This appeal is from the judgment which followed, and from an order denying a motion for a new trial.

[1] The first point raised is that the evidence is not sufficient to support the judgment. Appellant maintains that the only evidence upon the subject of his guilt is the following: W. B. Moore, long a resident of

Fresno, testified that the signature on the check was not his; that he had never authorized any person to sign his name thereto; that he knew no other person of his name in the county of Fresno; and that he had never known the defendant. R. R. Haropp, an old resident of Fresno, testified that he knew no person in Fresno named H. H. Haropp, and that the only other person by that name in that vicinity was his father, A. R. Haropp. There was evidence that neither of the banks named in the information had a checking account in the name of W. B. More or H. H. Haropp at any time within several years. There was the evidence of a handwriting expert that both checks were written by the defendant, and that the only attempt to disguise the handwriting was one word in the second check, which the expert stated might have been caused by a change in position of the writer. The appellant himself testified as follows:

"I first saw that check, filed as Plaintiff's Exhibit 1 in the room 26 of the Salvation Army Hotel, on the night of the 17th of October, 1930. I wrote the check and signed it. I did it by the instructions of witness Dant and another gentleman. I did not know who that other gentleman was. He said his name was W. B. More. I never saw him before and have not since seen him. I do not know where he is now. It looked suspicious to me on account of the transaction which came up over some liquor, that is what the check was given for. The witness Dant gave him the liquor for the check. The liquor was in two jugs. I have been in jail and never looked for this man More.

"The other check, Exhibit No. 2, I wrote and signed it. There were two men together. The witness Dant brought them into my room. The witness Osburn and Cal Nance and Coon Dog Benson were there. They were all pretty full. This man gave Dant the check for the booze—two jugs. They took the booze and went out. Dant and Osburn said it would be all right. I found out there was something wrong about the checks when I was arrested. I wrote the name of H. H. Haropp to that second check. He said that was his name. I had no way of knowing whether he had an account at the bank—I never saw him before. I did not know there was anything crooked about the matter. If I had known his name was not H. H. Haropp, I would not have written it."

Appellant argues that it thus conclusively appears that he signed the names of W. B. More and H. H. Haropp to the respective checks at the request and in the presence of persons who claim to be those parties respectively, and that this does not constitute forgery in the absence of proof that he knew that the names these persons gave were not their true names, nor unless it appears that he knew that such persons did not have sufficient funds in the respective banks to meet the checks.

We find, however, considerable other evidence in the record. Carl Christensen testified that he ran a cigar store in Fresno and cashed the first check for the appellant on October 18, 1930; that he and Dant came to the store together, and appellant asked him to cash the check for him; that Dant told him appellant roomed at his home, and he told them that, if Dant would indorse the check, he would cash it; and that Dant indorsed the check and he gave the appellant the money, which he put in his pocket. He also testified that later he cashed the other check in about the same manner; that Dant accompanied the appellant to his store; that appellant had the check; and that, at his request, Dant indorsed the check, which he cashed. He further testified that both checks were returned to him, and subsequently another party took up the $7 check, paying him that amount, and Dant took up the $6 check, paying him that amount. Dant testified that the first time he ever saw the first check was in Christensen's store when the appellant was trying to cash it; that he told Christensen appellant was rooming at his house, and Christensen asked him to indorse the check; that he did so; and that Christensen gave the money to appellant, and he put it in his pocket. He further testified that a few days later, the appellant asked him again to "O. K." a check for him, telling him the signer was a business man there and that the check was good; that he indorsed the other check here involved, and Christensen gave the money to appellant; that later, when Christensen told him the checks were no good, he himself took up one and another man took up the other. He testified that he did not see the defendant write either of the checks; that he knew nothing of a man named W. B. Moore being present on the occasion when the appellant testified the first check was signed; that appellant brought the second check there already written; and that the appellant had tried to get him to cash the second check before taking it to Christensen, telling him the check was in payment for whisky which he had sold to the party signing it. He further testified that the defendant left Fresno on October 27, 1930; that the defendant had been staying at his place, and had promised to make the two checks good; that on October 27 the defendant told him that he would leave his outfit there while he went to Visalia to collect some money, and that he would come back and make the checks good; that ten minutes later he saw the defendant come out with his grip and run around the corner; and that he immediately phoned to the district attorney. There is evidence that two men came from the district attorney's office, and with

Dant hunted for the defendant. Also that the defendant went to Los Angeles on that day, and later was brought back by an officer from Montebello, Cal. A police officer testified that on November 5, 1930, the defendant told him he did not remember writing the checks. Another officer testified that, while he was returning him from Montebello, the defendant stated that he had issued these checks while intoxicated.

If it is conceded, as argued by appellant, that the mere writing of a check for another at his request is not forgery, such a situation does not conclusively appear from the evidence. The jury may well have refused to believe the story told by appellant. To believe that Dant turned over liquor to a stranger, and accepted, in payment therefor, a check written and signed for the stranger by this helpful individual who had never seen the stranger before, the check not only being written in the presence of Dant, but actually at his suggestion, calls for a high degree of credulity. Perhaps the jury recognized the "mysterious stranger" who is omnipresent in liquor cases. In addition, there is ample evidence that the check was not written under the circumstances testified to by appellant. The evidence is sufficient to sustain the verdict, nor more than a conflict appearing, at best.

[2] Error is next claimed in the refusal of the trial court to give certain instructions offered. It is first claimed that the court erred in refusing an instruction, which, after setting forth what was claimed by the prosecution in reference to the first count of the information, and what was claimed by the defendant in reference to that count, concluded as follows: "And the jury are instructed that if the said check for $7 was drawn by defendant, at the request of a person then and there representing himself to be W. B. Moore, and at the request of that person wrote his name, or what that person claimed to be his name, W. B. Moore, to that check, believing him to be named W. B. Moore, and not knowing that W. B. Moore did not have a checking account or credit at that bank, then, and in that event, the making and the signing of the said check would be of the said person so claiming to be W. B. Moore, and would not be the act of defendant, and in such case defendant would not be guilty of forgery."

And also another instruction which, after setting forth what was claimed by the prosecution in reference to the second count of the information, and what was claimed by the defendant in reference to the same count, concluded as follows: "If it be true that the instrument described as the first act of forgery by defendant was written by him at the request of and in the presence or by the direction of a person then representing himself to be named W. B. Moore, and if it be further true that the said person was then a stranger to defendant and the said instrument was written by defendant at the request of said stranger and in his presence, and the name he represented himself to have, W. B. Moore, was written thereto in his presence, and at his request and direction, then the drawing, uttering, signing and delivery of that check would be the act of the person so requesting the same to be written, and defendant in such case would not be guilty of forgery."

It is apparent that the concluding part of this second instruction mistakenly referred to Moore instead of Haropp. We think no error is shown. Aside from the other objections, we should hesitate to approve the proposition that a person is justified in writing and signing a check for a stranger, even at his request, without some excuse or reason therefor, and without knowledge of facts that could justify such procedure. In addition, the pertinent parts of the requested instructions are covered in an instruction given by the court, to the effect that, if they should find that the defendant had authority to sign the check, they should find him not guilty.

[3, 4] Appellant complains of the following instructions, which were given by the court:

"In a crime of this nature, certain elements are necessary to be established, and certain questions must be decided by you as jurors. In this case before you can convict the defendant:

"First, were the checks which are set out in the information executed, created or made by defendant?

"Second, was the defendant authorized by W. B. Moore or H. H. Haropp, to so execute, create or make the checks?

"Third, did defendant know that he had no authority to sign the name of W. B. Moore or H. H. Haropp?

"Fourth, were the checks, as executed, created or made, passed by the defendant knowing the same to have been executed, created or made without authority?

"Fifth, did the defendant have the intent to defraud some person, either at the time he executed, created or made the checks, or at the time he passed the checks, if you find that he either endorsed or passed them, or both?

"If you find that the prosecution has established these elements by proof which convinces you beyond a reasonable doubt, and to a moral certainty, then I instruct you that it is your duty to convict the defendant."

It is claimed that these instructions exclude the idea that any other persons of similar names had authorized the making and signing of the checks. The appellant admitted writing and signing the checks, and the only question raised by his defense was his authority so to do. That issue was submitted to the jury under appropriate instructions. The instruction here complained of must be read with all of the others, and, taken together, they were sufficient to cover the question as to whether the writing and signing of the checks had been authorized by any persons named Moore and Haropp.

[5] It is next claimed that the court erred in giving the following instruction: "The Court further instructs the jury that while they must be convinced of the guilt of the defendant beyond a reasonable doubt, from the evidence in the case in order to warrant a conviction, still the proof need not be the direct evidence of persons who saw the offense committed. The acts constituting the crime may be proved by circumstances. In other words, there are two classes of evidence recognized and admitted in courts of justice upon either of which jurors may lawfully find an accused guilty of crime. One is direct and positive testimony of any eye witness to the commission of the crime, and the other is proof of a chain of circumstances pointing sufficiently strongly to the commission of the crime by the defendant and which is known as circumstantial evidence. Such evidence may consist of statements by defendant, plans laid for the commission of the crime, in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. It is essential that in the chain of evidence relied upon each fact be established to a moral certainty and beyond a reasonable doubt.

"You are further instructed that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct testimony."

It is insisted that this was an erroneous instruction upon the weight of the evidence. Appellant relies upon the case of People v. Vereneseneckockockhoff, 129 Cal. 497, 58 P. 156, 62 P. 111. In that case, an instruction that circumstantial evidence is not likely to be fabricated, taken in connection with the other circumstances shown, was held to be improper. In a number of other cases it has been held that it is not reversible error to instruct the jury that there is nothing in the nature of circumstantial evidence making it less reliable than other classes of testimony, where the instruction, considered with the rest of the charge, merely means that a verdict may be based upon circumstantial evidence, as well as on direct evidence, where the same is sufficiently convincing. People v. Wilson, 23 Cal. App. 513, 138 P. 971; People v. Watts, 198 Cal. 776, 247 P. 884, 892. In the last case cited, in referring to an expression somewhat similar to that used here, the court said: "The court's statement that the facts referred to in the instructions might be established 'as satisfactorily and as conclusively by circumstantial as by direct evidence,' when read in connection with the whole charge, amounted to no more than a statement that circumstantial evidence is legal and competent, and that if the jurors found it to be sufficient to prove defendant's guilt beyond a reasonable doubt they might accept it and act upon it just as if it were direct evidence. So construed, the instructions state the law correctly. People v. Tom Woo, 181 Cal. 331, 184 P. 389."

That language might well have been used in reference to the instruction here complained of. It may also be pointed out that the judgment here does not rest entirely upon circumstantial evidence for its support.

[6] The last point raised is, that there is a fatal variance between the allegations of the information and the proofs. This contention is based upon the claim that the judgment rests entirely upon the testimony of Moore and Haropp that they had never authorized the defendant to sign their names to the respective checks. While testimony to that effect was introduced, that was only a part of the people's case. There is ample other evidence, to the effect that the defendant had no authority from any other persons with similar names, to support the verdict.

The judgment and order are affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

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116 Cal.App. 9

SEXTON v. BOLLINGER et al.

Civ. 7844.

District Court of Appeal, First District, Division 2, California.

Aug. 4, 1931.

Rehearing Denied Sept. 3, 1931.

Mechanics' liens ⚿281(3).

In action to foreclose mechanic's lien, evidence *held* to show that written contract with plaintiff as architect was modified and rescinded.

The evidence showed that plaintiff was employed as architect to build hospital, but that subsequent developments required a change in method of payment under which plaintiff was to accept stock.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by N. W. Sexton against Lawrence F. Bollinger and others to foreclose mechanic's lien. **From an adverse judgment, plaintiff appeals.**

Affirmed.

Bertram H. Ross, of San Francisco (Samuel T. Bush, of San Francisco, of counsel), for appellant.

Tinning & Delap, of Martinez, and Homer W. Patterson, of Richmond, for respondents.

STURTEVANT, J.

The plaintiff commenced an action against the defendants to foreclose a mechanic's lien. The trial court made findings in favor of the defendants, and from a judgment entered thereon the plaintiff has appealed.

In his complaint the plaintiff based his cause of action on a written contract employing him as architect. The indenture of employment, set forth as an exhibit, is dated January 22, 1929. In their answer the defendants inserted certain denials, and then they set forth certain affirmative defenses, and among others they pleaded that the written contract was modified and rescinded. The trial court made a finding in favor of the defendants on the issues presented by that affirmative defense. The plaintiff earnestly contends that said finding is not supported by the evidence that was introduced at the trial.

As early as 1927 the defendant L. F. Bollinger commenced the attempt of building a hospital in Richmond in Contra Costa county. At first he tried to organize a stock company and to issue $500,000 in stock. On that line he proceeded until it transpired that the proposition could not be put over, and he stopped all proceedings and refunded moneys received and was about to give up the project.

A little later the plaintiff called on him, and they discussed a modified project and ways and means. Following that conversation, the plaintiff drew up plans and specifications for a building that would cost approximately $140,000. It was a part of their plan that second mortgage notes should be issued to pay for the land on which the hospital was to be located and to pay the architect. On January 22, 1929, the plaintiff prepared, and thereafter he and Mr. Bollinger executed, a written contract by the terms of which Mr. Bollinger, as owner, employed the plaintiff, as architect, to build the hospital. Among other things, that instrument provided: "The Owner agrees to pay the Architect at the rate of six per cent, hereinafter called the basic rate, computed and payable as stated in the said conditions and to make any other payments and reimbursements arising out of the said conditions. Payments to be made as follows: $200.00 upon completion of Blue Prints & specifications including complete engineering plans. 50% of fee when available from receipt of Bank loan. Balance in 2nd Mortgage notes. These to be the first ones issued of the Series." On February 7, 1929, a written application for a loan of $75,000 was made to the Richmond branch of the American Trust Company. The bank denied the application, but offered to make a loan in the sum of $40,000. At about that time the plaintiff had attempted to interest Liebert & Trobeck as contractors. The contractors, the plaintiff, and Mr. Bollinger attended at a meeting at the bank, where they had an interview with Mr. Younce, the cashier. In that interview Mr. Younce stated to all of them that the bank loan would be available to pay for labor and material, but not to pay the fees of an architect, and that no part or portion of the loan could be used for any such purpose. Mr. Bollinger and Mr. Younce both testified that in that conversation the plaintiff stated that he would take stock in the Hospital Richmond in payment of his fees. As we understand the record, down to the time of said conversation, no property had actually been bought on which to build the hospital. But about that time a site was found available. On interviewing the owner of the land, it was found that he would make a conveyance thereof and accept a second mortgage in payment. After making some inquiry, Mr. Bollinger was able to negotiate a loan from his aunt for the additional sum of $10,000. At about this time the plaintiff stated to Mr. Bollinger: "Carry on, I will stick by you and will get through somehow." When the foregoing arrangements had all been made, the plaintiff proceeded to make modified plans and specifications, and thereafter the building was commenced in June, 1929. Soon after the building was commenced, Mr. Bollinger made a supplemental application to the corporation commissioner for permission to issue stock. Before doing so he stated to the plaintiff that the only way in which the plaintiff could be compensated would be for him to take stock in the corporation. The plaintiff stated in reply that before giving his consent he wanted to confer with his attorney. Mr. Bollinger testified that thereupon Mr. Sexton and he called on Mr. Jerome White, an attorney at law, in San Francisco, and stated the facts to Mr. White, and that Mr. White told Mr. Bollinger to proceed and make his application for permission to issue stock to the plaintiff in payment for his services. The application was made and granted. Thereafter, on August 15, 1929, three certificates of stock were issued in the name of the plaintiff. When Mr. Bollinger tendered them to the plaintiff, he hesitated about receiving them, and telephoned to Mr. White. When he hung up the telephone, the plaintiff asked Mr. Bollinger to go with him to Mr. White's office, which they did on September 12, 1929, and on arriving there left the certificates of stock with Mr. White's secretary, who, in the absence of Mr. White, delivered a receipt for the stock. About two weeks later that stock was returned to Mr. Bollinger by registered mail, and no communication accompanied it. On October 4th the plaintiff produced an escrow agreement and asked Mr. Bollinger to accompany him to the American Trust Company and there deposit the stock in escrow. That was done. On November 15, 1929, another certificate was issued to the plaintiff. On November 25th the plaintiff was needing money, and made an appeal to Mr. Bollinger for cash. As a result of that appeal, Mr. Bollinger offered to purchase four shares of the stock then in escrow. The offer was accepted, and the transfer was made. However, the other shares of stock were left in escrow, and, as we understand the record, are still in the possession of the American Trust Company. Thereafter, on January 27, 1930, the plaintiff commenced this action.

It is an admitted fact that the $200 payable to plaintiff "upon completion of blue prints and specifications" has been paid. Scanning the statement of facts hereinabove recited, we think it is clear that there was evidence that the parties modified and abandoned the written contract on which the plaintiff relies, and that the finding under attack is sustained by the evidence.

In their brief the defendants present certain other points. However, in view of what has been said above, it is unnecessary to discuss them.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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115 Cal.App. 571

In re BLACKBURN'S ESTATE.

BLACKBURN v. BLACKBURN et al.

Civ. 7777.

District Court of Appeal, Second District, Division 1, California.

July 22, 1931.

Rehearing Denied Aug. 18, 1931. Hearing Denied by Supreme Court Sept. 17, 1931.

1. Wills ⟹440.

In construing wills, court should seek to ascertain real purpose which testator sought to effectuate by words of will.

2. Wills ⟹656.

Forfeiture clause of will should not be given wider scope than language plainly requires.

3. Wills ⟹660.

Legatees' objections to appointment of additional executrix named in will after appointment of one executrix named *held* not refusal to acquiesce in provisions of will, precluding their taking thereunder.

Facts disclosed that one of legatees who objected to appointment of additional executrix had already been appointed executrix, that objections to appointment of additional executrix were based on the fact that, because of appointment and qualification of first executrix appointed, court was without jurisdiction to appoint an additional executrix, and that by reason of appointment of first executrix without objection from the other executrix named in will, latter had waived any rights she might have had under will to be appointed coexecutor; that she was resident of state of Texas, and that her appointment would not be for best interests of estate.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

In the matter of the estate of Simon Houston Blackburn, also known as S. H. Blackburn, deceased. Petition by George M. Blackburn to construe provisions of the will with respect to right of Irene Blackburn and Lulu B. Spurling to receive a legacy or bequest thereunder. From the order, Irene Blackburn and Lulu B. Spurling appeal.

Reversed.

Stearns, Luce & Forward, Edgar A. Luce, and A. M. Thompson, all of San Diego, and W. A. Alderson, of Los Angeles, for appellants.

E. Everett Bennett and Janeway, Beach & Hankey, all of Los Angeles, for respondent.

CONREY, P. J.

This appeal is from an order, the effect of which was to determine that Irene Blackburn and Lulu B. Spurling had forfeited their right to the legacies provided in the will of Simon Houston Blackburn to be bequeathed to them, by having filed objections to the appointment of one Grace B. Killough as one of the executors of said will.

Irene Blackburn, who had been named in the will as one of the executors, filed a petition for the probate of the will and for the issuance to herself of letters testamentary. In the will the testator appointed Grace B. Killough as the other executor. On December 9, 1929, the petition was duly heard and an order was entered admitting the said will to probate and appointing Irene Blackburn executrix. On the same day, after the making of the order appointing the said Irene Blackburn executor, Grace B. Killough filed a petition praying that she be appointed a joint executrix of the estate of said decedent. On the 20th day of December, 1929, Lulu B.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Spurling and Irene Blackburn filed objections in the superior court to the appointment of Grace B. Killough as executrix. These objections were overruled and an order was made appointing Grace B. Killough coexecutor of the estate of said deceased. On June 19, 1930, Irene Blackburn and Grace B. Killough, as executors of the last will of Simon Houston Blackburn, deceased, filed a petition for partial distribution, praying that $22,000 of the funds on hand be distributed to the legatees entitled thereto pursuant to the terms of the will. The court ordered partial distribution to all of the legatees except Irene Blackburn and Lulu B. Spurling, and continued the hearing as to the right of these two last-named persons to share in the distribution. Thereafter George M. Blackburn, one of the legatees, filed a petition to construe provisions of the will with respect to the right of Irene Blackburn and Lulu B. Spurling to receive any legacy or bequest thereunder. Thereupon, after due hearing of the matter, the court determined that Irene Blackburn and Lulu B. Spurling, pursuant to the provisions of the will of said deceased, had lost the right to recover any legacy or bequest under the will of said deceased by reason of having theretofore, in violation of the terms to the appointment of Grace B. Killough as and provisions of said will, filed an objection one of the executors.

The provisions of the will which are relied upon as authority for the court's order are found in articles 5 and 6 thereof. In article 5 the testator said: "By this my Last Will and Testament, I have disposed of my estate after due consideration of the respective needs and rights of all persons, and all benefits herein conferred in any manner whatsoever are conferred upon the express conditions that the legatees thereof acquiesce in this my Last Will and Testament and all provisions thereof, and in any or all codicil or codicils thereto, and any and all provisions in said codicil or codicils contained. * * *" Article 6 reads as follows: "If any beneficiary or legatee under this my Last Will and Testament, or any person who, if I died intestate, would be entitled to any part of my estate, either in his or her name or in the name of another, either directly or indirectly, or by procuring, aiding, or abetting another, contests, controverts, disputes or calls into question the validity of this my Last Will and Testament, or any provision contained therein, or any codicil or codicils thereto, such person or persons shall take nothing by reason of this my Last Will and Testament or any of its provisions, or any codicils thereto, but shall forfeit any right or claim thereunder and any portion of my estate to which any person opposing my Will would in any contingency be entitled and, if in said case any person or persons or such heir or heirs or any other person or persons whomsoever shall be lawfully determined to have a share of my estate, I give, devise and bequeath to such person or persons the sum of One Dollar ($1.00) and no more, in lieu of any other share or interest in my estate."

As before noted, Irene Blackburn of Escondido, Cal., and Grace B. Killough of Stephenville, Tex., were named in the will as executors thereof. On December 9, 1929, Irene Blackburn was appointed executrix in accordance with her petition. At that time Mrs. Killough had filed no application for appointment although she was present in court at the time; and it does not appear that she made any objection to the order. On the same day, however, Mrs. Killough filed a petition for appointment as coexecutrix. When this petition came on for hearing, Irene Blackburn and Lulu B. Spurling objected to the appointment of Mrs. Killough upon certain grounds which in substance were: That by reason of the appointment and qualification of Irene Blackburn as executrix the court was without jurisdiction to appoint an additional executrix; that by reason of the appointment of Irene Blackburn as executrix in the manner above noted, and without objection from Mrs. Killough, the latter had waived any rights she might have had under the will to be appointed coexecutor; that Mrs. Killough is a resident of the state of Texas and that her appointment as such executrix would not be for the best interests of the estate, would cause confusion and delay in carrying out the probate of said will and the distribution of the property of the estate, and would materially add to the expense of the probate of the estate; and "that said Grace B. Killough has advised these objectors that she does not intend to give personal supervision to said estate, but intends to return to reside in said state of Texas."

[1-3] The order against which the appeal is directed cannot be sustained unless it be held that, by reason of the objections thus made to the appointment of Mrs. Killough as coexecutor, the said Irene Blackburn and said Lulu B. Spurling either refused to acquiesce in the testator's will and all provisions thereof, or in some manner called into question the validity of the will or of some provision contained therein. We need not enter into a discussion of the authorities which hold that forfeiture provisions relating to contests of wills are valid and permissible; and that in construing wills the court should seek to ascertain the real purpose which the testator sought to effectuate by the words of the will; or that the appointment of an executor is an important part of a will; or that a forfeiture clause should not be given any wider scope than the language used plainly requires. All these propositions may be conceded. It seems to us very clear that in making the objections

which they did make, at the time and in the manner shown by the record, appellants Blackburn and Spurling did not in any manner call in question the will or the validity of any provisions thereof. If at the time of the admission of the will to probate and of the appointment of Blackburn as sole executrix, appellants Blackburn and Spurling had contested the right of Mrs. Killough to be appointed executrix, notwithstanding the provisions of the will naming her as such executrix, it may be that the making of such contest would have been such refusal to acquiesce in the terms of the will that the order declaring forfeiture of the contestants' right as legatees would have been sustained. But in fact at that time there was no application by Mrs. Killough, and apparently she was then consenting to the appointment of Blackburn without asking for her own appointment as coexecutor. We are of the opinion that the subsequent objections made by appellants in opposition to the later application of Mrs. Killough, such objections being made at the time and under the circumstances and on the grounds above noted, may not reasonably be held to constitute a refusal to acquiesce in the provisions of the will. It follows that appellants have not lost their right to share as legatees in the property of decedent's estate.

The order is reversed.

I concur: HOUSER, J.

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115 Cal.App. 736

In re MICKLEY'S ESTATE.

MICKLEY et al. v. CITIZENS' NAT. TRUST & SAVINGS BANK et al.

Civ. 7898.

District Court of Appeal, Second District, Division 2, California.

July 31, 1931.

Rehearing Denied Aug. 27, 1931. Hearing Denied by Supreme Court Sept. 28, 1931.

1. Wills ⚷386.

Reviewing court must presume that order granting new trial in will contest was not based on insufficiency of testimony, where order did not so indicate (Code Civ. Proc. § 657).

2. Wills ⚷337.

Where contestants argued that will was unnatural because ignoring testator's brother and giving comparatively small legacy to niece, erroneous instruction suggesting that will was not unnatural justified new trial.

It appeared that by will in controversy, testator, with exception of small legacy to niece and life income to widow, left entire estate to charitable institution, and instructions in question stated that under California law, testator could not leave more than one-third of estate to charitable society, and that since every one is presumed to know law, jury must find that testator knew that only one-third of his estate would go to charity, which perhaps caused jury to believe that contestants were amply provided for, and hence induced jury improperly to discredit testimony tending to show that disposition of estate was unnatural and that testator was incompetent, which was issue that contestants were in fact trying.

3. Appeal and error ⚷978(1).

Since judge knows atmosphere of trial, order granting new trial because of erroneous instructions should not be disturbed unless obviously wrong.

4. Wills ⚷324(2).

Evidence in will contest *held* sufficient for jury on issue of testator's incompetency.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceedings by Albert J. Mickley and others to contest the will of Edgar J. Mickley, also known as E. J. Mickley, deceased. After the jury had found for the contestees, Wylma Mickley, the Citizens' National Trust & Savings Bank, and others, the court granted a new trial, and the bank appeals.

Affirmed.

Clay & Handy, William U. Handy, and Edgar G. Pratt, all of Los Angeles, for appellant.

Jones, Stephenson, Palmer & Moore and William Fleet Palmer, all of Los Angeles, for respondents.

IRA F. THOMPSON, J.

[1] This is an appeal from an order granting a motion for a new trial in a will contest where the jury found in favor of the proponent on the issue of incompetency. The order does not indicate that it was granted on account of the insufficiency of the testimony, and therefore under the provisions of section 657 of the Code of Civil Procedure we must indulge the presumption that the order was not based upon that ground.

The respondents direct our attention to two instructions given by the trial judge which they say were erroneously given and which justify the order appealed from. They read as follows:

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"You are instructed that under the laws of this state a testator leaving legal heirs may not leave more than one-third of his estate to any charitable or benevolent society or corporation, and if he attempts to do so, all over the one-third shall go to the residuary legatees, next of kin, or heirs, according to law."

"You are instructed that every person is presumed to know the law and if you find from the evidence that the testator was of sound and disposing mind at the time he made the will or the codicil thereto, you must find that he knew that under the terms of his will as modified by the codicil thereto the Philadelphia Home for Incurables would take but one-third of his estate at the death of his wife, and that his brother, or his heirs would take one-third, and that his niece or her heirs would take one-third, unless by the preponderance of the evidence introduced in the case you are satisfied in your mind that the contrary was true."

[2, 3] There were two instruments, the one dated November 7, 1928, and being the will of decedent, and the other a codicil thereto executed November 13, 1928. They had been admitted to probate prior to the contest. By their provisions the deceased left his entire estate, with the exception of $5,000 given to contestant Miriam Mickley by the codicil, to the Fidelity Philadelphia Trust Company, in trust for the purposes of paying the income therefrom to his widow, Wylma Mickley, for the term of her life, and upon her death the principal, together with accruing rents and profits, to be paid over to the Philadelphia Home for Incurables. The codicil, in addition to the legacy mentioned, changed the executor from the Fidelity-Philadelphia Trust Company to the Citizens' National Trust & Savings Bank of Los Angeles, and also declared that testator was a resident of California. In this state of affairs it was one of the arguments of the contestants to convince the jury that testator was not of sound mind at the times in question, that these wills were unnatural, i. e., that no provision was made for the natural object of decedent's bounty, his brother, Albert J. Mickley, and only the $5,000 legacy to his niece Miriam Mickley, the daughter of a deceased brother, out of an estate approximating $250,000. On the other hand, appellant introduced a conversation in which one of counsel for appellant and the one who drew the will and codicil for the testator informed Mr. Mickley that under the law of California the Philadelphia Home for Incurables could take only one-third of his estate and that the other two-thirds would go to his brother and niece. In appellant's brief it is said that the instructions quoted were proposed by it "to show that the will and codicil were not unnatural." Herein lies the very vice of the instructions. Appellant was desirous of and for the time being succeeded in securing the judge to assist it in making the argument that the will and codicil were not unnatural. The question of whether the philanthropic institution should take or the contestants should take was not in issue, and evidently in granting the new trial the judge was of the opinion that as a comment upon the fact, they must have had an effect upon the jury, perhaps causing them to believe that contestants were amply provided for, and hence inducing them to improperly discredit testimony tending to support the case of contestants upon the issue they were, in fact, trying. It must be apparent that we are not able to appreciate as thoroughly as could the trial judge the influence these instructions may have had upon the jury. He was familiar with the atmosphere of the trial and unless it be apparent that he was in error we ought not to disturb his ruling.

[4] It is obvious, therefore, that the order should not be reversed unless, as it is argued by appellant, there was not sufficient evidence adduced by the respondents to warrant the case being submitted to the jury. But it is manifest that the evidence in this regard was sufficient. The testator entered the Good Samaritan Hospital on October 28, 1928, and remained there until his death on December 24, 1928. The day nurse testified that during all of the time he was there he was in a stuporous or semicomatose condition, although along toward the latter part of November he was a little better. The night nurse gave virtually the same testimony, saying, however, that his condition improved a bit after the first month. The attending physician, Dr. Gibbs, testified that in his opinion the patient was of unsound mind on November 7th and November 13th. Dr. Fishbaugh also testified that in his opinion the patient was of unsound mind on the 6th and 7th of November, and that his condition remained about stationary for two or three weeks thereafter. There are other details tending to confirm this testimony which it is unnecessary to set down, because it is obvious that the issue of incompetency was properly submitted to the jury. Other questions raised require no discussion.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

115 Cal.App. 681

PEOPLE v. STEWART.

Cr. 212.

District Court of Appeal, Fourth District, California.

July 27, 1931.

Rehearing Denied Aug. 10, 1931.

Hearing Denied by Supreme Court Aug. 24, 1931.

1. Licenses 🔑42(4).

Evidence in trial for violating Corporate Securities Act *held* to show trades of stock for realty, not cash sales thereof (St. 1917, p. 676).

2. Licenses 🔑42(4).

Holder of permit to sell corporate securities is presumed to know that violation thereof is violation of law (St. 1917, p. 676).

3. Licenses 🔑42(4).

Evidence *held* to support jury's finding that defendant knowingly violated statute by violating permit to sell securities (St. 1917, p. 676).

4. Criminal law 🔑508(6).

Refusal of directed verdict for appellant's codefendant *held* not error as depriving appellant of benefit of former's testimony (Pen. Code, § 1100).

> It did not appear that trial court believed that sufficient evidence had not been produced to put appellant's codefendant on his defense or that Pen. Code, § 1100, providing for dismissal, or appellant's desire for codefendant's testimony, was called to court's attention.

5. Criminal law 🔑1168(1).

Refusing directed verdict for appellant's codefendant *held* not prejudicial error, where appellant did not know what codefendant's testimony would be (Pen. Code, § 1100).

6. Constitutional law 🔑62.

Licenses 🔑6(2).

Statute authorizing corporations commissioner to issue permits to sell securities *held* not unconstitutional as conferring Legislative or arbitrary powers on him (St. 1917, p. 676, § 4).

7. Criminal law 🔑1172(1).

Instruction that check on sufficient deposit was cash payment for stock, in absence of fraud, *held* not prejudicial to defendant in trial for violating Corporate Securities Act.

8. Licenses 🔑42(5).

Instruction to convict of violating Corporate Securities Act, if transactions were for purpose of evading provisions of permit to sell stock, *held* not erroneous.

9. Criminal law 🔑480.

Testimony that witness had charge of bank's records and supervision of people who made them *held* sufficient foundation for admission of his testimony as to depositors' accounts.

10. Criminal law 🔑1172(1).

Instruction that corporation's records were not binding on defendant, in absence of proof that he knew of contents or supervised making thereof, *held* not prejudicial error.

> The evidence in trial for violating Corporate Securities Act showed that defendant was corporation's principal promoter and fiscal agent, had charge of its office, attended all directors' meetings, advised board as to whether he had sufficient stock subscriptions to take care of transactions involved, and usually informed directors as to how bank balance stood; that his qualified statement that he did not know exact amount of money in bank on certain day referred only to transaction involved in one of three counts of indictment; and that transactions were entered into pursuant to plan to trade stock in corporation for realty, instead of selling it for cash.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

R. L. Stewart was convicted by violating the Corporate Securities Act, and he appeals. Affirmed.

Curtis Hillyer and Irve C. Boldman, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Warner I Praul, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was jointly charged with one Clarence R. Wilson in an indictment returned by the grand jury of San Diego county with the violation of the Corporate Securities Act of the state of California. The indictment contained three counts. The material part of the first count may be thus abbreviated: "That the said Robert L. Stewart and Clarence R. Wilson * * * did wilfully, unlawfully, knowingly and feloniously sell, offer for sale * * * to Hulda C. Holmquist * * * 3050 units * * * of the California Land Buyers Syndicate, a Delaware corporation for a consideration other than cash * * * in nonconformity with and with intent to violate the provisions of the Amended Permit dated April 9, 1928, issued to said corporation by the Commissioner of Corporations of the State of California. * * *"

The second count, in about the same language, charged a similar sale of 667 units of the same stock to William B. Gross. The third count similarly charged a sale of 1,000 units to I. W. and Vitulia E. Randall. The two defendants were tried together, the jury finding Wilson not guilty on all counts and Stewart not guilty on the first count and guilty on the second and third counts. The court denied a motion for a new trial, and this appeal is from that order and from the judgment.

It appears from the evidence that the California Land Buyers' Syndicate was organized under the laws of the state of Delaware, and that it filed its articles in the office of the secretary of state in California and also in the office of the county clerk of San Diego county, where its principal place of business was located. The principal purpose of the company was to buy, sell, and deal in real estate. On July 1, 1926, a permit was issued to the company by the commissioner of corporations of the state of California, authorizing it to sell and issue certain of its shares of stock, as follows: "1st—To sell and issue 40,000 shares of its investment shares and 40,000 shares of its common stock, in units of one investment share and one common share, at and for the selling price of $26.00 per unit, cash, lawful money of the United States, for the uses and purposes recited in its application."

On April 9, 1928, an amended permit was issued by the commissioner of corporations, authorizing it to sell certain remaining stock "at and for the price of $30 per unit, cash, lawful money of the United States, for the uses and purposes recited in its application." The defendant was regularly licensed as a security salesman in the state of California. From the organization of this corporation he acted as its fiscal agent and, as such, had direct supervision over the sale of its stock, receiving a commission of 20 per cent. on all sales of stock made by the company. He also had charge of the office of the syndicate, with several employees working under him. The other defendant, Wilson, was a licensed real estate salesman and in charge of the real estate department of the syndicate.

In reference to the Gross transaction, involved in the second count of the indictment, it appears that in July, 1929, Gross was the owner of a certain parcel of real property in San Diego, for which he was asking $25,000. He took the matter up with Wilson, who examined the property and appraised its value at from $18,000 to $20,000. Gross went to the office of the company and discussed the proposed transaction with the appellant, who told him that the syndicate had paid 10 per cent. dividends and had money to pay more, and showed him stacks of dividend checks being made out for delivery to the stockholders. Gross signed a letter addressed to Wilson offering to sell his land to the syndicate for $20,000, or "accept 667 units in California Land Buyers securities both investment and common for the above described property." This letter was handed to appellant and by him presented to the board of directors. The directors adopted a resolution to buy the Gross property at the price of $20,000. The appellant informed Gross that when the deal was completed he would receive the shares of stock in the company. Gross signed a stock subscription agreeing to purchase 667 units of stock in the syndicate for the sum of $20,010. An escrow was opened with a title company, Gross depositing a deed conveying his property to the syndicate, with instructions to record it upon the payment of $20,000. The syndicate deposited in this escrow its check for $20,000, with instructions to deliver the check to Gross upon the receipt of a deed for the property. Upon the closing of the escrow the appellant delivered to Gross 667 units of this stock. At the same time the appellant laid the $20,000 syndicate check before Gross and said: "Now in order to make this legal you will have to sign the back of this check." Thereupon Gross indorsed the $20,000 syndicate check and delivered it to appellant, together with $10 in currency. Appellant deposited this $20,000 check in his own account in the First National Bank, and gave his own check to the syndicate for $20,000 in payment for the stock. It further appears that, at the time of the presentation of the $20,000 check payable to Gross, the syndicate's balance in the bank amounted only to $404.26, aside from the credit afforded by appellant's $20,000 check, which had been deposited to that account. It also appears that, at the time of the presentation of the $20,000 check drawn in favor of the syndicate, Stewart's balance in the bank was insufficient to cover that check without the credit afforded by the $20,000 credit of the syndicate check, which had been deposited to his account.

In the Randall transaction, covered by the third count of the indictment, a similar situation appears. It was agreed that the syndicate would purchase from the Randalls certain real property owned by them in San Diego for $30,500, and the Randalls agreed to purchase 1,000 units of stock in the syndicate at the price of $30 per unit. Randall signed a stock subscription for 1,000 units, and an escrow was opened. The checks were handled in the same manner as in the Gross transaction. At the time the company's check was issued for $30,500, its bank balance was only $87.36. At the time Stewart's check was issued for $30,000, his bank balance was $35.62.

These figures are exclusive of the deposit in each account of the other check.

[1] Appellant first urges that the verdict is contrary to the law and the evidence. It is earnestly urged that these transactions were, in fact, cash sales, within the meaning of the terms of the permit. Appellant says: "The real question is does the evidence show that they were in truth and fact cash transactions, or does it show that they were exchanges of real property for stock." It is urged that in modern business usage, checks are equivalent to cash, and also that, since each party to the transaction received what he desired, no harm was done. Conceding that in modern business checks are frequently used in lieu of cash, and also that, under many circumstances, they may be considered equivalent to cash when they are covered by sufficient funds actually in the bank upon which they are drawn, a different situation is here shown. It fully appears that there was nothing behind either one of these checks except the other check, which was itself worthless. In fact, four sales are represented in these two transactions for a total of over $100,000, and the only real money or real credit used is the $10 in currency. While it may be said that each party received what he wanted, the entire transaction is a trade, both in fact and effect. As was said in People v. Kuder, 98 Cal. App. 206, 276 P. 578, 580: "All of the respective accounts consist of contemporaneous credits and debits, in spite of which there were no funds ever in the possession of the bank, and it requires no degree of expert bookkeeping to reveal the fact that it received nothing and disbursed nothing through the checking system of the depositors, and the corporation received nothing for the certificate of stock issued to appellant."

In the case before us the corporation received nothing for its stock in each transaction, except a piece of real estate. Nor can it be said that the result and effect are the same, since the corporation was organized for the purpose of dealing in real property. It is well known that almost universally the trading price of real estate is much higher than the price asked in a sale for cash. Not only would that fact make such transactions as these inequitable as to persons who purchased stock in the corporation for cash, but such exchanges as are represented here would further reduce the assets of the corporation, to the detriment of those buying stock for cash, since, the higher the nominal price of the real estate purchased, the higher would be the appellant's commissions, as he was paid 20 per cent. on the stock issued. While appellant argues that the subsequent financial difficulties of this corporation were caused by a general deflation of real estate values, it may well be that a large part of the loss suffered by the stockholders occurred through the inflated values of the real estate taken over through the violations of the permit to sell stock, with which appellant is charged.

[2, 3] Appellant next insists that it does not appear that he knowingly violated the terms of the permit. While it is conceded that, where a person commits an act in violation of a statute, it is presumed both that he intended the natural consequence of his act, and that he knew of the existence of the law violated, it is argued that this presumption does not extend to the violation of such a permit as is here involved. In this case, it appears that the appellant had actual knowledge of the terms of the permit, and that he even consulted other parties in an effort to determine what could be done to evade it, without violating its terms. He attempts to excuse his act by the claim that he was advised by the attorney for the corporation that the method pursued would not be a violation of the statute. Not only do we think this would not be a sufficient excuse, but the attorney for the corporation testified that, when the first of the transactions involved in the indictment came up, he told the appellant that land could be bought from a party and stock sold to the same party, provided the purchase of the stock was handled entirely distinct from the sale of the land; that is, if the purchase of the stock and the purchase of the land were entirely distinct and each stood on its own feet; and that this could be done if the matter was so handled that, if a line were drawn right down to the usual stock deal and the usual land deal, each would be distinct and stand on its own feet. This attorney also testified that he later inquired of the appellant as to one or two of these transactions which had gone through, as to "whether each party had actually a credit that was good and cashable." The appellant replied that "it had been." In People v. McCalla, 63 Cal. App. 783, 220 P. 436, it was held that good faith was not to be considered as a factor in the determination of the defendant's guilt on a charge of violating the provisions of the Corporate Securities Act. Nor do we think the rule should be any different, where, as in this case, the defendant is charged with violating a permit which is issued in accordance with the provisions of that act. Not only must it be presumed that a defendant knows that a permit must be obtained from the commissioner of corporations before certain securities may be sold, as provided for in the statute, but he must also be presumed to know that a failure to conform to the terms of the permit, when issued, is also a violation of law under the statute. Were this not true, not only would the very object and purpose of the statute be frustrated, but, of necessity, the guilt or innocence of an accused would then turn upon his own opinion. Not only is this true, but the evidence here shows that the appellant had actual knowledge of the terms of the permit, and in our opinion it is also

sufficient to support the finding of the jury that the appellant knowingly violated the statute in failing to conform to the terms thereof.

[4, 5] At the conclusion of the people's case, counsel for Wilson made a motion for a directed verdict as to him, which motion was by the court denied. It is contended that this was error as to appellant, and that under section 1100 of the Penal Code the court was required to direct a dismissal so that appellant might have had the benefit of his codefendant's testimony. It nowhere appears that the trial court was ever of the opinion that sufficient evidence had not been produced to put Wilson upon his defense. It also appears that no motion to have the defendant discharged under that section was ever made. Nor does it appear that that section was ever called to the attention of the court, or that any desire of the appellant to have the testimony of his codefendant was ever expressed or called to the attention of the court. A motion for a directed verdict is not the same thing as the discharge contemplated by that section. The jury is not bound to follow the advice of the court in directing a verdict, while section 1100 refers to an act within the power of the court to control. Where applicable, it may be made at any time before the evidence is finally closed. No error as to appellant is shown in refusing this request for a directed verdict made at the close of the People's Case. We may also add that no showing of injury is made, as appellant frankly states that, had he been able to call his codefendant as a witness, he does not know what his testimony would have been.

[6] Appellant next claims that section 4 of the Corporate Securities Act (St. 1917, p. 676) is unconstitutional, as attempting to vest legislative powers in an administrative officer, it being claimed that legislative functions are here delegated to the commissioner of corporations. It is also contended that the act confers arbitrary powers upon the commissioner of corporations and attempts to give to regulations imposed by him the force and effect of public law, and that this may not be done. Appellant admits that the case of People v. Kuder, 93 Cal. App. 42, 269 P. 198, 202, 630, is somewhat opposed to his contention and quotes the following from that case: "Yet, in all cases where the question has arisen, it has been held that the commissioners of various departments may be invested with and exercise the power to make reasonable rules and regulations, and to determine any fact or state of facts upon which the law makes, or intends to make, its own action depend."

He then argues that in so holding it was not the intention of the court to go so far as to hold that, where the power to make rules and regulations is delegated to an administrative officer, such officer may be guided in so doing only by his own conscience. He then cites a number of cases from other jurisdictions, which it is claimed hold that such rules and regulations have not the force and effect of public law. As was said by the Supreme Court in People v. Kuder, supra, in reference to the same section of the Corporate Securities Act which is here attacked: "We think it unnecessary to look outside our own state for authority upholding the right of the Legislature to empower and direct a commission or board created by it to make reasonable rules and regulations, to investigate into affairs of the business, profession, or occupation over which it is given jurisdiction, and exercise sound discretion as occasion may arise in granting or denying rights which are conditionally conferred. Respondents do not complain that the conditions imposed by the permit issued to them were unreasonable, oppressive, or arbitrary. Since, therefore, these precautionary measures in the interests of public safety may, as we have observed, be delegated to and performed by a board, commission, or officer theretofore duly constituted by the Legislature, respondents manifestly are subject to the regulations and conditions prescribed by the commissioner of corporations in this instance, and are not legally justified in complaining of the source from which they emanated."

In Agnew v. Daugherty, 189 Cal. 446, 209 P. 34, 35, the court said: "The passage in the above quotation from the statute which allows the commissioner to issue a permit authorizing the applicant to sell his securities 'upon such terms and conditions as the commissioner may in said permit provide' must be read in connection with the context, which provides that the commissioner must inquire into the method of doing business, and shall ascertain if the same is fair, just, and equitable, and that the methods used in disposing of them would not work a fraud upon the purchasers thereof. The terms and conditions to be prescribed in the permit must not be such as would make a greater burden than is consistent with safety and security. * * * If the commissioner should refuse to issue a permit, except upon conditions which would be unjust, unfair, or inequitable to the applicant, doubtless he would have the right to have such permit revised and reformed so as to make it equitable and fair, but we cannot assume that he will impose such conditions in advance of his action."

While we agree with appellant that the power of the commissioner of corporations, in the respect upon consideration, has other limitations than the dictates of his own conscience, the fact remains that no showing is here made that the terms of the permit issued in this case were not fair, just, and equitable, nor that they were not reasonable in view of the purpose for which the corporation was organized. We think the point raised is sufficiently answered by the case just cited, and the case of People v. Kuder, supra.

[7, 8] Complaint is made of the giving of the following instruction: "You are instructed that payment for stock by check payable on presentation and drawn against a sufficient fund on deposit to meet it, at the time of presentation, was payment in cash as though the payment had been made in coin, lawful money of the United States, in the absence of fraud."

We are unable to see how this could have prejudiced the defendant. Not only is there no evidence in this case to show that the checks under consideration complied with the rule there laid down, but the last clause of the instruction merely pointed out that, where fraud is shown, the general rule would not apply. A check given for the very purpose of violating the law, though otherwise good, would not comply with the terms of the permit. The following instruction is also assigned as error: "I further instruct you that if you find from the evidence beyond a reasonable doubt that the people have shown that the entire transactions as set forth in the indictment and known from the evidence as the Holmquist transaction, the Gross transaction and the Randall transaction, was not a bona fide sale for cash but was a proceeding carried out by the defendants for the purpose of evading the provisions of the permit for the sale of stock in violation of the Corporate Securities Act, then it is your duty to find the defendants guilty as charged in the indictment."

The only argument here made is that it may not be a violation of the statute to evade it. Although this may be true, an act done for the purpose of evading the statute which is also "in violation of" the statute would not come within the evasions which, according to appellant, are permissible.

[9] It is next argued that the evidence of the bank accounts of the syndicate and of the appellant were improperly admitted, since no foundation was laid as to the qualification of the witness to testify. The witness in question testified that for ten years he had been comptroller of the First National Trust & Savings Bank; that as such he had charge of the records of this bank and of the accounts of its depositors; that he had with him these records, and that he was able to determine from the records the condition of the accounts; that the files of the bank were under his supervision; and that a great many people had to do with the making up of the bank records, but that these people were under his general supervision. We think the foundation for the admission of this testimony was sufficiently laid. People v. Woollacott, 80 Cal. App. 278, 251 P. 826; People v. Kuder, supra; People v. Weaver, 96 Cal. App. 1, 274 P. 361.

[10] It is next urged that the court erred in refusing the following instruction: "You are instructed that nothing contained in the books of the California Land Buyers Syndicate or in any records of the California Land Buyers Syndicate nor any testimony based thereon nor any conclusions which you might draw, nor anything contained therein is binding upon these defendants or either of them in the absence of proof, satisfying your minds beyond a reasonable doubt, that they knew of the contents of said books or records or that the said books or records were made or kept under their direction or supervision."

Appellant relies upon the case of People v Doble, 203 Cal. 510, 265 P. 184, as showing this was reversible error. In connection with this, it is pointed out that the appellant was asked if he knew how much money the syndicate had in their bank account when the $20,000 check involved in the second count of the indictment was drawn. He replied: "No, I did not know the exact amount of money that they had on that particular day." In the Doble Case, one of the particular defenses urged was that the defendant knew nothing of the excess sales of stock in the corporation which had been made by other parties, and that, if any had been made, this had been done against his orders. In the case before us, no issue was made of any lack of knowledge on the part of the defendant, and all of the evidence tends to show that he had such knowledge, except this one answer of the appellant, which is itself very qualified. It appears from the evidence that the appellant was the principal promoter of this company and its fiscal agent; that he had charge of the company's office; that he attended all meetings of the board of directors; that he advised the board as to whether he had sufficient stock subscriptions to take care of the transactions here involved; that he usually furnished the directors with information as to how the bank balance stood; and that, in reference to the transaction involved in the first count of the indictment, appellant had stated that they did not have cash enough in the bank to buy the property at that time. It also appears that the appellant's qualified statement that he did not know the exact amount of money in the bank on a certain day was made only in reference to the transaction involved in the second cause of action, and that no evidence to that effect was given in connection with the third count. While we are inclined to the view that the instruction should have been given, in view of the entire record, we are unable to hold that an issue was sufficiently presented to make the refusal of the instruction prejudicial error. In addition, it may be said that the evidence plainly shows that these transactions were entered into in pursuance of a plan to trade stock in the corporation for real property, instead of selling the stock for cash. Under such circumstances, even the fact that the corporation had not sufficient money in the bank to meet the check, and consequently any knowledge of the appellant upon that subject, were not essential elements of proof. The appellant consulted a number of parties for the purpose of ascertaining how such a trade could be made without directly violating the law. Irrespective of whether the plan suggested to him would have been legal, it clearly appears that he did not follow it. We think the evidence shows that in truth and in fact these were not sales of stock for cash, but that they were exchanges of stock for real property.

Appellant maintains that he is the victim of circumstances, that he was dominated by the board of directors of the corporation, and that he merely carried out instructions given him by the board. There is ample evidence that the domination was the other way, and that the appellant went far beyond any instructions shown to have been given him. Neither may it be said that the offense was a technical one only, and that no harm resulted therefrom.

For the reasons given, the order and judgment are affirmed.

We concur: MARKS, J.; JENNINGS, J.

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116 Cal.App. 13

SOUZA v. UNDERWRITERS' FIRE PATROL OF SAN FRANCISCO.

Civ. 7875.

District Court of Appeal, First District, Division 2, California.

Aug. 4, 1931.

Rehearing Denied Sept. 3, 1931. Hearing Denied by Supreme Court Oct. 1, 1931.

1. **Trial** 🔑163.

Motion for nonsuit on ground evidence showed no negligence of defendant proximately causing accident *held* sufficiently specific.

2. **Trial** 🔑162.

Motion for nonsuit is not favored when made at end of plaintiff's case.

3. **Automobiles** 🔑245(22).

In action by street car passenger against owner of truck which collided with fire engine, evidence justifying inference that truck driver heard siren, obligating him to stop near curb, *held* sufficient to take case to jury (St. 1923, p. 560, § 133).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by John V. Souza against the Underwriters' Fire Patrol of San Francisco, a corporation. Defendant's motion for a nonsuit was granted, and plaintiff's motion for a new trial denied, and plaintiff appeals.

Reversed.

R. M. Estcourt, William Sea, Jr., and Austin Lewis, all of San Francisco, for appellant.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

STURTEVANT, J.

[1] The plaintiff sued to recover a judgment for damages for personal injury. At the end of the plaintiff's case the defendant moved for a nonsuit. The motion was granted. The plaintiff made a motion for a new trial. That motion was denied, and the plaintiff has appealed. In his first point the plaintiff contends that the motion for a nonsuit was not sufficiently specific. The motion was based on the ground that it had not been shown by the evidence in the case that the defendant was guilty of any carelessness or negligence in the operation of its truck proximately causing this accident. The plaintiff quotes 9 California Jurisprudence, page 949, as follows: "It is, therefore, settled law that a motion for a nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made." We think that the motion was as specific as the pleadings and the facts called for.

[2, 3] On the 15th of May, 1926, the plaintiff was a passenger on an out-bound McAllister street car. He and his family were seated on a bench which was inside of a movable metallic gate which at that time was closed. The bench was on the south side of the front end of the street car. When the street car reached Buchanan street it stopped to let off some passengers. While it stood there one of the trucks of the defendant came north on Buchanan street attempting to go to a fire for which the fourth call had been put in. It was the intention of the driver of the truck to turn to his right when he reached McAllister street. Just as the truck was in the intersection of Buchanan and McAllister streets and attempting to make the turn, No. 14 engine operated by the fire department of the city and county of San Francisco left the firehouse located in the middle of the block on the south side of McAllister and between Buchanan and Webster streets. As that engine left the firehouse Lieutenant Isbel testified that he sounded the siren and kept sounding it. When he got outside of the firehouse he turned to his right and proceeded east on McAllister. While defendant's truck was in the act of making the above-mentioned turn, engine 14 was driven between the truck and the street car. The truck hit the engine

amidship. The engine was forced to rub the side of the street car, and in doing so hit the gate and the plaintiff testified that at the same time he was hit in the back. At this time the plaintiff claims that when the fire engine sounded its siren the defendant's truck should have immediately moved to a position as near as possible and parallel to the right-hand curb, and should have remained there until the fire department apparatus had passed it. He cites and relies on section 133 of the California Vehicle Act (St. 1923, p. 560). Omitting irrelevant parts, that section provides: "Upon the approach of any * * * fire department vehicle, * * * upon the sounding of a signal by such * * * fire department vehicle * * * every other vehicle shall immediately be moved to a position as near as possible and parallel to the right-hand curb, and shall remain there until the * * * fire department apparatus has passed such vehicle." It will hardly be disputed that the statute rests upon the assumption that the driver of the other vehicle shall hear the siren of the fire department apparatus. Such driver was not called and the record does not disclose any direct evidence to the effect that he did or did not hear the siren. However, the record does not show affirmatively that there were any other vehicles in the neighborhood, nor that there was any noise that would in any way prevent the driver of defendant's truck from hearing the siren if the same was sounded. There is no evidence in the record that the siren on the engine does not make a noise sufficiently loud to be heard around the corner of one block. In very short, the case rests on the presumptions or inferences that may be resorted to when a motion for nonsuit is made at the end of plaintiff's case. The courts do not favor the motion when made at that time. In Burr v. United Railroads, 163 Cal. 663, at page 665, 126 P. 873, 874, the court said: "It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true. Equally well settled is the rule that 'negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be drawn from the evidence.' Wahlgren v. Market St. R. Co., 132 Cal. 656, 663, 62 P. 308, 64 P. 993; Kimic v. San Jose-Los Gatos R. Co., 156 Cal. 379, 104 P. 986. It is only where the evidence is such that but one conclusion with respect to negligence could be reached by a reasonable and impartial man that the question becomes one of law for the court." The principle involved in the Burr Case was essentially the same as the principle involved in the instant case. In the Burr Case, if the motorman had looked, he would have seen. In the instant case, if the driver listened, he would have heard. In neither case was there direct evidence. In the Burr Case the court stated the facts which were no more favorable to the plaintiff than the facts in the instant case. Having done so, on page 666 of 163 Cal., 126 P. 873, 874, the court said: "The testimony justified the inference that the motorman saw the plaintiff's automobile upon the track, but that, notwithstanding, he came on without slackening his speed until he was actually upon the automobile." So, in this case, the testimony justified the inference that the driver of the truck heard the siren upon the fire engine, but that, notwithstanding, he went forward, without drawing up to the curb and struck the fire engine. Furthermore, it cannot be said that every reasonable man would be bound to conclude on the facts shown that the collision was not caused by the failure of the truck driver to stop when he first heard the siren.

The order appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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116 Cal.App. 19

WILLIAMSON v. FITZGERALD et al.

Civ. 4349.

District Court of Appeal, Third District, California.

Aug. 4, 1931.

Rehearing Denied Sept. 3, 1931. Hearing Denied by Supreme Court Oct. 1, 1931.

1. Automobiles ⚷224(5).

Evidence warranted finding that injured owner furnishing automobile for pleasure trip was not contributorily negligent, where, immediately before accident, driver's negligence in kissing companion was unexpected.

Evidence disclosed that plaintiff owned and furnished automobile involved to transport herself and three companions on pleasure trip planned by the others, whom she had frequently accompanied on similar excursions; that plaintiff was not called on to buy gasoline or pay any other expenses of journey; that member of party known to plaintiff to be careful driver operated automobile, and, although previously he had always given close attention to driving, he permitted his attention on this occasion to be temporarily diverted when he kissed his companion in response to her request; that on noticing approaching automobile he became confused and turned suddenly, overturning automobile and injuring plaintiff,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

who, due to driver's unexpected carelessness, had had no opportunity to protest or to demand control of automobile.

2. Automobiles 🔑224(5).

Respecting contributory negligence, adequacy of warning against automobile driver's imprudence depends on particular circumstances.

3. Automobiles 🔑245(87).

Whether automobile owner injured by driver's unexpected negligence was contributorily negligent *held* for court in trial without jury.

4. Automobiles 🔑224(1).

Automobile owner voluntarily joining pleasure expedition did not thereby assume risks from driver's unexpected negligence.

Owner did not assume risks from driver's unexpected negligence, since one does not ordinarily assume risk of dangers which one has no reason to anticipate.

5. Automobiles 🔑196.

That injured member of pleasure expedition owned automobile involved or was engaged in joint pleasure excursion with driver did not estop her from recovering against negligent driver.

6. Negligence 🔑93(1).

Automobile driver's negligence may be imputed to passenger engaging in joint enterprise where each has equal right to control other regarding conduct causing accident, making both liable to injured third person.

Imputed negligence under such circumstances depends on authority of person sought to be charged therewith to direct and control conduct of driver of automobile with relation to acts or omissions which contribute to cause of accident.

7. Negligence 🔑93(1).

Those engaged in automobile pleasure excursion are not necessarily engaged in "joint enterprise."

[Ed. Note.—For other definitions of "Joint Enterprise," see Words and Phrases.]

8. Negligence 🔑93(1).

Owner who, having been invited to furnish automobile and accompany friends on pleasure trip, surrendered control thereof, *held* not "engaged in joint enterprise" so as to charge owner with driver's negligence.

9. Negligence 🔑93(1).

Imputed negligence doctrine is inapplicable where member of joint enterprise or common adventure sues another member for negligence; doctrine of joint enterprise being peculiar to subject of contributory negligence.

10. Trial 🔑404(1).

If reasonably possible, findings should be reconciled to support judgment.

11. Appeal and error 🔑1071(5).
Automobiles 🔑247.
Trial 🔑395(5).

Finding that injured owner of automobile riding therein retained right to voice in its control *held* surplusage and harmless, and not conflicting with finding that driver exercised sole management.

12. Automobiles 🔑224(5).

Owner lending automobile to another and becoming passenger therein has right, and, in absence of contrary agreement, duty to prevent driver's carelessness.

A failure by owner of automobile to exercise reasonable supervision and control over driver under such circumstances so as to warn him against violating traffic laws or to protest against driving in negligent or reckless manner may constitute contributory negligence which will preclude recovery for injuries sustained as a result thereof.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Julia A. Williamson against J. A. Fitzgerald and another. Judgment for plaintiff against defendant named, and defendant named appeals.

Affirmed.

Herbert Chamberlin, of San Francisco, for appellant.

Edward Van Vranken and R. M. Dunne, both of Stockton, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment of $11,846.80, which was recovered against the appellant, for personal injuries sustained by the plaintiff in an automobile casualty.

The plaintiff was employed as housekeeper at the Lincoln Hotel in Stockton. She was the owner of the Studebaker sedan automobile which is involved in this action. The codefendant Lucretia McConnell, also known as Mrs. Lou Tressler, was a clerk in the same hotel. For four years these ladies had been friends and associates. Mrs. Tressler kept company with the appellant, while the plaintiff associated with a gentleman by the name of Klein. By prearrangement this group of four planned to drive from Stockton to San Francisco to attend a show. July 17, 1928, Mrs. Tressler called the plaintiff on the telephone informing her of the plan to drive down to San Francisco and requested her to bring her machine over to her apartments on Lafayette street. The plaintiff accordingly obtained a leave of absence from her duties at the hotel, and, dressing for the occasion, drove to the Tressler apartments, where she found the trio above mentioned waiting for her. The appellant, who was known to the plaintiff to be a careful driver, operated the car both going to and returning from their destination. Mrs. Tressler occupied the front seat upon the appellant's right. The plaintiff and her companion sat in the rear seat of the machine. No previous statement was made regarding the operation of the vehicle. Mrs. Tressler appears to have planned the expedition, and the appellant assumed the responsibility of doing the driving. The plaintiff was not called upon to pay any of the expenses of the journey. The party had dinner and attended the show together in San Francisco, where they remained overnight.

The following morning they set out early to return to Stockton. It was then perfectly light and clear. Without previous incident of any significance, while they were driving at the rate of 35 or 40 miles an hour down a slight grade over a thirty-foot paved highway through Dublin canyon, they observed a truck loaded with lug boxes which was stalled upon this grade upon their left-hand side. Owing to a slight curve in the highway, an approaching Ford machine was concealed behind the truck. When the Studebaker car reached a point about one-half a block from the truck, without previous warning, Mrs. Tressler addressed herself to the appellant, who sat by her side driving the car, saying, "Punkey, kiss me." He proceeded to do so. His attention was thereby temporarily diverted from his operation of the car. At this instant, the approaching Ford machine appeared from behind the truck. There was ample room for both cars to pass the truck. But, observing this indiscreet act and apprehending the danger therefrom, the plaintiff exclaimed, "Oh, be careful." Mr. Klein also warned the appellant of the danger. The plaintiff testified that, as they warned the appellant of the danger of his conduct, he looked up, and, seeing the approaching machine, became startled and confused. She said, "He looked up and he acted as if he was panicky or something—he became excited. * * * When he looked up—it seemed like he became—well, I don't know whether you would call it frightened or not." The appellant thereupon suddenly pulled his car off to his right, and then violently back to his left, after they had passed the stationary truck and the approaching Ford machine. The Studebaker sedan swerved, careened, and toppled over. Mr. Klein, who sat in the rear seat with the plaintiff, was killed. She was seriously and permanently injured. This suit for damages was instituted against both the appellant and Mrs. Tressler, his companion. The case was tried by the court sitting without a jury. Judgment for damages was rendered in favor of the defendant Tressler, but against the appellant for the sum of $11,846.80. The serious nature of the injuries which were sustained by the plaintiff is not disputed. The amount of the judgment is not criticized.

The appellant contends that (1) the plaintiff was guilty of contributory negligence; (2) the plaintiff assumed the risk of riding with the appellant because she was engaged with him in a joint enterprise, or pleasure expedition at the time of the accident; (3) the findings of facts are in irreconcilable conflict.

[1] There is nothing in the present record to warrant a finding of contributory negligence on the part of the plaintiff. She had frequently accompanied the appellant and Mrs. Tressler on former automobile excursions when he did the driving. His previous conduct led the plaintiff to believe he was a careful driver. He had never before attempted to kiss Mrs. Tressler while he was engaged in driving a car. The plaintiff had never before known him to permit himself to be diverted from careful attention to his driving. This careless act of kissing Mrs. Tressler, which diverted his attention so as to cause the accident, was so unexpectedly performed that the plaintiff had no opportunity to protest or demand the control of the machine.

[2, 3] The adequacy of a warning against imprudent conduct of the driver of an automobile so as to purge one of contributory negligence depends upon the circumstances of each particular case. 5–6 Huddy's Cyc. of Automobile Law, p. 266, § 144. The question of plaintiff's contributory negligence in the present case was a problem for the determination of the trial judge. Its solution of this question, under the facts of this case, will not be disturbed on appeal. In the authority last cited it is said in § 144 thereof: "Where the reckless driving has continued but for a short distance, and there has been but little time for the guest to take precautions for his safety, his negligence may be a question for the jury."

[4] Under the circumstances of this case it may not be said the plaintiff assumed the risks of danger from the negligent conduct in driving merely because she voluntarily became a member of the pleasure expedition. One does not ordinarily assume the risk of dangers he has no reason to anticipate.

[5-7] The plaintiff is not estopped from maintaining this action for damages against the driver of her automobile on the ground

that she was the owner thereof, or because she was then engaged in a joint pleasure excursion with him and may have been entitled to exercise joint control with him over the operation of the machine. It is true the negligence of the driver of an automobile may be imputed to another occupant of a machine with whom he is engaged in a joint enterprise where each has an equal right to control and direct the conduct of the other with respect to the acts or omissions which furnish or contribute to the cause of accident complained of, so as to render them both liable to a third person for injuries sustained thereby. 45 C. J. 1020, § 574; 1 Blashfield's Cyc. of Auto Law, p. 969, § 13; 5–6 Huddy's Cyc. of Auto Law, p. 285, § 149. Imputed negligence under such circumstances depends upon the authority of the party sought to be charged therewith to direct and control the conduct of the driver of the automobile with relation to the acts or omissions which contribute to the cause of the accident. It is not true that all who are engaged in an automobile excursion for pleasure are necessarily participants in a joint enterprise. The mere fact that several persons are doing some particular thing together does not necessarily charge each with the negligence of the others. 45 C. J. 1020, supra; 1 Blashfield's Cyc. of Auto Law, p. 970, § 14; Meyers v. So. Pac. Co., 63 Cal. App. 164, 218 P. 284; Koplitz v. St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74. In 5–6 Huddy's Cyc. of Auto Law, p. 280, § 146, it is said: "Even the owner of the vehicle may in some cases be considered a guest of the driver, so that the driver's negligence will not be imputed to him."

In 19 California Jurisprudence, page 660, § 85, it is said: "Negligence may not be imputed to a person merely because he is the owner of an instrumentality which caused the injury."

[8] In the present case the pleasure expedition was not planned by the plaintiff. She was informed of the proposed trip by Mrs. Tressler and directed to furnish her automobile for their use. At the request of the appellant she delivered the keys of the car to him. He assumed the entire control and operation of the machine. The plaintiff was not asked to participate in the expense of gas, oil, or the storage bill for the car. She did not attempt to direct the course or operation of the machine. The evidence indicates without contradiction that the expedition was planned by the other members of the party, and that the plaintiff was invited to accompany them and furnish her automobile as a means of transportation. Under such circumstances the owner of a machine may not be said to be engaged in a joint enterprise so as to charge her with the negligence of the driver. In the case of Pope v. Halpern, 193 Cal. 168, 174, 223 P. 470, 473, it is said: " 'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.' It will be seen * * * that in order that there be such a joint enterprise it is not sufficient merely that the passenger of the machine indicate the route, or that both parties have certain plans in common, such as a 'joy ride,' but the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle."

Reputable authority holds that the doctrine of imputed negligence between members of a joint enterprise does not necessarily apply to a mere pleasure excursion. In 1 Blashfield's Cyc. of Auto Law, page 971, supra, it is said: "The mere fact that the driver and passenger have the common purpose of a pleasure trip is not alone sufficient to show a joint enterprise." Nicora v. Cerveri, 49 Nev. 261, 244 P. 897.

In the case of Bailey v. Parker, 34 Ohio App. 207, 170 N. E. 607, it was held that the driver of an automobile and passengers who were members of the same orchestra and were riding in the same machine to fulfill an engagement to furnish music for an entertainment were not therefore occupied in a joint enterprise, so as to impute the negligence of the driver to the other members of the orchestra. In the case of Koplitz v. St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74, where twenty-eight young men and ladies participated in the expense of hiring a bus, in which they drove to Lake Johanna to attend a Fourth of July picnic dinner, it was held they were not engaged in a joint enterprise so as to impute the negligence of the driver, who was a member of the pleasure excursion, to the other members thereof. In the case of Wilmes v. Fournier, 111 Misc. Rep. 9, 180 N. Y. S. 860, four men went together on a hunting expedition. By common consent they used the automobile owned by one of the party as a means of transportation. Through the negligence of the owner of the machine, one of the party was injured. A judgment against the driver of the machine was sustained. On appeal it was held that the hunting expedition was not such a joint enterprise as would impute the negligence of one member of the expedition to another member thereof in a suit between them. In the case of Beard v. Klusmeier, 158 Ky. 153, 164 S. W. 319, 321, 50 L. R. A. (N. S.) 1100, Ann. Cass. 1915D, 342, the court says: "We cannot agree with appellant's contention that, where one invites another for a pleasure ride, the two are engaged in a common enterprise or joint venture, and that neither is liable to the other for any act of negligence."

[9] Regardless of whether the circumstances of the pleasure party in the present case constituted a joint enterprise as that term is defined by the law, the doctrine of imputed negligence may not be invoked by one member of the joint enterprise against another so as to defeat a claim for damages for negligence on the part of the former. The doctrine of imputed negligence is inapplicable to a member of a joint enterprise or common adventure when one member of the enterprise is sued by another member thereof for injuries sustained through the negligent operation of an automobile which is being used in the course of the enterprise. The doctrine of joint enterprise is peculiar to the subject of contributory negligence and has no application to actions brought by one joint adventurer against another to recover for injuries due to the latter's negligence. 45 C. J. 1021, § 574; 62 A. L. R. 442, note IV; O'Brien v. Woldson, 149 Wash. 192, 270 P. 304, 305, 62 A. L. R. 436; Bailey v. Parker, 34 Ohio. App. 207, 170 N. E. 607, 609; Bloom v. Leech, 120 Ohio St. 239, 166 N. E. 137, 139; Wilmes v. Fournier, 111 Misc. Rep. 9, 180 N. Y. S. 860, 861; Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 433, 44 A. L. R. 785, 789; Harber v. Graham, 105 N. J. Law, 213, 143 A. 340, 341, 61 A. L. R. 1232, 1235. In the case last cited a brother and sister were touring Massachusetts for pleasure in the defendant's automobile. The sister was injured through the negligence of her brother who was driving the car. On appeal from a judgment in favor of the defendant, it was urged that the giving of the following instruction was prejudicial error, to wit: "If the jury find that the plaintiff and the defendant were engaged in a common enterprise at the time of the accident, then, regardless of any question of negligence, the defendant is entitled to a verdict."

The court said: "Taking up the 'common enterprise' point, we think the learned trial judge lost sight of the fact that this principle, resting as it does upon the relation of agency existing inter sese among persons engaged in a joint or common enterprise, is applicable only as regards third persons not parties in such enterprise."

In the case of Bushnell v. Bushnell, supra, the court quotes approvingly from 1 Shearman & Redfield on Negligence (6th Ed.) § 65a, as follows: "The doctrine of imputed negligence is that in certain relation there shall be visited upon the plaintiff the negligence of another concurring with that of the defendant so as to defeat the action. It is peculiar to contributory negligence and can be invoked only where the negligence of another, for which the plaintiff is responsible, besides that of the defendant, proximately contributes to the injury."

In the case last cited the court says: "He who in the process of a joint enterprise is engaged in operating a vehicle represents, in so doing, all who are associated with him in that enterprise, and, if he is negligent, any one of them may look to him for damages upon the same basis as that upon which a principal holds an agent liable for his negligent conduct. * * * Where she [the plaintiff] was charging him [the defendant] directly with responsibility for injuries due to his own failure in duty, there was no place for any imputation of his want of care to her, and the sole issues were those having to do with his negligence and her own contributory negligence. The doctrine of joint enterprise was wholly inapplicable to such a situation."

In the case of Wilmes v. Fournier, supra, in discussing the same limitation of the application of the principle of imputed negligence, the court says: "No case has been cited by counsel in which one person, concededly engaged in a common enterprise, has sought to maintain an action against one of his associates. The fact whether there is a joint enterprise is one of importance in the class of cases cited, when the action is against a third person; but, as between themselves, I know of no rule of law that throws a mantle of protection over the tortious acts of an associate in a joint enterprise or in a partnership."

In the case of O'Brien v. Woldson, supra, the plaintiff and defendant were engaged in a pleasure excursion similar to the situation in the case at bar. The plaintiff paid for the gasoline and other expenses of the trip. Through the negligence of the defendant, who was driving the car, the plaintiff was injured. Judgment was rendered in favor of the plaintiff. From this judgment the defendant appealed. He claimed exemption from liability on the doctrine of imputed negligence. The judgment was affirmed. The court said: "Where the action is brought against a third party, the rule is that the negligence of one member of the joint enterprise within the scope of that enterprise will be imputed to the other. * * * It does not necessarily follow, however, that that rule should be applied when the action is by one member of the joint enterprise as against the other. When the action is against a third person each member of the joint enterprise is a representative of the other, and the acts of one are the acts of all if they be within the scope of the enterprise. When the action is brought by one member of the enterprise against another, there is no place to apply the doctrine of imputed negligence. To do so would be to permit one guilty of negligence to take refuge behind his own wrong. The situation when the action is brought by one member of the enterprise against the other is entirely different from that when recovery is sought against a third person. For present purposes it is sufficiently accurate to say that the relations of joint adventurers as between themselves are governed practically by the same rules that govern partners. Harm v. Boatman, 128 Wash. 202, 222 P. 478. In the case of partners, an action for damages will lie by one partner against the other for wrongs inflicted upon the person or property of the one seeking to recover."

The doctrine of imputed negligence is therefore not available to the defendant in the present case.

[10-12] The findings of the court are not in irreconcilable conflict. The court did find that the plaintiff was the owner of the automobile in which the parties were riding at the time of the accident, but that the defendant Fitzgerald had the actual management, control, and operation of the car at that time. The court further found that the plaintiff's injuries were sustained as the proximate cause of appellant's gross negligence and carelessness in diverting his attention from driving the machine while he proceeded to kiss his companion, and that the plaintiff was not guilty of contributory negligence. The appellant contends that the court inconsistently found that "plaintiff did not then and there have, or take any part in the management, operation or control of said automobile, but did have, at said time, a right to a voice in the control thereof." All findings should be reconciled, if reasonably possible, so as to support the judgment. The complaint was first drawn on the theory that the plaintiff was riding in the automobile at the time of accident as the guest of the appellant. On motion of the plaintiff, all reference to this theory of her relationship as a guest was stricken from the complaint. Without objection, the cause was tried on the appellant's theory that his negligence might be imputed to the plaintiff so as to preclude her from recovering damages, provided the pleasure expedition could be construed to be a joint venture between the participants therein. In view of the preceding discussion upon the principle last mentioned, and in support of the judgment, it may be assumed the court concluded that the pleasure expedition upon which the parties were engaged did not constitute a joint enterprise. It may also be assumed, for the purpose of supporting the judgment, that the appellant was not driving the machine at the time of the accident as the agent of the plaintiff, but, upon the contrary, that she abandoned the entire operation and control thereof to him, and that he assumed the actual and absolute control and management thereof. But, even though it be assumed, as the findings declare, that the plaintiff retained the "right to a voice in the control thereof" this is not in conflict with the unqualified finding that the appellant actually exercised the sole management, control, and operation of the car, and that the plaintiff assumed no part in the management or control thereof. It is true that, when the owner of an automobile lends his machine to another person and becomes a passenger therein, he has the right, and, in the absence of an agreement to the contrary, it becomes his duty, to prevent careless or reckless conduct on the part of the driver in the operation thereof. Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Bosse v. Marye, 80 Cal. App. 109, 119, 250 P. 693; Rapolla v. Goulart, 105 Cal. App. 417, 287 P. 562. A failure on the part of the owner of a machine to exercise reasonable supervision and control over the driver under such circumstances so as to warn him against violating the traffic laws or to protest against driving in a negligent or reckless manner may constitute contributory negligence which will preclude the recovery of damages for injuries sustained as a result thereof. In the present case, however, there was nothing in the previous conduct of the appellant to indicate that he was operating the machine in a careless or negligent manner, or to warn the plaintiff that the driver of the machine proposed to engage in kissing his companion. This negligent act, on part of the appellant, of kissing Mrs. Tressler was evidently the proximate cause of the accident. The plaintiff had no opportunity to warn him against such conduct. There is therefore no evidence in the record to warrant a holding that the plaintiff was derelict in the performance of her duty as the owner of the car. The finding of the court that she had a right to a voice in the control of the machine was therefore surplusage and harmless.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

115 Cal.App. 727

ECKSTROM v. BROOKS.

Civ. 7634.

District Court of Appeal, First District, Division 2, California.

July 31, 1931.

Rehearing Denied Aug. 28, 1931. Hearing Denied by Supreme Court Sept. 28, 1931.

1. Gifts 🔑47(1).

In administrator's action on note, burden rested on maker to establish that deceased payee had canceled note by unconditional gift to maker.

2. Gifts 🔑47(1).

In administrator's action on note, no presumption existed that maker's evidence that deceased payee had canceled note by unconditional gift to maker was false.

3. Appeal and error 🔑1002.

Although maker contended note was canceled by unconditional gift from deceased payee to maker, conflict of evidence rule *held* not ameliorated.

4. Gifts 🔑49(6).

Where maker claimed cancellation of note by unconditional gift from deceased payee, testimony of maker was required to be viewed with caution.

5. Appeal and error 🔑930(1).

In administrator's action on note which maker claimed was canceled by unconditional gift from deceased payee, appellate court must presume that trial court and jury fairly viewed maker's evidence with caution.

6. Appeal and error 🔑1001(1).

Finding supported by substantial evidence is not open to review on appeal, although law requires clear and convincing proof.

7. Principal and agent 🔑43(1).

Generally, death revokes agency.

8. Gifts 🔑33(2).

Gift of note *held* complete on payee's delivery thereof to maker rendering note unenforceable.

9. Gifts 🔑33(2).

That payee making gift of note to maker might have created agency to clear maker's title to land conveyed by trust deed securing note *held* immaterial as regards right of payee's administrator to enforce note.

10. Gifts 🔑10.

Note may be subject of gift.

11. Gifts 🔑31(1).

Title to note passes on delivery with intention to make gift thereof irrespective of indorsement by payee.

12. Bills and notes 🔑499.

Where note is shown to have existed, presumption prevails that obligation exists until shown to have been paid or canceled.

13. Appeal and error 🔑205.

Whether prejudicial error occurred in exclusion of photographic enlargements of deceased's handwriting could not be determined, where no foundation was laid for introduction thereof and those offered were not marked for identification.

14. Trial 🔑260(5).

Refusing instruction regarding gifts which was incorrect statement of law *held* not error, where court gave instructions fully covering subject of gifts inter vivos and gifts causa mortis (Civ. Code, § 1149).

15. Gifts 🔑51.

Instruction relating to delivery of note and trust deed containing statement that gift of note did not depend on reconveyance under trust deed to give it effect *held* not error.

16. Gifts 🔑31(1).

Valid gift of note may be made without conveyance of security.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Arthur L. Eckstrom, as administrator of the estate of John L. Eckstrom, deceased, against Ida Jean Brooks. Judgment for defendant, and plaintiff appeals.

Affirmed.

James F. Brennan, and E. A. McDonald, both of San Francisco (Vincent Surr, of San Francisco, of counsel), for appellant.

Gilbert D. Ferrell, of Redwood City (Fred W. Comba, of Redwood City, of counsel), for respondent.

NOURSE, P. J.

Plaintiff sued as administrator of the estate of John Eckstrom, deceased, to recover upon a promissory note of $9,000. The cause was tried with a jury and defendant had a verdict. Plaintiff has appealed on typewritten transcripts.

When about sixty years of age, John Eckstrom was divorced from his wife and moved to the home of the defendant, where he remained until his death, nine years later. During this entire time he was estranged from his family, and a short time before his death, stated that he did not desire any of them to have any of his property. He was afflicted with many physical ailments and was unable to carry on any steady labor. During all this time defendant, who was a practical nurse, cared for him, doing his cooking, washing, and nursing without compensation. The note in suit was executed in 1926 and was secured by a third deed of trust on property owned by defendant. A few weeks before his death in July, 1928, the deceased handed to the defendant in the presence of her son the promissory note and deed of trust, telling her that he wanted her to have the note and did not want any of his family to be able to collect from her. At the same time the deceased executed and delivered to the defendant an authorization to the trustee named in the deed of trust to reconvey to defendant. These documents were given by defendant to her son on the same day with instructions to record the authorization, but the son failed to do so until the day following the death of deceased.

[1-6] Counsel for appellant list their points under ten headings. The first three points relate to the burden of proof, which concededly rests with the respondent in cases of this character. The fourth point rests on the statement that "in this type of action the presumption is that the evidence of the defendant is false." There is no such presumption in the law. The further statement that the "conflict of evidence rule" is ameliorated in these actions is equally fallacious. Though the courts have frequently said that the testimony of the party in interest in these cases should be "viewed with caution and even with suspicion, to prevent fraud," our function is nevertheless that of a reviewing court which must presume that the trial court and jury honestly and fairly viewed the evidence with such care. The true rule of these cases is stated in Steinberger v. Young, 175 Cal. 81, 85, 165 P. 432, 434, where the court says: "If there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal" even where the law requires proof of the fact to be clear and convincing.

Appellant gives his fifth point the heading "Inherent improbabilities." In support of the point he refers to several portions of the testimony of the respondent and her son detailing the transactions which we have heretofore recited and insists that some of these transactions were inherently improbable. Without further repetition it is sufficient to say that we have read this testimony with care and that we cannot say that it is inherently improbable. Many of the transactions were not done with the care and prudence that one would exercise under the advice of counsel, in fact, some things were very carelessly done, and if we were viewing the case as jurors we might have strong suspicions as to the truth and accuracy of some of the testimony. But that is not always improbable which is merely irregular or suspicious. Running through the argument upon these points, the appellant frequently refers to the "forgery" of the decedent's signature to the authorization to reconvey the realty. The original exhibit has been brought up, and we are asked to test the validity of this signature in the light of other exemplars of decedent's handwriting. But this is a pure question of fact which was left to the jury under complete instructions. We cannot say upon a review of the evidence that the jury drew a wrong conclusion merely because some of the evidence may seem "suspicious."

[7-11] The sixth and seventh points may be treated under the general head that "Death revoked all agency and the gift remained uncompleted." In both respects the statement is a true statement of the law, but it has no application to the facts of this case. Death revokes an agency, but here there was no agency in so far as the issues raised by appellant are concerned. He was suing upon a promissory note which the evidence discloses was "paid in full" or canceled by the unconditional gift to the maker. From the very moment this gift was made the note became no longer enforceable, and it is of no concern of appellant that an agency might have been created to make a reconveyance in order to clear respondent's title to the land covered by the deed of trust. There is no conflict in the authorities that a promissory note may be the subject of a gift and that title passes on delivery with that intention irrespective of endorsement by the payee. 28 Cor. Jur. 666, 700.

[12] In his eighth point appellant argues for the presumption that the note having been shown to exist the obligation exists until shown to have been paid or canceled. Respondent does not quarrel with appellant. She relies on her evidence of gift as proof overcoming the presumption.

[13] Point No. 9 relates to the failure of appellant to secure the admission in evidence of some photographic enlargements of the handwriting of the deceased. Many cases are cited to the point that such photographs are admissible—a rule which is not disputed. But the point is not material here because the appellant failed to lay the proper, or any, foundation for the introduction of any photographs and because he has not marked for identification those offered. Hence we are unable to determine whether prejudicial error occurred in the ruling.

[14] Finally it is argued that the trial judge erred in refusing appellant's proposed instruction reading: "I instruct you that if John Eckstrom intended to make a gift to Ida Jean Brooks, and delivered certain papers

to her, but intended that his gift should not take effect until after his death, then I instruct you that *this was not a gift.*" The proposal was an incorrect statement of the law. Section 1149, Civil Code, provides that a gift made in view of death with the intent that it shall take effect only in case of the death of the giver is a gift causa mortis. In other instructions given the trial judge fully covered the subject of gifts "inter vivos" and gifts "causa mortis."

[15, 16] Complaint is also made of the portion of the instruction given upon request of respondent and reading: "That the gift did not depend upon reconveyance under the deed of trust to give it effect." The instruction in which the portion complained of was included related to the delivery of the promissory note and deed of trust only. It had no relation to the reconveyance nor the title to the realty. That a valid gift of the promissory note could be made without a conveyance of the security is too plain for argument. The effect of such a gift is a question which is not involved in this instruction.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App. 588

PEOPLE v. MACK.

Cr. 1152.

District Court of Appeal, Third District, California.

July 23, 1931.

1. Criminal law 🔑665(4).

Witness' disobedience of court's order to remain outside courtroom during trial is not ground for rejecting his testimony.

2. Criminal law 🔑804(7).

Court did not err in orally instructing jury without defendant's consent, where instruction was taken down by reporter (Pen. Code, § 1093, subd. 6, and § 1127).

3. Criminal law 🔑804(1), 863(2).

Statutory provision that instructions shall be in, or reduced to, writing is mandatory, and applies to both original charge and further instructions after jury's retirement (Pen. Code, § 1127).

4. Criminal law 🔑1144(14).

Presumption on appeal is that reporter performed duty to take down oral instructions in shorthand (Pen. Code, § 1093, subd. 6, and § 1127).

5. Criminal law 🔑836.

Statutes requiring court to indorse and sign decision on each charge given or refused are inapplicable to charge given of its own motion (Pen. Code, §§ 1127, 1176).

6. Criminal law 🔑1105(1).

Reporter's transcript of court's oral charge must be certified by trial judge to present it for review on appeal (Pen. Code, § 1176).

7. Criminal law 🔑863(2).

Court's remark in answer to jury foreman's question regarding leniency that jury had only to find whether defendant was guilty or not guilty *held* not improper.

8. Assault and battery 🔑92.

Evidence *held* to support conviction of assault with deadly weapon.

9. Criminal law 🔑798½.

All possible forms of verdict need not be given jury, but it may prepare and present its own form of verdict, which court must accept, if legally sufficient.

10. Criminal law 🔑1186(4).

Court's remarks, rebuking defendant's attorney in jury's presence, *held* not reversible error, in absence of showing of provocation therefor or tone of voice in which made (Const. art. 6, § 4½).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

C. W. Mack was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

C. I. Bennington, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PRESTON, P. J.

Defendant was convicted by a jury of the crime of assault with a deadly weapon. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

[1] Appellant contends that the court committed prejudicial error in permitting the witness Clayburn to testify, for the reason that said witness had remained in the courtroom during the progress of the trial after the court had made an order excluding all witnesses from the courtroom. There is no merit in this contention. The disobedience of the court's order to remain outside the courtroom during the progress of the trial might well have subjected the witness to punishment for contempt of court, but it is no ground for re-

jecting his testimony. See People v. Boscovitch, 20 Cal. 436; 27 Cal. Jur. 64.

[2] Appellant also claims the court instructed the jury orally without the consent of the defendant. The statute authorizes such instructions to be given to the jury in a criminal case, if taken down by the phonographic reporter. Sec. 1093, subd. 6, Pen. Code; People v. Bourke, 66 Cal. 456, 6 P. 89; People v. Wheatley, 88 Cal. 114, 26 P. 95; People v. Leary, 105 Cal. 486, 39 P. 24.

To avoid uncertainty as to the instructions given the jury, the Criminal Practice Act required that the charge be given in writing, except when the parties mutually consented that it be oral. This was the rule until 1874 when section 1093 of the Penal Code was amended (amendments to the Codes 1873–74, p. 444) to provide: "If the charge be not given in writing, it must be taken down by the phonographic reporter."

In 1897 the law was further changed, when section 1127 of the same Code was amended (St. 1897, p. 184). This amendment provides: "All instructions given (except such as might incidentally be given during the admission of evidence) shall be in writing, unless both parties request the giving of an oral instruction, or consent thereto, and when so given orally, all instructions must be taken down by the phonographic reporter."

[3] The requirement that the instructions be in or reduced to writing is mandatory and applies both to the original charge and to further instructions given after the jury has retired for deliberation. People v. Hersey, 53 Cal. 574; 8 Cal. Jur., pp. 324, 325.

[4] The record in this case does not show whether the instructions were given orally or in writing, but, conceding that they were given orally, the presumption is that the reporter performed his duty and took down the charge in shorthand, and that he must have done so appears from the fact that the full charge is brought to this court in the transcript. People v. Barton, 88 Cal. 176, 25 P. 1117; People v. Cline, 83 Cal. 374, 23 P. 391; People v. Marks, 72 Cal. 46, 13 P. 149.

[5, 6] Sections 1127 and 1176 of the Penal Code requiring the court to indorse and sign its decision upon each charge presented and given or refused do not apply to a charge of the court given of its own motion, as appears to have been done in this case. 8 Cal. Jur., p. 318. However, the reporter's transcript of the charge must be certified by the trial judge, as provided in section 1176 if a review of the oral charge is sought on appeal. This was done in the case at bar.

Therefore, upon the record here presented, we find no error in the court not instructing the jury in writing.

[7] The record contains the following: "3:50 o'clock p. m. * * * the jury retire to their jury room to deliberate upon a verdict and at 5:10 o'clock p. m. of this same day the jury announce that they wish to come into the court room and they are conducted to the jury box whereupon the following proceedings are had:

"* * * The Court (to Foreman Strang): Now, Mr. Strang, are you the foreman?

"Foreman Strang: Yes. So far we have been unable to agree and what information we require was in case we found the defendant guilty could we ask you—

"The Court (interrupting): Now don't ask me anything about punishment.

"Foreman Strang: We want to know if we could ask in regard to leniency?

"The Court: No, you have nothing to do with that.

"Foreman Strang: We have nothing to do with that?

"The Court: No, sir, you went in there and promised me, and took an oath that you would try this case solely from this evidence and the instructions of the Judge and find whether he was guilty or not guilty and that is all you have to do with. If you cannot find a verdict from that it is too bad, that's all.

"Foreman Strang: Well, that is all.

"The Court: All right, you can go back to your rooms now, gentlemen." At 5:44 o'clock of the same day the jury returned a verdict of guilty as charged in the information, to wit, assault with a deadly weapon.

Appellant insists that the court by these remarks intimated to the jury that it should find him guilty of the offense charged, and precluded the jury from finding him guilty of the lesser offense of simple assault; and that the trial court should, in answer to the foregoing question regarding leniency, have instructed the jury that it could find the defendant guilty of an assault only and submitted a form of verdict to that effect.

The remarks did not have reference alone to a possible verdict of guilty. It merely called to the attention of the jury the fact that they were to try the case upon the evidence produced and the instructions of the court and find a verdict of "guilty or not guilty."

The remarks here complained of are of an entirely different character from those condemned in such cases as People v. Kindleberger, 100 Cal. 367, 34 P. 852; People v. Blackwell, 81 Cal. App. 417, 420, 421, 253 P. 964, relied upon by appellant.

[8] The court in its charge to the jury had explained to them fully the difference between an assault and an assault with a deadly weapon, and the jury was at liberty to return a verdict of either assault with a deadly weapon as charged in the information or a verdict of what is generally termed "simple assault." The jury found him guilty of the higher of-

fense. This verdict is amply supported by the evidence. In fact, the evidence shows without substantial conflict that appellant and the complaining witness became involved in a quarrel over a gambling debt of 25 cents, and that the appellant deliberately stabbed and cut the complaining witness a number of times with a knife, one wound penetrating the left lung and producing great bodily injury.

From all the facts and circumstances appearing in evidence it is difficult to see how the jury would have been warranted in convicting the appellant of assault only. If he was guilty of any offense, he was at least guilty of the offense with which he was charged and convicted.

[9] As a matter of convenience all possible forms of verdict are usually prepared by the clerk and explained and given to the jury by the court, but this is not required in a criminal case. The jury has the right to prepare and present its own form of verdict, and, if legally sufficient, must be accepted by the court.

[10] Complaint is made that the trial court committed prejudicial error in rebuking the attorney for appellant during the trial, and in the presence of the jury. The remarks complained of might well have been omitted, but we are unable to say from the record what provocation prompted them or in what tone of voice they were made. They may have been mere passing remarks and not calculated to offend counsel or prejudice his client's case in the eyes of the jury. We are unable to say that any miscarriage of justice occurred by reason of any of the court's remarks. Article 6, § 4½, Const.

In conclusion we might add that the court manifested its fairness and lack of prejudice against the defendant by imposing upon him punishment in the county jail for one year, instead of sending him to the state prison, which it might well have done under the verdict Section 245, Pen. Code.

The judgment and the order are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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115 Cal.App. 639

HOWARD v. NATIONAL ICE CREAM CO. et al.

Civ. 7478.

District Court of Appeal, First District, Division 1, California.

July 27, 1931.

1. Trial ⚷228(1).

Where qualifications which must ordinarily accompany statement of law to jury are properly stated in general charge, cause will not be reversed, although in isolated passages there be omission to state them.

2. Appeal and error ⚷216(2).

Defendant, having failed to request more specific instructions respecting right of way at intersection, could not complain.

3. Trial ⚷296(3).

Instruction respecting right of way at intersection *held*, in view of other instructions not misleading (St. 1923, p. 560, § 131 (a), as amended by St. 1925, p. 412, § 15).

> Instruction that plaintiff motorist was entitled to right of way if she had, at lawful speed, entered upon intersection and was proceeding over intersection at lawful speed, and if defendant automobile truck had not as yet entered upon intersection, was not misleading as premitting finding that plaintiff had right of way regardless of whether both vehicles approached intersection at same time, especially in view of later instruction that brought in St. 1923, p. 560, § 131 (a), as amended by St. 1925, p. 412, § 15, which provides that where two vehicles approach intersection at approximately same time, vehicle approaching from right, if traveling at lawful speed, shall have right of way.

4. Automobiles ⚷246(47).

Record *held* not to contain substantial evidence that colliding automobiles approached intersection at approximately same time, as regards right of way instruction (St. 1923, p. 560, § 131 (a), as amended by St. 1925, p. 412, § 15).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Letitia Howard against the National Ice Cream Company and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Joseph E. Reardon and Benjamin F. Curtaz, both of San Francisco (Enid Childs, of Berkeley, of counsel), for appellants.

Leo R. Friedman, of San Francisco, for respondent.

KNIGHT, J.

A motortruck owned by the defendant National Ice Cream Company and driven by the defendant McCarthy collided with and overturned a Ford coupe owned and driven by plaintiff, at the intersection of Broderick and Lombard streets in San Francisco, injuring plaintiff and Mrs. Ellen Murphy, who was riding with plaintiff at the time. Thereafter plaintiff brought this action for damages on account of the injuries she sustained and a jury awarded her a verdict for $6,000. From the judgment entered thereon defendants have taken this appeal, urging as sole ground for reversal the giving of two instructions relating to the subject of right of way at street intersections.

The accident happened about 1 o'clock in the afternoon. Plaintiff was traveling along the right-hand side of Broderick street in a southerly direction. The truck was traveling easterly on Lombard, which intersects Broderick at right angles. There is some conflict in the testimony as to whether plaintiff, upon reaching the intersection, brought the coupe to a dead stop or almost to a standstill; plaintiff and Mrs. Murphy having stated that it was brought to a stop or almost to a standstill, and the truck driver, another witness for the defendants, and a Miss Legeal, who was the third occupant of the coupe, but escaped injury, having stated that the coupe stopped at the intersection. However, after having brought it to a stop or almost to a standstill plaintiff proceeded across the intersection and reached the other side, beyond the southerly curb line of Lombard, when the coupe was struck by the truck. The force of the impact threw the coupe about twenty-five feet up a 13 per cent. grade on Broderick street, where it overturned on its side in a reverse position, pointing back toward the intersection.

[1-3] The first instruction objected to (numbered XXII), which is the important one to be considered, reads as follows: "Under section 131 of the California Vehicle Act as the same was in force on the first day of August, 1927, where a motor vehicle, traveling at a lawful rate of speed, has entered an intersection of public highways, such motor vehicle has the right of way over all other motor vehicles approaching or about to enter upon such intersection and all such other motor vehicles must yield to such vehicle so driven upon such intersection the right of way. Therefore, if you find from the evidence that the automobile driven by the plaintiff Letitia Howard had, at a lawful speed, entered upon the intersection of Broderick and Lombard streets and was proceeding over said intersection at a lawful speed and that the automobile truck driven by defendant Florence McCarthy had not as yet entered upon such intersection you must also find that the automobile driven by Letitia Howard had the right of way over said intersection and that it was the duty of said Florence McCarthy to yield said right of way to the automobile driven by Letitia Howard and that it was the duty of said Florence McCarthy to stop the automobile truck he was driving if the same was necessary to yield the right of way to the automobile driven by Letitia Howard." The substance of the other (numbered XXIV) was merely that if the jury found from the evidence and under the instructions theretofore given that the automobile driven by plaintiff had the right of way and that the driver of the truck failed to yield said right of way to her, and such failure was the sole and proximate cause of the collision, plaintiff was entitled to a verdict.

Defendants contend that the evidence in the case would have been sufficient to warrant the jury in finding that both vehicles approached the intersection at approximately the same time; that if it were so found, the truck, having approached from the right, would have been entitled to the right of way, under the provisions of subdivision (a) of section 131 of the California Vehicle Act, as amended in 1925 (St. 1925, p. 412, § 15), which was in force at the time of the accident, providing the truck was traveling at a lawful rate of speed, and irrespective of the fact that the coupe entered the intersection first; and they argue, therefore, that the effect of the instructions complained of was to instruct the jury erroneously that plaintiff was entitled to the right of way, if she entered the intersection first, regardless of whether both vehicles approached the intersection at the same time.

As in many other cases of this kind presented for review, defendants have singled out one instruction from the several given upon the same subject, and by a process of faulty reasoning endeavor to show that the instruction selected for criticism implies something contrary to its true meaning. As said in Weaver v. Carter, 28 Cal. App. 241, 152 P. 323, 326: "The courts have often pointed out the fallacy which often characterizes the attempt to invalidate a verdict by selecting certain detached passages in the charge of the court and subjecting them to a technical, and often a somewhat hypercritical, analysis to show that they misstate the law or are calculated to mislead the jury to the prejudice of the rights of one of the parties to the action. It is hardly conceivable that a set of instructions could be prepared from which isolated parts could not be selected and conclusively shown, when taken alone and by themselves, to be erroneous and detrimental to a party to the suit. Hence the obvious proposition has often been emphasized that all the limitations, qualifications, or conditions which must ordinarily accompany the statement of principles of law to a jury in a particular case cannot be given in one sentence, nor, indeed, in one paragraph or a single instruction, and that, where they are found properly stated in the general charge of the court, the cause will not be reversed, even though in isolated passages there is an omission to state them; in other words, if all the instructions, taken together, and not being inconsistent with each other or confusing, give to the jury a fair and just notion of the law upon the point to which they are addressed, it is sufficient." (Citing numerous cases.)

The construction defendants would have placed upon the instruction above quoted is obviously based upon a distortion of its terms, for as will be observed it does not state unqualifiedly, as defendants argue, that plaintiff was entitled to the right of way if the jury found, merely, that she entered the intersection first, but it expressly declares that her right of way was dependent upon the conditions that she had already entered and "*was proceeding over said intersection* at a lawful speed and that the automobile truck * * * had not as yet entered upon such intersection" (italics ours); and it would seem to be quite impossible for the jury to find that she was in the position of "proceeding over" the intersection before the truck entered upon the same, without having first found that she approached the intersection ahead of the truck; unless, of course, the truck was stopped at the intersection and admittedly such was not the case, the truck driver himself having admitted that the coupe was at a standstill at the intersection when he reached the westerly property line of Broderick and that he did not stop.

However, aside from the technical wording of this particular instruction, the record discloses that the court gave some forty-nine instructions, all of which appear to be satisfactory to defendants except the two mentioned, and among them gave several others having either a direct or indirect bearing upon the question of the right of way at intersections. One of them embodied the very section of the California Vehicle Act upon which defendants rely. The instruction was as follows: "The law of this State in force at the time of this accident, provides as follows: Section 131 (a) of Motor Vehicle Act; Right of Way: 'When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed.' If you find that Mrs. Howard did not comply with the above provisions of the Motor Vehicle Act, and that her failure to comply with such provisions was the sole proximate cause of this accident, then I instruct you that your verdict must be in favor of the defendants." Furthermore, the jury was instructed that the driver of the truck had a right to assume that plaintiff would drive her machine in a lawful and prudent manner and would observe the provisions of the California Vehicle Act (instruction XV); and that he had the right to assume that other drivers of automobiles would yield to him the right of way if such right of way was given him (instruction XVI); also that a failure to comply with a duty imposed by a statute of a state constituted negligence as a matter of law (instruction XX). If defendants desired any instructions more specific in terms upon the subject, they should have proposed the same; and having failed to do so, cannot be heard to complain of those given. Wirthman v. Isenstein, 182 Cal. 108, 187 P. 12. As held in Brown v. Beck, 63 Cal. App. 686, 220 P. 14, defendants had the opportunity at the trial to request instructions in accordance with the views they are now advancing, and having failed to take advantage of that opportunity, they may not be heard to complain at this time. See, also, Wirthman v. Isenstein, supra; Viera v. Atchison, etc., Ry. Co., 10 Cal. App. 267, 101 P. 690; 24 Cal. Jur., p. 796.

The case of Hoffman v. McNamara, 102 Cal. App. 280, 282 P. 990, upon which defendants mainly rely and from which they have extensively quoted in their brief, is essentially different from the present one. There the appellant admitted that both vehicles approached the intersection at approximately the same time, and that, therefore, the vehicle approaching from the right was entitled to the right of way, if traveling at a lawful speed; nevertheless the appellant requested the court to instruct the jury that *as an exception to this rule* the motorist on the left would be entitled to the right of way if he entered the intersection first. Obviously, to have given such an instruction would have been to add a distinct clause to the statute, containing an exception to the traffic rule therein declared; and consequently the trial court refused to give the same, and such refusal was sustained on appeal. The decision in the other case which is strongly emphasized by defendants, Jordan v. Great Western Motorways (Cal. App.) 294 P. 9, has since been set aside by a transfer of the cause to the Supreme Court. But even in the decision so vacated, there is nothing which conflicts with the views herein expressed, for there some six instructions were held to be prejudicially erroneous; and the court concluded therefore that under such circumstances the jury was not fully and fairly instructed as to the law of the case. Here, as pointed out, the principal instruction assailed was not erroneous, and whatever slight uncertainty there may have been, if any, in its wording, was done away with by giving the later instruction embodying the section of the California Vehicle Act upon which the preceding instruction was based. James v. Frazee, 209 Cal. 456, 288 P. 784.

[4] Moreover, from an examination of the reporter's transcript it would seem that the contention defendants now make, that both vehicles approached the intersection at approximately the same time, originated since the appeal was taken, and that there is no substantial evidence in the record to justify such conclusion. The truck driver did not so testify, and although there is a sharp conflict as to the exact location of the truck at the time the coupe started across the intersection, all of the testimony shows that the coupe reached the intersection and stopped there be-

fore the truck reached the intersection. In this regard plaintiff and Mrs. Murphy testified that before attempting to cross the intersection, after having stopped, they looked up and down Lombard street and saw no vehicle approaching, and that after having reached the middle of the intersection they looked again and at that time the truck was up Lombard street just about opposite a certain red house, which proved to be more than 55 feet from the intersection; and Miss Legeal testified that as they stopped at the intersection she looked up Lombard street and that the truck was then near the third pole, westerly of the intersection, which was shown to be at least 115 feet distant therefrom. And the truck driver himself, and another witness produced by defendants, stated that the coupe was stopped at the intersection when the truck reached the same, his testimony being that when he reached the westerly property line of Broderick street he saw the coupe stopped at the intersection; that believing he had the right of way he reduced his speed to about five or six miles an hour, and without stopping proceeded to cross the intersection, but that the coupe then entered the intersection ahead of him, turning first to the left as if to go down Lombard street and then to the right to go up Broderick; and that the collision was inevitable. In view of the foregoing testimony, it would appear that there was no substantial evidence to warrant the jury in finding that both vehicles approached the intersection at approximately the same time.

The judgment is affirmed.

We concur: TYLER, P. J.; WARD, Justice pro tem.

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115 Cal.App. 697

RENO v. A. L. BOYDEN CO. et al.

Civ. 6834.

District Court of Appeal, Second District, Division 2, California.

July 28, 1931.

1. Chattel mortgages 🔑219.

Evidence showed that chattel mortgagor sold mortgaged honey with mortgagee's permission, justifying nonsuit of mortgagee's action against mortgagor and mortgagor's vendee for damages from sale.

2. Appeal and error 🔑1061(3).

Possible error in granting nonsuit could not be prejudicial, where only effect was to prevent judgment for defendant on merits (Code Civ. Proc. § 475).

3. Chattel mortgages 🔑219.

Where chattel mortgagee permitted mortgagor to sell mortgaged honey on mortgagor's promise to pay him from proceeds, mortgage lien was extinguished from time of sale.

4. Chattel mortgages 🔑219.

Chattel mortgagor may sell mortgaged property absolutely with mortgagee's oral consent.

5. Chattel mortgages 🔑219.

Chattel mortgagee permitting mortgagor to sell mortgaged goods waived penal statute requirement that mortgagee be notified of sale (Pen. Code § 538).

6. Chattel mortgages 🔑219.

Chattel mortgagor's promise to pay mortgagee $500 on mortgage note from proceeds of sale of mortgaged goods *held* good consideration for mortgagee's permission to sell goods, regardless of whether mortgagor kept promise.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by H. B. Reno against A. L. Boyden Company and another. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

J. S. Le Page, of Long Beach, for appellant.

R. D. Wickham, of Alhambra, and John N. Helmick, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Prior to June 1, 1926, plaintiff and defendant Fassel owned together a certain apiary and equipment pertaining thereto, located in San Bernardino county; also some honey and wax at the apiary and certain honey stored with the defendant A. L. Boyden Company in Los Angeles county. Apparently about that date, plaintiff sold his half interest in the apiary, equipment, wax, and honey to Fassel, who executed and delivered his promissory note in the sum of $4,500 therefor, and also executed and delivered a chattel mortgage covering said personal property to secure said note, dated June 1, 1926, but actually executed and acknowledged July 6, 1926, and recorded in Los Angeles county July 9, 1926, and in San Bernardino county August 3, of that year. A portion of the honey stored with defendant company was sold by defendant Fassel to said A. L. Boyden Company after the recording of said mortgage in Los Angeles county, and suit was brought by plaintiff against both to recover damages alleged to have been sustained by reason of said sale. The case was tried before the court, a jury having been waived, and at the close of plaintiff's evidence motion was made by each defendant for nonsuit on the ground that the evidence showed that plaintiff had given his consent to the sale. Such motions were granted, and, from the judgment and order, plaintiff appeals.

Appellant contends that the evidence shows a consent with a condition precedent, viz., that he was to be first paid $500, and that in consequence the court erred in granting said motions. Plaintiff was asked: "Did you ever give Mr. Boyden or Mr. West or anyone representing the company permission to sell or dispose of this honey? A. No, sir; not without written notice from me." It nowhere appears in the evidence that the sale was made by the Boyden Company, but it does appear that such company bought the honey from defendant Fassel, and the answer given is eminently correct.

On cross-examination, plaintiff was asked if defendant Fassel had talked with him about a permit to sell the honey, to which he replied: "He asked me many times if he couldn't sell it. I always refused.

"Q. You told him absolutely he couldn't sell it? A. Absolutely."

Plaintiff was then shown a letter dated November 29, 1927, which he said was in his handwriting, and which contained the following language: "* * * & don't forget that I give you permission to sell honey & if you sold all I was to rec. 500.00 & as it stands I never even rec. 5c can you blame me for not approving of such business."

Asked as to what he meant by that language, the witness said: "I didn't give you [sic] permission to sell anything unless you give me $500 and interest.

"Q. You did give him permission to sell the honey, did you not? A. If he paid me the money; but he never did.

"Q. You gave him permission to sell the honey providing he paid you? A. $500 cash and all interest. But under no other condition."

Asked for the conversation between himself and defendant Fassel at the time he gave such permission, he said: "Mr. Fassel did ask me several times about selling the honey. I told him the last time he positively couldn't sell that honey unless he paid me $500 and all interest to date. Other than that I wouldn't permit him to sell it at all.

"Q. The $500 he was to pay to you was to come out of the proceeds? A. I don't know where it was to come from. As long as he paid me I didn't much care where it came from.

"Q. You expected him to sell the honey and get $500 and turn that over to you, was that it? A. Yes."

The letter referred to was introduced in evidence and it appears therefrom that it was in reply to a "nasty letter" which plaintiff had received from defendant Fassel. In the beginning of the communication plaintiff says: "Well from all I can read in your letter you are quite in arms at this time. Am sorry it has to be as is but all I have asked for is the interest due me. Yes, you have paid 200.00 & there is still 100.00 due & it was due June first 1927. Why didn't you pay your interest when you sold the honey? No, you pay everybody but me & I guess you thought I could wait because I was easy."

[1-5] Taking the testimony of plaintiff in its entirety and giving it the most favorable inference, it clearly shows that he gave defendant Fassel permission to sell the honey on the latter's promise to pay him out of the proceeds $500 and the interest due, and that any language used by plaintiff which, taken by itself, might be susceptible to the inference that the consent above referred to was based on the condition that plaintiff first received $500 is but a conclusion of the latter, and creates no conflict in the evidence. On the other hand, it corroborates the testimony of Fassel to the effect that he did not sell the honey until after plaintiff had given him permission so to do. In our opinion, no other conclusion could be drawn from plaintiff's evidence. Even assuming that error was committed in granting the motions here in question, the only effect we can see that it had was to prevent a judgment on the merits in favor of defendant, and, from an examination of the entire record, we fail to see where any substantial rights of appellant were affected. Under the circumstances, even if it is error it should be disregarded. Section 475, Code Civ. Proc. Fassel having sold with plaintiff's consent, there could be no conversion, either in the sale by him or in the purchase by his codefendant, as it was clearly intended under the permission granted that upon such sale the title should pass to the purchaser free of the lien of the mortgage above mentioned, and that the proceeds of the sale were to be received by Fassel, who in turn was to pay to plaintiff $500 thereof. As was said in White Mountain Bank v. West, 46 Me. 15, 20, concerning a similar situation, "from the time of sale, the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him." The rule laid down therein was expressly approved by our Supreme Court in the case of Maier v. Freeman, 112 Cal. 8, at page 12, 44 P. 357, 53 Am. St. Rep. 151. In that case, there was a writing appointing the mortgagor agent of the mortgagee to take six cars of sheep from Arizona to California, "he to turn over the proceeds of said sheep to us." No authorization to sell was expressly conferred by such writing, but such authority might be inferred therefrom by reason of its reference to the disposition of the proceeds of sale. We know of no law requiring such authorization to be in

writing, nor has any been cited us by appellant, although he calls attention to the fact that in this case it is not in writing. The rule seems to be that a mortgagor may make an absolute sale of the mortgaged property with the mortgagee's verbal consent. Section 456, Jones on Chattel Mortgages, 5th Ed. Section 538, Penal Code, so far as applicable here, provides in substance that one who sells any part of mortgaged property is guilty of larceny and punishable accordingly, "unless * * * at or before the time of making such sale * * * such mortgagor informs the person to whom such sale * * * is made, of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale, * * * in writing, by giving the name and place of residence of the party to whom the sale * * * is to be made." On the face of such statute, it is clear that its purpose is to protect not only the purchaser of mortgaged property by giving him notice of the existence of the mortgage, but the mortgagee as well, by giving him the name and address of the intended purchaser so that he can trace his property. But where, as here, the property is sold with the consent of the mortgagee, there would seem to be no reason for such requirement, as the latter waives his lien and the buyer is protected by the absolute sale.

As was said in Gage v. Whittier, 17 N. H. 312, 319, of a penal statute in New Hampshire which prohibited the sale by the mortgagor of mortgaged property without the written consent of the mortgagee entered upon the mortgage and upon the margin of the record thereof, "It was no part of its design to interpose any restraint upon the alienation of personal property, with the assent of the mortgagee, against whom a title may be acquired, as it would seem, as well since as before the statute, by any proper evidence of his having assented to the sale, or of his having become a party to it." In the case of People v. Phillips, 30 Cal. App. 31, 157 P. 1003, 1004, the court says that "the giving of mere permission to sell does not work a waiver of the right to have notice of the sale furnished" under section 538, Penal Code. The Supreme Court, however, in denying an application for hearing after such decision, says: "In denying the application we do not wish to be understood as holding that if permission to sell was given by the mortgagee it would not operate as a complete waiver of the requirement of the statute that notice of the sale shall be given to the mortgagee." People v. Phillips, supra, page 35 of 30 Cal. App., 157 P. 1005.

[6] Appellant urges that there was no consideration for the consent given by him. The honey sold was apparently only a small part of the property covered by the chattel mortgage, and, so far as the evidence shows, the note was not due. Plaintiff accepted the promise of the mortgagor to pay him $500 from the proceeds of sale on the principal of the note, which would seem to be a good consideration notwithstanding the fact that Fassel did not live up to his promise, if in fact he did not.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

115 Cal.App. 704

PEOPLE v. JOHNSON.

Cr. 2082.

District Court of Appeal, Second District, Division 2, California.

July 29, 1931.

1. **Criminal law 🔑507(7).**

In incest prosecution, complaining witnesses under age of eighteen were not "accomplices," and required no corroboration; records failing to show juvenile court's refusal to take jurisdiction of witnesses' cases (Pen. Code, § 1111; St. 1915, pp. 1225–1229, §§ 1–3, 4c, 5, 6, as amended).

[Ed. Note.—For other definitions of "Accomplice," see Words and Phrases.]

2. **Criminal law 🔑741(1), 742(1).**

Jurors were sole judges of weight of evidence and witnesses' credibility.

3. **Criminal law 🔑1159(4).**

Where complaining witnesses' evidence was legally sufficient to prove accused's guilt, reviewing court could not minutely examine claims that witnesses were discredited or that their testimony was unworthy of belief.

4. **Criminal law 🔑48.**

To sustain insanity defense, it must appear that accused was so deranged and diseased mentally when act was committed that he was not conscious of wrongful nature thereof.

5. **Criminal law 🔑1159(5).**

Jury's finding, supported by evidence, that accused was not insane when committing incest *held* conclusive.

6. **Criminal law 🔑1172(2).**

Where evidence did not substantially conflict with jury's finding, error in instructions would not be prejudicial.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Roy Johnson was convicted of incest, and he appeals.

Affirmed.

R. C. Hunting, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was accused by information of the crimes of rape and incest. The first four counts charged him with rape committed upon the person of a daughter then sixteen years of age, and counts 9 to 12, inclusive, charged the same acts as incest. Counts 5 to 8 charged defendant with rape committed upon the person of another daughter, of the age of fourteen years, all of said acts having occurred on and between September 1, 1928, and August 14, 1929. The jury returned verdicts of guilty on each of the sixteen counts on February 13, 1931, and defendant having also entered a plea of "not guilty by reason of insanity," was by stipulation tried as to such plea on February 16 before the same jury; a verdict finding him sane at the time of the commission of the offenses charged being returned on such plea. Prior to pronouncing judgment the court on motion of defendant vacated and set aside the verdicts as to counts 1 to 8, inclusive, charging rape. From the judgments of conviction on the verdicts on the remaining eight counts, charging incest, and from the orders of the court denying his motion for new trial and his application for probation, defendant has appealed.

Appellant contends: (1) That the evidence is insufficient to sustain the verdicts and judgments, and (2) that the verdict of the jury as to the sanity of defendant lacks support of evidence.

[1-3] 1. Outside of arguing that the testimony of each complaining witness is so inherently improbable as to be unworthy of belief, appellant does not question the fact that if worthy of belief such testimony amply supports the verdicts and judgments. He does, however, contend that both were accomplices, and that there is no sufficient corroboration of their testimony under section 1111, Penal Code. The testimony that they were sixteen and fourteen years of age stands undisputed. Said section defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." The complaining witnesses both being under the age of eighteen years, it would be the duty of any magistrate in whose court a complaint was filed on the same charges as contained in the information here, upon ascertaining that fact, to immediately suspend all proceedings and forthwith certify the cases to the juvenile court of the county, where the same charge could not possibly be brought and prosecuted, and no other court could legally proceed on the original charges unless the persons charged had been remanded by order of the juvenile court for prosecution therein, either as being over the age of eighteen years or as being unfit subjects for consideration of the juvenile court. Sections 4c, 5, and 6, and 1, 2, and 3 of the Juvenile Court Law (St. 1915, pp. 1225–1229, as amended). In view of the positive mandate of section 5 above cited, and in the absence of any proof in the record before us that the juvenile court has refused to take jurisdiction of such cases, we fail to see how it can be said that either complaining witness is liable to prosecution for the offenses charged against appellant. In consequence they could not be accomplices, and no corroboration of their testimony was necessary. Both girls told a straightforward story, which must have carried conviction to the jury hearing them, and the jurors were the sole judges of the weight of the evidence and the credibility of the witnesses. As the evidence of the complaining witnesses seems to us to be "legally sufficient to prove the guilt of a defendant * * * we may not examine with minuteness claims that witnesses are discredited, or that their evidence is unworthy of belief." People v. Durrant, 116 Cal. 179, 200, 48 P. 75, 79. Nor do we find any error in the instructions complained of which related to the necessity of corroboration and the fact that the girls could not give legal consent to the acts charged.

[4, 5] 2. "In this state, in order that 'insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed.'" People v. Troche, 206 Cal. 35, 46, 273 P. 767, 772. The evidence on this question consisted of the testimony of lay witnesses, friends and relatives of defendant, and of experts, some of the latter who had examined appellant at the time of his incarceration in the state hospital, which occurred in the fall of 1929, and during the period of his stay there. An examination of such evidence shows that on the point as to whether or not he was conscious of the wrongful nature of the act committed the evidence is not seriously conflicting, and, of course, the verdict of the jury is conclusive on that question (People v. Troche, supra), notwithstanding the fact that the evidence does show that appellant's mental balance was somewhat disturbed by overindulgence in alcoholic liquors. It is also to be noted that the testimony of the lay witnesses was largely in support of this last condition, none of them, or in fact any of the witnesses, so far as we have found, testifying that in their

opinion the defendant did not understand the wrongful nature of the acts committed; and the fact that after the girls were taken to juvenile hall and the officers came to arrest him, he excused himself and disappeared and was not apprehended for several days, and then some three miles from his home, indicates rather persuasively that he did so understand.

[6] It is urged that the instructions given were conflicting and erroneous. While the evidence to a certain extent is conflicting, as we have said, we do not see how the jurors could have reached any other conclusion than they did, as the conflict seems not to be on the real point at issue; and even if the instructions were erroneous, which we do not find them to be, we do not see how appellant was prejudiced.

Appellant also urges the unconstitutionality of section 1027 of the Penal Code. We have had occasion to consider this question before and determined it adversely to such contention in the case of People v. Strong (Cal. App.) 300 P. 84, notwithstanding the direct conflict with the case of People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L. R. A. (N. S.) 917, Ann. Cas. 1912B, 688, cited and quoted from by appellant. At the time appellant's brief herein was written petition had been made to the Supreme Court for a hearing before it after the decision above referred to, but such petition was thereafter denied.

Judgments and orders affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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115 Cal.App. 583

PACIFIC COAST ADJUSTMENT BUREAU v. INDEMNITY INS. CO. OF NORTH AMERICA.

Civ. 7566.

District Court of Appeal, First District, Division 1, California.

July 23, 1931.

Rehearing Denied Aug. 22, 1931. Hearing Denied by Supreme Court Sept. 21, 1931.

1. Insurance 🔑430.

Word "loss" in employees' fidelity bond *held* to refer only to wrongful abstraction, willful misapplication, or fraudulent or dishonest acts.

> "Abstraction" is taking from with intent to injure or defraud, "wrongful abstraction" has been defined as "unauthorized and illegal taking or withdrawing of funds, etc., and appropriation thereof to taker's benefit," and "willful misapplication" means willful, unauthorized, and illegal application of employer's funds to employee's use and benefit with intent to injure and defraud, but not necessarily with malice or ill will.
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> [Ed. Note.—For other definitions of "Abstract; Abstraction," "Loss," and "Willful Misapplication; Willfully Misapply," see Words and Phrases.]

2. Insurance 🔑539(1).

Insured need not act on mere suspicion in giving notice of loss to employees' fidelity insurer.

3. Insurance 🔑665(7).

Evidence *held* to warrant jury's finding that insured did not discover loss until month in which employee's financial transactions, of which fidelity insurer was notified, occurred.

4. Insurance 🔑539(1).

Provision of employees' fidelity bond for prompt notice to surety of employee's dishonest acts covers only acts actually known to employer, in absence of stipulations for diligence.

5. Insurance 🔑598.

Interest on amount of judgment on employees' fidelity bond *held* properly allowed from date on which proof of loss was filed (Civ. Code, § 3287).

6. Judgment 🔑314.

Court could amend judgment on employees' fidelity bond by allowing interest, as to which there was no fact issue.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Pacific Coast Adjustment Bureau against the Indemnity Insurance Company of North America. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL and LANGDON, JJ., dissenting.

Hartley F. Peart and Sylvester J. McAtee, both of San Francisco, for appellant.

Percy V. Long and Bert W. Levit, both of San Francisco, for respondent.

WARD, Justice pro tem.

This is an action based upon a bond issued by the appellant Indemnity Insurance Company of North America to the respondent, whereby appellant bound itself to pay to the respondent "any direct financial loss, that it may sustain by reason of any act of larceny, embezzlement, theft or any other fraudulent or dishonest act, wrongful abstraction or wilful misapplication," committed during the term of the bond by any employee covered by the schedule attached to the bond. A jury returned a verdict for plaintiff. Judgment was entered with certain interest, and defendant appealed. The bond provided: "When the Assured discovers a loss hereunder, written notice of same shall be delivered to the Company and within ninety (90) days thereafter an itemized statement of claim shall be furnished to the Company. * * * This bond shall terminate, as to any employee, upon the discovery by the Assured of a loss through or on account of such employee."

Respondent is engaged in the adjustment of losses for insurance companies. Its main office is in San Francisco, but it has branch offices located at points throughout the western states. Each branch office is in charge of a branch manager, and at each branch are located one or more adjusters and clerical help. The method of financing the branches was as follows: The branch manager had authority to draw drafts upon the head office of respondent, whereby he obtained the necessary funds for operating the branch office. Each branch manager was permitted to draw what he thought would be needed for the operation of his branch, and he was instructed not to draw too heavily in the early part of the month. The funds so obtained were used to pay all of the expenses of the branch, including the branch manager's salary. The funds drawn were charged to each branch manager personally, and it was not required that they be kept in bank in the name of respondent. At the end of each month each branch manager would submit to the head office an account wherein would be shown the amount of money received from the head office through the medium of drafts, a detailed itemization of all expenditures, and the balance due to the head office. A check for this balance payable to respondent was required to accompany the statement of account.

An employee, Pixler, was the agent of respondent at Boise, Idaho, from December, 1924, until July of 1926. Pixler was covered by the schedule attached to the bond. In the early part of 1925, Pixler, to meet certain payments on his property, etc., was permitted by the respondent to draw on his salary for the succeeding month. In June of the same year, Pixler drew a draft for $1,000 after having drawn one for $350. The home office withheld payment pending explanation by Pixler. It subsequently developed that $400 was used for Pixler's personal use, which was returned at the end of June. In April, 1926, Pixler drew a draft for $1,200, part of which was used for Pixler's doctor's and hospital expenses. This brought from the home office a wire to Pixler that he had exceeded his authority, and that no consent would be forthcoming for use of money beyond business requirements and necessities. Pixler accounted for the money at the end of the month. The adjustment company did not give notice to the bonding company of this transaction. During the first twelve days of July, 1926, Pixler drew on respondent for $2,450, upon which the verdict of the jury for $1,943 in favor of respondent was based. Respondent notified the bank at Boise City that a certain draft, a part of the $2,450, would not be honored, pending satisfactory advices from Pixler. Subsequently Pixler resigned. An accountant examined the books, appellant was notified of the result of the examination, and the filing of this action followed.

[1-4] The principal point in this case is whether there was discovery by respondent of the loss, on account of Pixler's financial transactions, prior to July, 1926. As used in the bond, the word "loss" has reference only to a wrongful abstraction, willful misapplication, or a fraudulent or dishonest act, such as larceny, embezzlement, or theft. "'Abstraction' is taking from with intent to injure or defraud." Words and Phrases, Third Series, Vol. 1, page 46. Wrongful abstraction has been defined as "an unauthorized and illegal taking or withdrawing of funds, etc., and the appropriation of such funds or securities to the benefit of the taker." Chapman v. Nieman (Tex. Civ. App.) 276 S. W. 302, at page 303. "Willful misapplication * * * means a willful, unauthorized, and illegal application of the funds or securities of the bank to the use and benefit of the employee." Chapman v. Nieman, supra. In defining willful misapplication, Words and Phrases, Third Series, Vol. 7, page 1038, uses the following language: "The intent to injure and defraud, which is essential, does not necessarily involve malice or ill will, but merely that general intent to injure and defraud which always arises, in contemplation of law, when one willfully or intentionally does that which is illegal and fraudulent." The controlling element in all of the enumerated acts set forth in the bond is fraud. If the use of the money obtained by the drafts simply created an indebtedness from Pixler to the respondent and did not constitute a fraud, then it would be unnecessary to report such transactions to the bonding company. "The insured is not called upon to act on mere suspicion in the matter of giving notice to the insurer. * * *" See Los Angeles Athletic Club v. United States Fidelity & Guaranty Co., 41 Cal. App. 446, 447, 183 P. 174, 177. Though respondent cautioned Pixler not to draw in excess of his necessary business needs, and though he was plainly told that respondent's funds were not to be used for personal use, nevertheless, it is plain that respondent did not treat the use of such funds for personal expenses as anything more than an indebtedness, which in their minds did not arise to the enormity of a fraud. We find this position

somewhat justifiable in view of the fact that from January, 1925, until June, 1926, the money was accounted for at the end of each month. It is true respondent had opportunity of investigation and means of knowledge, but the apparently frank statements of Pixler and the return of the funds at the designated periods was evidently sufficient to warrant the jury in finding that respondent did not discover; that is, that actual knowledge of fraud was not apparent until July, 1926. "It is held that these provisions (requiring the obligee to notify the surety promptly of any act of fraud or dishonesty) do not enlarge the duty of the obligee when no special stipulation is made for the exercise of diligence in supervising the conduct of the principal, and that the covenant that the obligee shall at once notify the surety of any act of fraud or dishonesty on the part of the principal, only covers such acts as are actually known to the employer, and not those he might have known by the exercise of diligence." Stearns on Suretyship (3d Ed.) 420; Perpetual Building & Loan Association v. United States Fidelity & Guarantee Co., 118 Iowa, 729, 92 N. W. 686.

In view of the foregoing facts and the conclusions reached thereon, the motion for a nonsuit was properly denied. What has been said heretofore answers the contentions of appellant relative to the instructions given and refused.

Appellant contends that a remark made by the court was an abuse of discretion and prejudicial to defendant's position. The record does not indicate that any objection, assignment of misconduct, or motion to strike out, or motion to instruct the jury to disregard the remark was made. We are satisfied that the remark was not intended to and did not sway the jury upon any phase of the issues involved in this case.

[5, 6] Upon motion of respondent after verdict and judgment, the court made an order amending the judgment, on the verdict, by allowing interest upon the amount of the judgment from August 11, 1926, the date upon which the proof of loss was filed. Appellant contends that plaintiff was not entitled to interest, as a matter of law, for the reason that the recovery sought was not for sums capable of being made certain by calculation. The case of Perry v. Magneson, 207 Cal. 617, 279 P. 650, relied upon by appellant, was a matter wherein the court had to determine the cost of completing a building. The amount was not fixed. In this case, the amount was made certain in the proof of loss. No claim of its uncertainty was made during the trial. "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. * * *" Civ. Code, § 3287. The bond provided: "Third: When the Assured discovers a loss hereunder written notice of same shall be delivered to the Company and within ninety (90) days thereafter an itemized statement of claim shall be furnished to the company." The proof of loss was filed August 11, 1926, and interest was properly allowed from that date. There was no issue of fact as to interest, and the court had the right to amend the judgment. See Engelberg v. Sebastiani, 207 Cal. 729, 279 P. 795.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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115 Cal.App. 597

FEENY v. SMILEY et ux.

Civ. 4292.

District Court of Appeal, Third District, California.

July 23, 1931.

1. **Trusts 🔑372(3).**

In action to establish trust, finding that defendants, one of whom was trustee, were owners of land they caused plaintiff to purchase, allegedly as temporary accommodation to trustee, *held* supported.

2. **Trusts 🔑31.**

To establish trust relationship, there need not be transfer of legal title to trustee.

3. **Appeal and error 🔑1011(1).**

There being substantial evidence to support findings, judgment must be affirmed, though evidence be conflicting.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Nellie S. Feeny against William F. Smiley and wife. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Garner White, of Inglewood, for appellants.

Roane Thorpe, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

The main contention of the appellants on this appeal is that the evidence is not sufficient to support the judgment.

It is admitted that on the 25th day of April, 1927, defendant William F. Smiley was, by written instrument, appointed the trustee of plaintiff to receive for her certain money amounting to $8,500 from Orson L. Early, and that on or about the 5th day of August, 1927, the appellant William F. Smiley had in his possession, as such trustee, under said written instrument a sum in excess of $1,500, which he had received from the said Early.

There was evidence produced on the part of plaintiff to the effect that she reposed confidence and trust in appellant William F. Smiley, and for that reason had appointed him her trustee; that on or about the 5th day of August, 1927, appellant William F. Smiley represented to respondent that he was in trouble with one Minnie Handley to whom he had sold a tract of land for $5,250; that she was suing him for the return of her money; that he desired respondent to help him out of said difficulty by buying said tract of land; and that, if she would do so, he would sell the same within a short time and make her a profit, or that, if he failed to sell the land in a short time, he would return her money. He further stated to her that he had enough money in his hands, as trustee, to make a down payment of $1,500 for her.

Respondent informed Smiley that she did not want the property and did not wish to buy it, but was willing to help him temporarily, if he could sell the land within a short time, so that she would be repaid her money, and failing in that he would return her money, and, upon the assurance of Smiley that he would do so, she agreed to purchase the property; that the purchase price was $5,250, upon which the $1,500 held by Smiley, as trustee, was applied, and two notes for $2,000 and $1,750 were signed by respondent in favor of Jennie Smiley, and same were secured by two deeds of trust aggregating the sum of $3,750; that respondent was induced to enter into said deal and make the purchase of said property solely by reason of the representations made to her by appellant Smiley; and that but for said representations she would not have purchased it.

It is admitted by the amended answer that respondent demanded of appellants the return of the $1,500, and that she offered to return everything she had received under the said sale to her of said land, but the appellants, and each of them, refused, and still refuse, to comply with her demand.

Respondent was corroborated in her statements regarding the representations made to her by appellant Smiley by the testimony of Jane Garn and F. W. Rinehart, who were present when the representations were made by appellant to respondent and by Louise O'Connelly, who was present at a subsequent interview respondent had with appellant Smiley.

[1-3] The claim of appellants that the court erred in finding that appellants were the owners of the tract of land in question on the 5th day of August, 1927, is without foundation. In the first place, it is admitted that one of the appellants, Jennie Smiley, was the owner. This is no evidence that it was her separate property. On the other hand, the escrow instructions, filed as an exhibit, show that this tract was conveyed by quitclaim deed to Jennie Smiley and William F. Smiley by Minnie Handley and Albert M. Handley, and that appellants joined in the deed conveying the property to respondent.

Appellants also contend that the following finding is not supported by the evidence: "That plaintiff during all of the times mentioned in the complaint herein reposed great confidence and trust in the defendant William F. Smiley and had for that sole reason appointed him trustee; that said plaintiff had not had any experience in business dealings of any kind and accepted without question the business advice of her said trustee, the said William F. Smiley."

Appellant testified that she had perfect confidence in Smiley; he was her trustee, and she thought, of course, he would look out for her interests; that she never did any business in regard to this piece of property or any other property that was discussed without his advice.

It is evident from her testimony that she had the utmost confidence in Smiley, and the inference is fairly deducible that it was owing to that confidence that she selected him as her trustee, and as such relied upon him.

Appellants take the position that in the agreement between Early and respondent Smiley was merely a depositary, although named as trustee, and cites numerous authorities to the effect that a depositary under those conditions is merely the agent of the parties for a limited purpose. However that may be, the acceptance by respondent of Smiley as her trustee under the terms of that agreement supports the claim of respondent that she had confidence in him and trusted him.

Appellants claim that to establish a trust relationship there must be a transfer of the legal title to the trustee. This is not the law. A trust may be established in many ways. It may be established where the bond between the parties is merely one of friendship. Cal. Jur. vol. 25, p. 130; Palladine v. Imperial Valley F. L. Ass'n, 65 Cal. App. 727, at page 745, 225 P. 291, 299, where the court said: "It has been held that when men deal as friends, and one accepts as true false representations by the other, into which, but for the relation of friendship, he would have made inquiry, the law will protect him in his trust."

The evidence produced by respondent in this case clearly shows that she relied wholly and entirely upon the representations of Smiley. She testified that she made no personal examination of the property, nor any independent investigation regarding it prior to its purchase by her. She did not regard it as a bona fide sale of the property to her, but merely as a temporary means of relieving Smiley from the trouble he was experiencing from the suit brought against him by Minnie Handley.

Appellants moved for a new trial, which was denied, and judgment was thereupon rendered.

While the evidence was conflicting, there is substantial evidence to support the findings of the trial court, and, such being the case, the judgment must be affirmed.

It is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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116 Cal.App. 39

RATLIFF v. RATLIFF.

Civ. 6574.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1931.

1. Judgment 🔑162(4).

Denying plaintiff's motion to set aside default and judgment on cross-complaint made almost six months after entry of default, evidence conflicting concerning delay, *held* not abuse of court's discretion (Code Civ. Proc. § 473).

2. Appeal and error 🔑875.

Plaintiff not appealing from default judgment entered on cross-complaint, on appeal from order refusing his motion to vacate default, could not object to sufficiency of cross-complaint; defects not affecting court's jurisdiction.

3. Judgment 🔑106(1).

Court was authorized to treat pleading containing essential elements of cross-complaint as to part of claim, as cross-complaint requiring answer, and to render default judgment thereon.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Robert E. Ratliff against Christina D. Ratliff, in which defendant filed a cross-complaint. From orders made after final judgment, plaintiff appeals.

Affirmed.

Koenig & Brunton, of Los Angeles, for appellant.

C. L. Belt and Edmund S. Green, both of Los Angeles, for respondent.

CONREY, P. J.

On August 20, 1928, default of plaintiff was entered for failure to answer defendant's cross-complaint. Thereafter on December 11, 1928, and pursuant to said default, judgment on the cross-complaint was entered. On February 19, 1929, pursuant to notice given, cross-defendant presented to the court a motion that the said default and judgment be set aside and that the execution on the judgment be recalled and quashed. The grounds of motion were that the default and judgment and execution had been taken against cross-defendant through his inadvertence, surprise, and excusable neglect; and that the judgment was void for the reason it was rendered on a counterclaim. The motion was heard upon affidavits by the respective parties. At the same time cross-defendant moved that he be permitted to file answer to cross-complaint nunc pro tunc as of February 12, 1929. These motions having been denied, said cross-defendant appealed from each of said orders of denial.

[1] The first contention of appellant is that there was an abuse of discretion in the court's failure to grant relief from the default and judgment. Such applications for relief must be made within a reasonable time, but in no case exceeding six months after the judgment, order, or proceeding was taken. Section 473, Code Civ. Proc. This motion was presented on the next to the last day of the sixth month after the entry of default. The affidavits show a conflict in the evidence concerning the circumstances of delay involved in the motion. Abuse of discretion has not been shown and the order denying relief should be affirmed.

[2, 3] The next point suggested by appellant is that the judgment is void in that the cross-complaint did not state a cause of action as a cross-complaint, but was only a counterclaim, requiring no answer. The complaint of the plaintiff stated a cause of action for conversion of certain described personal property. The cross-complaint stated a cause of action apparently intended for recovery of certain personal property or its value, of which property at least a part corresponds in description to the property described in plaintiff's complaint. The amount of the demand, based upon the alleged reasonable value, exceeded $500. Since there was no appeal from the judgment, we think that appellant is not entitled, on appeal from the orders in question here, to raise this objection to the sufficiency of the cross-complaint. The defects are not such as could affect the jurisdiction of the court. Van Loben Sels v. Bunnell, 131 Cal. 489, 494, 63 P. 773. The pleading on

which the judgment is based contained the essential elements of a cross-complaint, with respect to at least a part of the property claimed; therefore the court had authority to treat it as a cross-complaint requiring an answer and to render judgment on default. Under the law as existing at the time the cross-complaint was filed the amount of the demand was sufficient to bring the case within the jurisdiction of the superior court at that time.

Since the court was justified in refusing to vacate the judgment, it follows that there is no error in the second order from which the plaintiff appeals, viz., the order denying motion to file answer to cross-complaint.

The orders are affirmed.

We concur: YORK, J.; BISHOP, Justice pro tem.

116 Cal.App. 17

PREDER v. FIDELITY & CASUALTY CO. OF NEW YORK et al.

Civ. 6866.

District Court of Appeal, Second District, Division 2, California.

Aug. 4, 1931.

Notaries 🔑11.

Notary's certifying to trustee's forged signature on void trust deed securing note did not proximately cause loss to trustee who paid note.

> It appeared that trustee's action to recover against notary and her surety was based on fact that notary certified to forged signature on trust deed and falsely certified that trustee, whose signature was forged, had appeared before notary and acknowledged signature, but it did not appear that, aside from creating cloud on title to realty involved, void trust deed executed by perpetrator of fraud created any obligation on trustee through instrumentality of notary, and, since it could not have resulted in valid subsisting indebtedness, there was no legal liability.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by William Preder against the Fidelity & Casualty Company of New York and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

John F. Poole, of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent Fidelity & Casualty Co. of New York.

Fred E. Peterson and Berge Lion, both of Los Angeles, for respondent Henrietta Schreiber.

CRAIG, J.

General and special demurrers having been sustained, the plaintiff appealed from the resultant judgment.

Respondent Schreiber was a notary public in and for the county of Los Angeles, and the respondent corporation issued its usual bond guaranteeing the faithful performance of her services as such notary public. A deed of trust, bearing the forged signature of appellant as one of three trustees of a firm designated as Nau, Preder & Co., purporting to be a lien upon certain real property and to secure a promissory note, was certified as having been acknowledged personally by said trustees. Being "hard pressed financially * * * plaintiff was compelled to sell" said property, and "to make said sale and clear the title * * * was compelled to pay" the principal sum of said note. It was further alleged that the notary also certified to certain deeds "making up the title upon which said forged trust deed rested," but it nowhere appears as to what if any damage appellant claims to have sustained as a result of these latter alleged derelictions. The asserted basis of the action arises from the fact that the defendant Schreiber certified to a false signature, and falsely certified that the plaintiff appeared before said notary public and acknowledged the same.

It is contended that it was reversible error to sustain the demurrers of the defendants without leave to amend. However, it does not appear that, aside from a clouding of the title to the realty, the void deed of trust executed by the perpetrator of the fraud created any obligation upon the part of appellant through the instrumentality of the notary public. Since it could not have resulted in a valid subsisting indebtedness, it follows that there was not a legal liability. Neither involuntary payment of the amount of the note, nor the validity of the deed of trust, could have been alleged. "In an action such as this it must appear that the default of the notary was the proximate cause of the loss, or there can be no recovery. 20 R. C. L. 336; American Surety Co. v. First National Bank, 203 Ala. 179, 82 So. 429; Overacre v. Blake, 82 Cal. 77, 82, 22 P. 979." Riverside Portland Cem. Co. v. Maryland Casualty Co., 46 Cal. App. 87, 189 P. 808, 809; Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 P. 843.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

115 Cal.App. 593

SMITH et ux. v. ZANA et al.

Civ. 4077.

District Court of Appeal, Third District, California.

July 23, 1931.

Rehearing Denied Aug. 22, 1931.

1. Negligence 🔑136(26).

Contributory negligence of pedestrian kicked by horse while walking between horse and porch on store *held* for court trying case.

2. Appeal and error 🔑1010(1).

Appellate court could not interfere, where evidence sustained trial court's finding on question of plaintiff's contributory negligence.

3. Negligence 🔑136(9).

Negligence or contributory negligence is established as matter of law only where no fact is left in doubt and no inference other than that of negligence can be drawn.

4. Negligence 🔑136(8).

Although facts are undisputed, if reasonable minds can draw different conclusions upon negligence or contributory negligence, question is for jury.

Appeal from Superior Court, Calaveras County; J. T. B. Warne, Judge.

Action by William C. Smith and wife against Antonio Zana and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Berry & Watson, of Stockton, and Virgil M. Airola, of San Andreas, for appellants.

Chas. P. Snyder and Joe Huberty, both of San Andreas, for respondents.

PRESTON, P. J.

The plaintiff, Lutitia Smith, was kicked by a horse belonging to the defendants. She and her husband, William C. Smith, brought this action for damages. The cause was tried by the court without a jury, resulting in a judgment in favor of the plaintiffs for both special and general damages in the total sum of $1,929.20. From this judgment the defendants prosecute this appeal.

Appellants, who are husband and wife, own and operate a merchandise store on the east side of Main street in the town of Campo Seco, in Calaveras county. In front of the store building is a porch about eight feet wide and three feet high, which was used by the people as a sidewalk in front of the store. About 100 feet south of the store, and on the same side of the street, is the post office. People living north of the store and on the east side of the street, in going to and from the post office, generally travel in the main street in front of the porch of store, for the reason that, at the north end of the porch, there were four steps to climb before reaching the top of the porch, and on the south side the steps were lower than on the north side, and it was much easier to traverse the porch going north than going south.

Appellants, in making deliveries of merchandise, used a wagon drawn by two horses, one a black mare named "Babe." When goods were to be delivered, the wagon would be driven parallel with the porch and close enough to permit the defendant A. Zana, the driver, to step from the wagon to the porch or vice versa.

The horses were only tied by setting the brake and wrapping the lines around the brake handle.

On the day of the accident, the wagon and team were parked in this position, with the team headed north and standing about 3 or 4 feet from the porch. While the team and wagon were in this position, Mrs. Smith went to the post office, and, upon returning, approached the team from the rear and walked between the porch and the team. In passing, the mare Babe kicked her and inflicted the injuries complained of.

[1, 2] The defendants contend that Mrs. Smith was guilty of contributory negligence as a matter of law. This contention is based principally upon the testimony given by Mrs. Smith to the effect that she had observed the mare Babe which kicked her, shortly before the accident, and she was "skittish," and that Mr. Zana could not drive her close enough to the porch for him to step from the wagon to the porch. That the mare "kind of shied off from the porch."

Also that she could have gone over the porch or to the west of the wagon in perfect safety. And that Babe had blinds on the bridle and could not see to the rear, and that she approached the team from the rear without speaking to them.

From these facts appellants strenuously insist "that Mrs. Smith did not exercise that ordinary care required by the law for her own safety, but on the contrary, chose a course that any person of ordinary prudence would consider positively dangerous." It must be admitted that there is much force to this argument.

We think, however, the question of contributory negligence on the part of Mrs. Smith was a question of fact to be determined by the court from all the facts and circumstances appearing in the evidence, and the learned trial court having determined that Mrs. Smith was not guilty of contributory negligence, and there being sufficient evidence in the record to sustain this finding, we are powerless to interfere.

The court also found upon sufficient evidence: "That for more than 5 years prior to the commencement of the action, the said defendants knowingly kept, maintained and harbored a vicious, mean and dangerous mare accustomed to kick, strike out and injure persons. * * *"

[3] The law is well established that it is only where no fact is left in doubt and no deduction or inference, other than that of negligence, can be drawn by the court or jury from the evidence, that the court can say, as a matter of law, that negligence or contributory negligence is established.

[4] Even where the facts are undisputed, if reasonable minds can draw different conclusions upon the question of negligence or contributory negligence, the question is one to be determined by the jury, if there be a jury; if not, by the court.

The authorities supporting this rule are so numerous that we need only cite one or two: Fike v. San Joaquin Light & Power Corp., 73 Cal. App. 712, 239 P. 344, and cases there cited.

There is no other contention made for a reversal of the judgment. For the reason stated the judgment must be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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116 Cal.App. 35

CORCORAN v. PACIFIC AUTO STAGES, Inc., et al.

Civ. 7909.

District Court of Appeal, First District, Division 2, California.

Aug. 6, 1931.

Rehearing Denied Sept. 5, 1931. Hearing Denied by Supreme Court Oct. 5, 1931.

1. Appeal and error 🔑685.

Where record did not show appellee waived jury trial, reviewing court could not consider error in permitting jury trial.

2. Automobiles 🔑244(6).

Verdict for pedestrian struck by bus *held* sustained by evidence of negligence.

Evidence disclosed that, while walking along edge of highway and shortly before he was hit, a light shone from the rear on the pedestrian's back; that he turned his head to the left, and, as he did so, the bus was within two feet of him and hit him from the rear, despite his attempt to step to his right; that there were no other objects in the highway and that no object obstructed the bus driver's view ahead; and that at the time of the impact and for approximately one hundred feet back the bus was being operated half off the right-hand side of the highway.

3. Automobiles 🔑244(51).

Defense that pedestrian struck by bus was contributorily negligent in violating statute by walking on right-hand side of highway outside business or residential district could not be sustained, absent evidence showing nature of district, since it will not be presumed that pedestrian was violating law (St. 1923, p. 517, § 28½ (c), as added by St. 1929, p. 510, § 7; St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, § 66; Code Civ. Proc. § 1869).

California Vehicle Act (St. 1923, p. 517) § 150½, as added by St. 1929, p. 546, § 66, requires pedestrian walking on highways outside of business or residence districts to walk close to his left-hand edge of the highway, and California Vehicle Act (St. 1923, p. 517) § 28½ (c), as added by St. 1929, p. 510, § 7, provides that every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within such district shall be established by clear and competent evidence and unless signposted when and as required by the act. Defendant did not introduce any evidence that the place was not signposted.

4. Automobiles 🔑242(8).

Defendants had burden of establishing contributory negligence of pedestrain struck by defendants' bus (Code Civ. Proc. § 1869).

5. Negligence 🔑136(5).

On personal injury action, refusing directed verdict for defendants upon evidence sufficient to sustain verdict for plaintiff *held* proper.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by John Corcoran against the Pacific Auto Stages, Inc., and another. From an adverse judgment, defendants appeal.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellants.

A. J. Stebenne, of Redwood City, for respondent.

STURTEVANT, J.

This is an action for personal injuries. Judgment went for the plaintiff, and the defendants have appealed.

On the evening of the 16th day of March, 1930, the plaintiff was knocked down and suffered the injuries complained of when he was a few feet from the westerly side of the highway leading from San Mateo to San Francisco. The accident occurred in the city of San Mateo approximately ninety feet south of the southerly line of Sixteenth avenue where the street abuts on the highway.

[1] The appellant contends that the trial court erred in permitting the cause to be tried by a jury over the objection of the defendants' counsel, plaintiff having waived trial by jury by failing to deposit with the clerk, within ten days prior to the date set for trial, a sum equal to the amount of one day's jury fees. It will suffice to state that none of the facts supporting that contention appear on the record before us. True it is that the objection was made in the trial court, but the objection was not supported by an affidavit, the records of the trial court, or otherwise.

[2] The defendants next assert that the verdict is contrary to law inasmuch as no proof was presented at the trial of any act of negligence on the part of the defendants or of either of them or of any fact or facts from which the jury could rightfully infer such negligence. The plaintiff testified that he had alighted from an automobile at the corner of Sixteenth avenue and El Camino Real, and that he walked directly to the west side of the last-named highway, and then when he arrived there that he turned south and walked along the westerly side of the highway to the point where the accident happened. It was a dark rainy night and he was a stranger in the neighborhood. While he was walking rapidly along the edge of the highway and shortly before he was hit a light shone from the rear on his back. He turned his head to the left, and as he did so the defendants' bus was within two feet of him. He turned his head and attempted to step to his right, but as he did so he was hit from the rear by the bus. There was evidence that at the time of the accident a Studebaker automobile was traveling parallel to the bus and on its left side, and both were going south. However, the record shows affirmatively that there were no other objects in the highway, and that no object at all obstructed the driver's view ahead. There was also evidence that at the time of the impact and for approximately one hundred feet back the defendants' bus was being operated half off the right-hand side of the highway. In view of these facts, it cannot be said that there was no evidence of negligence. Bauhofer v. Crawford, 16 Cal. App. 676, 117 P. 931.

[3, 4] The next point made by the defendants is that the verdict was contrary to the evidence because the evidence affirmatively showed that plaintiff's injuries were sustained directly and proximately through his own negligence and carelessness. True it is that the defendants introduced some evidence to that effect. It was their contention that immediately before the collision the plaintiff was in the act of jay-walking, and, furthermore, that he ran in front of the Studebaker automobile, and, having done so, dived in front of the bus being operated by the defendants, and that as he did so the defendants were powerless to avoid the accident. However, there is other evidence in the record. We have set forth that according to the plaintiff's testimony he was walking on his right-hand side of the highway in the city of San Mateo. His counsel contend that the accident occurred in a residence or business district, and that the plaintiff was within his rights in walking on that side. California Vehicle Act, § 150½ as added by St. 1929, p. 546, § 66. The defendants answer that there is no evidence that the place was in a "residence or business district." We think there was. Furthermore, it will not be presumed that plaintiff was violating the law. If it be conceded, as defendants claim, that there is no evidence in the record to the effect that the place where the plaintiff was walking was in a residence or business district, still the point must be ruled against the defendants. To prove a defense there should have been evidence showing the nature of the district. Section 150½ of the California Vehicle Act provides: "It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway." And subdivision (c) of section 28½ of the same act as added by St. 1929, p. 510, § 7, provides: "Every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district, and unless signposted when and as required by this act." But the defendant did not introduce any evidence that the place was not signposted. To establish a defense of contributory negligence the burden was on the defendants. Code Civ. Proc., § 1869; Kohler v. Wells, Fargo & Co., 26 Cal. 606, 611; Wilson v. California C. R. R. Co., 94 Cal. 166, 174–175, 29 P. 861, 17 L. R. A. 685; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 570, 112 P. 454.

[5] The last point made by the defendants is that they tendered an instruction instructing the jury to return a verdict in favor of the defendants and the trial court refused to give it. It is claimed that the refusal was error. In view of what we have said above, it is quite clear that no error whatever occurred by reason of the trial court's refusal.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

115 Cal.App. 694

PEOPLE v. MUNSON.

Cr. 1626.

District Court of Appeal, First District, Division 1, California.

July 28, 1931.

1. **False pretenses** 🔑**49(1).**

Evidence *held* sufficient to sustain conviction for grand theft.

2. **False pretenses** 🔑**49(3).**

In grand theft prosecution, corroboration required by statute may consist of statements made to others similar in character to fraudulent ones relied on by prosecuting witness (Pen. Code, § 1110).

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Porter Munson was convicted of grand theft, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

TYLER, P. J.

Defendant was accused under two separate indictments of grand theft. The two indictments were consolidated. Trial was had, and he was found guilty as charged in both indictments. Motion for a new trial was made and denied, and this is an appeal from the order and judgment. The main point urged for a reversal is that the verdict is contrary to law and the evidence.

The first indictment charged that defendant did feloniously steal, take, and carry away certain shares of stock, belonging to one J. A. Daly, in different corporations, of the value of about $4,500. The second indictment charged that he did steal, take, and carry away similar property belonging to a different person of the value of about $15,888. The offenses charged are of the character that was formerly designated as obtaining money under false pretenses. In support of the claim that the verdict is contrary to the evidence, it is urged that the complaining witnesses received for their property all that defendant agreed to give them, and hence there was no crime committed. We cannot subscribe to this conclusion, as we are of the opinion that there is ample evidence in the record to show that defendant, with fraudulent intent, was engaged in an unlawful enterprise or scheme designed to prey upon ignorant, credulous and foolish persons.

[1] With reference to the first indictment, there is evidence to show that on or about the 15th day of May, 1930, defendant, accompanied by two young women, called upon one James A. Daly at his home. They were familiar with the fact that he owned shares of stock in different corporations. Defendant represented to Daly that he was the owner of a wonderful mine which was producing ore running over $20 a ton, and that he desired funds with which to purchase certain machinery. Defendant stated that the mine was in full operation, and that twenty men were employed on the premises. He exhibited samples of ore and a vial containing gold dust which he represented came from the mine. He assured Daly that he would make large profits in a few months. The securities that Daly owned had cost him some $4,500, but had suffered a depreciation in value. Defendant informed Daly that he would give him his note for an amount equal to the original cost of the securities, and in addition thereto an interest in the mine, if he would put his stock in the venture. Daly was given the further assurance, which was false, that he could not possibly suffer a loss, as defendant carried life insurance in the sum of $100,000, and he would see to it that, in the event of anything happening to him, Daly's funds would be protected. Acting upon these representations, Daly went to his bank, withdrew his securities, and indorsed and delivered them over to defendant, who in turn delivered to Daly his promissory note as agreed. The next day defendant sold the securities for the sum of $2,825. The evidence further shows that, while defendant had a deed to the mine, it was not in operation, no men were employed thereon, and, in fact, it had not been in operation for a long time.

The evidence in support of the second indictment is of a like character. It shows that on about the 6th day of September of the same year defendant interviewed one Pierre Cerise, and represented to him that he was the owner of a mine located in Calaveras county with some two hundred acres adjoining thereto; that it was in full operation, some sixteen men being employed therein. Cerise, like Daly, was the owner of certain securities for which he had paid the sum of $15,888. The securities had also depreciated in value. Defendant informed Cerise that, in the event of his investing in the mine, he would give him his promissory note for the original cost of the above securities, and, in addition thereto, a 2 per cent. interest in the mine. He further stated that he would hold the stock in escrow under certain conditions. Acting under these representations, Cerise thereupon indorsed and turned over his securities to defendant, who sold them the next day for a sum several thousand dollars less than their cost. It appeared in evidence that defendant did not own this particular mine, but simply held an option to purchase the same for which he had paid the sum of $1. The mine was not in operation as represented, nor were any men employed on the premises.

For the purpose of showing motive and intent, evidence of other grand thefts committed by defendant in connection with the mining property was offered and received, and it appears therefrom that defendant secured large sums of money by reason of his false and fraudulent scheme. It is argued that the statements that the mines would pay large profits is but an expression of opinion of something to occur in the future, and therefore not what the law designates as a false pretense. Admitting this to be true, there were other representations as to existing and past facts which were untrue and made with the design of fraudulently obtaining possession of the property of the complaining witnesses. The evidence is ample to sustain the charge in both indictments.

[2] And, finally, it is claimed that the charges against defendant are wholly lacking in the corroboration required by section 1110 of the Penal Code. The claim is without merit. The corroboration required by the section invoked may consist of statements made to others similar in character to the fraudulent ones relied upon by the prosecuting witness. People v. Whiteside, 58 Cal. App. 33, 208 P. 132. As above indicated the record contains such statements.

The judgment and order are affirmed.

We concur: CASHIN, J.; KNIGHT, J.

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119 Cal.App.(Supp.) 759

PEOPLE v. ROSENBLOOM.

Cr. A. 654.

Appellate Department, Superior Court, Los Angeles County, California.

July 23, 1931.

Rehearing Denied Aug. 5, 1931.

1. Indictment and information ⟹125(4).

Where statute denounces series of acts altogether, and each separately, constituting offense, indictment charging all acts is sufficient and supported by proof of one act.

2. Criminal law ⟹252(2).

Defendant in municipal or justice's court cannot take advantage of formal defects in complaint (Pen. Code, § 1426).

3. Criminal law ⟹252(3).

Nicety of pleading is not exacted in justice's or municipal court (Pen. Code, § 1461a).

4. Criminal law ⟹252(1).

Sufficiency of complaint in justice's or municipal court must be tested by statute outlining requirements thereof, not by statute prescribing requirements of indictment (Pen. Code, §§ 950, 1426).

5. Criminal law ⟹252(1).

Complaint in justice's or municipal court, lacking in anything required by statute, is defective in substance (Pen. Code, § 1426).

6. Criminal law ⟹252(3).

Defendant in justice's or municipal court may not insist on sufficient particularity in complaint to enable pleading former acquittal or conviction (Pen. Code, § 1426).

7. Criminal law ⟹258(1).

On motion in arrest of judgment in municipal court, for defects in complaint, proceedings at trial may be considered in determining prejudice (Pen. Code, § 1452).

8. Criminal law ⟹968(1).

Motion in arrest of judgment can be made only upon grounds specified in Code (Pen. Code, § 1452).

9. Criminal law ⟹1044.

Unless motion in arrest of judgment points out particulars of insufficiency of pleading, point will not be considered on appeal (Pen. Code, § 1452).

10. Criminal law ⟹260(10).

That complaint in municipal court, charging defendant with selling misbranded drug, failed to state manner of misbranding, could not be considered on appeal, where motion in arrest of judgment did not state grounds of motion (Pen. Code, § 1452).

11. Druggists ⟹12.

Where labels on bottles contained words "pure fluid extract of ginger," and "U. S. P.," misbranding could be shown by proof that any other ingredient than ingredient properly belonging in fluid extract of ginger was contained therein, or that contents did not come up to U. S. P. standards (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

This was so, since words on labels constituted representation that no ingredients were contained in contents of bottles other than those which properly belonged in fluid extract of ginger, and that drug conformed to standards of United States Pharmacopœia.

12. Druggists 🔑5.

If label is false or misleading, drug may be "misbranded," though nothing be said about it or label be not shown to or read by buyer (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

[Ed. Note.—For other definitions of "Misbrand; Misbranding," see Words and Phrases.]

13. Druggists 🔑5.

Where ginger did not conform to U. S. P. standards, and contained poison not properly in ginger, label containing words "pure fluid extract of ginger" and "U. S. P." constituted "misbranding" (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

14. Druggists 🔑12.

In prosecution for misbranding, evidence that, as result of drinking defendant's ginger extract, buyers became paralyzed, *held* admissible to prove that ginger labeled "pure fluid extract of ginger" contained certain poison not properly contained therein (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

Such testimony was not only admissible as means of showing that ginger labeled "U. S. P." was mislabeled, since not conforming to United States Pharmacopœia, and was substandard, but also because, although labeled as ginger, it contained other substances, including this poison, as disclosed by effect on drinkers, and which had no place in extract of ginger.

15. Criminal law 🔑1144(12).

On appeal, court *held* required to disregard contradiction in testimony of people's witness, and assume that jury believed statement making other testimony based thereon admissible.

16. Druggists 🔑12.

In prosecution for misbranding ginger extract, presence of poison producing paralysis *held* provable by effect of ginger on drinkers.

Expert testified that, but for presence of such poison, men would not have become paralyzed.

17. Druggists 🔑12.

In prosecution for misbranding, evidence, admissible to prove ginger contained poison not properly contained therein, *held* not rendered inadmissible because tending to prove adulteration (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

18. Criminal law 🔑442.

Reply letters are presumed genuine, although bearing typewritten or rubber stamp signatures.

19. Criminal law 🔑442.

In prosecution for misbranding drugs, letter containing jobber's alleged guaranty against misbranding *held* inadmissible as reply letter, because of insufficient proof of contents and mailing of first letter.

Reply letter bore signature of signer, but signature was stamped thereon. Defendant testified merely that some one in his office wrote letter "to the firm from which he bought the ginger," that he saw it before it went out, and that shortly thereafter he received the alleged guaranty. There was no proof that letter, to which letter offered in evidence was a reply, was ever deposited in United States mails with postage paid.

20. Criminal law 🔑323.

There is presumption that matter deposited in mails, with postage paid, is delivered to addressee.

21. Criminal law 🔑442.

To make reply letter admissible as such, there must be internal evidence that it is reply letter, which must be either by showing contents or subject-matter of first letter.

22. Druggists 🔑5.

Offense of misbranding drugs *held* not to require specific intent (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

23. Criminal law 🔑808.

In prosecution for misbranding, reading to jury of portions of act defining adulteration *held* not error, where one means of proving misbranding was by showing adulteration (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

24. Criminal law 🔑1172(1).

In prosecution for misbranding drugs, reading to jury of portions of act defining adulteration, even if error, *held* not to call for reversal, where record conclusively showed misbranding (Deering's Gen. Laws 1923, Act 58, §§ 1, 5, 6).

Appeal from Municipal Court of Los Angeles; Ellis A. Eagan, Judge.

Jacob Rosenbloom was convicted of violation of the Pure Drugs Act of 1907 (Deering's Gen. Laws 1923, Act 58), and he appeals.

Affirmed.

Hugh L. Dickson, Frank P. Doherty and William R. Gallagher, all of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, and Joe W. Matherly and John L. Bland, Deputy City Prosecutors, all of Los Angeles, for the People.

YANKWICH, Judge pro tem.

The defendant appeals from a judgment of conviction of violation of the Pure Drugs Act of 1907 (Deering's General Laws, 1923 Ed., Act 58).

The complaint alleged that the defendant did, on March 23, 1931, "sell and offer for sale and hold out for sale and offer to deliver a drug, to-wit: extract of ginger, Superior Brand, which was then and there mislabelled and misbranded." It is contended that the complaint does not state an offense. Sections 5 and 6 of the act describe several distinct acts by way of definition of the terms "mislabeled or misbranded," and section 1 provides that "any person who shall * * * sell, or offer for sale, or keep for sale, * * * any such adulterated, mislabeled, or misbranded drug, shall be guilty of a misdemeanor." From the evidence in the case, it appears that the misbranding here involved is that denounced by section 5, which declares an article to be misbranded "the package or label of which shall bear any statement, design, or device, regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular."

[1-6] It is elementary that, where a statute denounces a series of acts, each of which separately and all together constitute an offense, an indictment or information is sufficient which charges all the acts denounced by the statute, and may be supported by proof in the record which shows the commission of one of the series of acts. People v. McClennegen, 195 Cal. 445, 452, 234 P. 91; People v. Welch, 89 Cal. App. 18, 264 P. 324. However, here the complaint described the offense by using terms defined in the statute, without specifying the particular act of mislabelling or misbranding. It has been held in California that charging a statutory offense in the language of the statute without designating the means is, at most, a defect of form. People v. Cronin, 34 Cal. 191; People v. Welton, 190 Cal. 236, 240, 211 P. 802. However, there is authority in the federal courts, under the Federal Pure Food Law, to the effect that the failure to specify the particular act of misbranding of which the defendant was guilty is a defect of substance, justifying the court in sustaining a demurrer to the evidence. United States v. St. Louis Coffee & Spice Mills (D. C.) 189 F. 191.

There is no demurrer to a complaint provided for in criminal procedure in municipal courts. "Any substantial defect in the complaint" is, however, made a ground for arrest of judgment. Penal Code, § 1452. The use of a limiting adjective here implies, of course, that there may be defects to which the section does not apply, but its proper construction is a matter of some difficulty. In the Superior Courts any defect which would be ground for a general or special demurrer is available on motion in arrest of judgment (Penal Code, § 1004; People v. Welton, 190 Cal. 236, 211 P. 802); but defects which are ground merely for a special demurrer are not so available, unless they are first objected to by demurrer. Such minor defects, consisting in the absence of that particularity which, in view of the peculiar nature of the offense, might be necessary in order to enable the defendants to prepare properly for and make their defense, are not defects of substance, but of form. People v. Welton, supra, 190 Cal. at page 240, 211 P. 802. In the justices' and municipal courts, since no provision is made for a demurrer, and the motion in arrest of judgment is limited to substantial defects, there appears to be no mode by which a defendant can take advantage of defects of form; that is, he is in the same position as a defendant in the Superior Court who has failed to demur. But nicety of pleading is not exacted in justices' courts (Ex parte Winston, 160 Cal. 18, 21, 116 P. 390), and, since the practice in the municipal courts, in criminal cases, is the same as that of justices' courts (Penal Code, § 1461a), this rule should apply to the municipal courts also. By section 1426 of the Penal Code, a complaint in the justices' (and municipal) courts is sufficient if it sets forth "the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint." The sufficiency of a complaint in a justice's (or municipal) court must be tested by this section, not by section 950 (Ex parte Winston, supra, 160 Cal. at page 20, 116 P. 390), and, if it is lacking in any matter required by section 1426, it may be regarded as defective in substance.

In the Winston Case it was held that a complaint which discloses the character of the offense charged (battery), and charges it in the words of the statute, is sufficient on habeas corpus, though it says nothing as to the particular acts of force and violence. Here the court also declared that cases holding that a defendant is entitled to have the charge against him set forth with sufficient particularity to enable him to plead an acquittal or conviction in bar of a subsequent prosecution are all cases where the question arose on special demurrer, and that such particularity is not a jurisdictional matter, since the identity of offenses can be otherwise determined. Since there is no provision for special demurrer in the justices' (or municipal) courts, or other mode of objecting to defects in form, a defendant is not entitled, in those courts, to insist on particularity in the respect here mentioned.

[7-10] The defect in the present case is not a total absence of a necessary averment—that is supplied, though by way of conclusion, by the allegation that the ginger was mislabelled and misbranded—but an uncertainty as to the

particulars regarding the matter. It sets forth the offense with such particulars as to enable the defendant to understand distinctly the character of the offense and to answer the complaint. Since the question may be raised only after trial, the proceedings at the trial may be given consideration in determining this matter, and they fail to show that the defect in the complaint in any way prejudiced defendant in making his defense.

A motion in arrest of judgment can be made only upon the grounds specified in the Code. None others are available. People v. Bawden, 90 Cal. 195, 27 P. 204; People v. Gardner, 98 Cal. 127, 32 P. 880; People v. Chaves, 122 Cal. 134, 143, 54 P. 596; People v. Delhantie, 163 Cal. 461, 125 P. 1066. It was decided in an early case (People v. Dick, 37 Cal. 277)—which has never been questioned or overruled,—that the particulars of the insufficiency of the pleading must be specifically pointed out in the motion. Otherwise the point will not be considered on appeal. See People v. Sansome, 98 Cal. 235, 239, 33 P. 202. The necessity for pointing out the particulars of insufficiency is much more apparent in cases arising in municipal courts, because no provision is made for a demurrer, either general or special. And it is not quite consonant with fairness and fundamental justice to allow the defendant to pass unnoticed or to overlook deliberately a defect in the complaint which is not jurisdictional, and permit him to spring it for the first time on appeal.

Even if we assume, therefore, that the complaint is defective, in a matter of substance, for failing to specify with which of the kinds of misbranding denounced by the statute the defendant is charged, the error cannot be considered here, because the record before us, while stating that a motion in arrest of judgment was made, does not state the grounds of the motion. We do not even know whether the insufficiency of the complaint was one of them. For all we know, counsel for the defendant may have urged some other grounds which are not even sanctioned by the Code. In view of the strict interpretation which our courts have placed upon the motion, the failure of the record to disclose as ground of the motion in arrest of judgment the particular ground urged here is fatal to its consideration by this court. We may add that, by being compelled to stand trial upon a complaint which lacks the required particulars, the defendant is in no worse situation than if the complaint had charged all the kinds of misbranding and mislabelling denounced by the act. In that event, as already stated, the conviction would depend (and could be supported) upon proof in the record of guilt as to any one of these species of misbranding and mislabelling. In neither case would the defendant know until the trial the particular act of the series with which he is charged. In last analysis, therefore, the hardship, if any, is no different when he is compelled to plead to a complaint which (without particularizing) charges him with an offense which is designated by a statutory name than when he is required to plead to a complaint which charges him with a series of acts.

[11, 12] The evidence of misbranding is clear. The labels on the bottles contained the words "pure fluid extract of ginger" and "U. S. P." This was a representation that no ingredients were contained in the contents of the bottles other than those which properly belonged in fluid extract of ginger, and that it conformed to the standards of the United State Pharmacopœia. The falsity of this claim on the label could be shown by proof that any other ingredient was contained in the contents, or that they did not come up to the U. S. P. standards. Of course, such evidence might have a tendency to show also that the ginger was adulterated, but it does not follow that the conviction was based on a showing of adulteration only. A drug is adulterated under section 4 of the act if, when sold under or by a name recognized in the United States Pharmacopœia, it differs from the standard of strength, quality, or purity laid down therein, or if the strength or purity fall below the professed standard or quality under which it is sold. The question of adulteration does not, therefore, concern itself with the label. The representation as to quality or character required on a charge of adulteration may be made orally, by letter, or in many ways other than by label. On the other hand, if the label is false or misleading the drug may be misbranded though nothing is said about it or the label is not shown to or read by the purchaser.

[13] In this case the evidence is clear that the ginger did not conform to the standard set by the United States Pharmacopœia. The label was therefore false in this respect. There was also evidence tending to show that it contained a poison which would not be in pure extract of ginger. Hence the statement on the label that the ginger was "pure" was also false. These falsehoods on the label in relation to the article contained in the bottles and the ingredients thereof constituted a misbranding.

[14-17] The defendant sold the ginger to pharmacists, and several paralytics, who had purchased the product from a druggist to whom the defendant sold it, were allowed to testify to the fact that they became paralyzed as a result of drinking the ginger. It is insisted that this was error, because there was no charge of adulteration and the testimony on behalf of the people showed that paralysis would result only from the presence in the ginger of the poison known as triorthocresylphosphate, and that none was found

in the remnants of the ginger sold by the defendant, upon test. The absence of the poison, if it were a positive fact proved, might, at first blush, make the admission of testimony as to the effect of the drinking of the ginger appear erroneous. However, the evidence on the subject is purely negative. There is no showing that any chemical test was made to find the poison. Dr. F. G. Crandall, a witness for the prosecution, who testified to the effect upon drinkers of the presence of this poison, was asked: "Now, so far as you know, there is no phosphate, that long name, found in it?" He answered: "No sir, none found in the particular sample Mr. Abernathy tested." Abernathy was the chemist who had analyzed the sample. The sole object of his analysis was to determine compliance with United States Pharmacopœia. He testified that the product was substandard. It is evident that the absence of the poison was merely assumed by Dr. Crandall, from the fact that Abernathy's analysis made no mention of it. Moreover, on cross-examination, by the defendant's own counsel, Dr. Crandall stated that, but for the presence of the poison, the men would not have become paralyzed. The testimony was therefore admissible as a means of showing that the ginger was mislabelled, not only because it did not conform to the United States Pharmacopœia, and was substandard, as disclosed by analysis, but also because, although labelled as ginger, it also contained other substances, including this poison, as disclosed by the effect on the drinkers, and which had no place in extract of ginger. It is true that the witness also testified that the victims might have become paralyzed even if they had drunk unadulterated ginger. But, on appeal, we must disregard the contradiction and assume that the jury believed the statement which makes the testimony admissible. In this view of the evidence, the presence of the poison could be proved by the effect of the ginger upon the persons who drank it. Such evidence would show misbranding. And, it being admissible for that purpose, the evidence was not rendered inadmissible by the mere fact that it also tended to prove adulteration. People v. Ciulla, 44 Cal. App. 719, 722, 187 P. 46; People v. Ball, 102 Cal. App. 353, 357–358, 282 P. 971.

[18-21] Error is predicated upon the refusal of the court to receive in evidence the following letter:

"Columbus 8774 Jordan Bros.
"1841 Broadway
"New York City.
"Aug. 15, 1930.

"California Extract Co., Los Angeles, California.

"Gentlemen: We have your letter of recent date and in reply beg to advise that we are not manufacturers of any of the products which we handle; we are jobbers of such items as Imitation Extracts, Drug Sundries, Fluid Extract of Ginger Bitters, etc. We buy these products from the manufacturing or jobbing houses and in the case of extracts or any item which comes under the Pure Food and Drug Act or the Internal Revenue Dept. (Prohibition Unit) we always insist on a guarantee and naturally we can give you the same guarantee that we receive, which is as follows:

" 'Guarantee.

" 'We, the undersigned, do hereby guarantee that such merchandise as listed herein, namely, Imitation Flavoring Extracts, U. S. P. Preparations, Extracts, etc., as we are selling and shipping, are not adulterated or misbranded within the meaning of the Federal Food and Drug Act of June 30, 1906, as amended.'

"Naturally, if the merchandise complies with the Pure Food and Drug Act, it would comply with the Revenue Dept. restrictions, so we feel quite confident that you will be perfectly safe in selling our merchandise.

"Trusting to hear from you at some early future date, we are,

"Yours very truly,
"Tom Jordan
"Jordan Bros."

The letter was offered as a guaranty under section 21 of the act. The refusal to receive it was based upon the ground that no proper foundation had been laid for its reception. The signature of the signer was not written in, but stamped. If this was a reply letter, the objection upon that ground was not valid. Fielding v. Iler, 39 Cal. App. 559, 563, 179 P. 519; note, 9 A. L. R. 990 et seq. The presumption of genuineness of reply letters is indulged in even as to letters bearing typewritten or rubber stamp signatures. Barham v. Bank of Delight, 94 Ark. 158, 126 S. W. 394, 27 L. R. A. (N. S.) 439; Lancaster v. Ames, 103 Me. 87, 68 A. 533, 17 L. R. A. (N. S.) 229, 125 Am. St. Rep. 286; National Acc. Society v. Spiro, 78 F. 774 (C. C. A. 6). However, the letter was inadmissible under the rule as to reply letters, because of insufficient proof of the writing or contents, and, more particularly, of the mailing of the letter to which it was said to be an answer. Kvale v. Keane, 39 N. D. 560, 168 N. W. 74, 9 A. L. R. 972; Consolidated Grocery v. Hammond, 175 F. 641 (C. C. A. 5).

The rule admitting reply letters depends in part on the presumption that matter deposited in the United States mail with the postage paid is delivered to the addressee, and in part on the internal evidence of the contents of the reply that it is an answer to a letter sent to the writer of the reply by the person who produces it. There can be no such internal evidence without a showing of the contents, or, at least, the subject-matter of the first letter. Here the defendant testified merely that some one in his office wrote a letter "to the firm from which he bought the ginger," that he saw it before it went out, and that shortly thereafter he received the alleged guaranty. The evidence in the case of Kvale v. Keane, supra, was much stronger. And yet the court there held that the proper foundation as to mailing or receipt had not been laid for its introduction. It is to be borne in mind that the letter was offered as a guaranty from the manufacturer which, under section 21 of the act, was a complete defense to the charge of misbranding, if believed by the jury. We feel that the nature of the document—the force which the law gives to it—should make us apply the rules just declared, if at all, with greater strictness, lest fraud be encouraged by a looser rule.

[22-24] Several minor contentions may be disposed of briefly. We think the sample of ginger analyzed was sufficiently identified as coming from bottles bearing the brand of the defendant. The court's charge to the jury was, on the whole, adequate and fair. It consisted, in addition to the usual instructions as to the presumption of innocence, of the reading of the various sections of the act, in hæc verba. The court even went so far as to read to the jury section 21 of the act, relating to the effect of a guaranty, although the written evidence of the guaranty was excluded. Thus the jury were left to infer the existence of a guaranty from other testimony. The court properly instructed the jury that intent was immaterial. The offense is not one which requires a specific intent. People v. Dillon, 199 Cal. 1, 7–9, 248 P. 230; U. S. v. Sprague (D. C.) 208 F. 419; U. S. v. Thirty-Six Bottles of London Dry Gin (C. C. A.) 210 F. 271. In view of the conclusion reached that adulteration was one of the means of proving misbranding and mislabelling, we cannot say that the reading to the jury of the portions of the act which define adulteration was error. As the jurors could conclude that there had been a misbranding or mislabelling through failure to disclose the presence of ingredients which showed adulteration, a definition of adulteration under the act would aid them in determining the fact. Moreover, the record shows so conclusively the mislabelling—and facts from which one could readily infer that the ginger contained the poison which produced paralysis—that, on the basis of the whole record, we would be compelled to hold that any error in this or any other respect comes within the saving grace of section 4½ of article 6 of the Constitution of California. See People v. Stefini (Cal. App.) 300 P. 112; People v. North, 81 Cal. App. 113, 122, 252 P. 1063.

The judgment and order are affirmed.

I concur: SHAW, Acting P. J.

On Rehearing.

SHAW, Acting P. J.

Appellant's petition for a rehearing after judgment in the above-entitled cause having been filed, and said petition having been duly considered, it is now ordered that said petition be denied.

I concur: YANKWICH, Judge pro tem.

213 Cal. 210

A. L. YOUNG MACHINERY CO. v. CUPPS et al.

Sac. 4097.

Supreme Court of California.
July 28, 1931.

Rehearing Denied Aug. 27, 1931.

1. Highways 🔑113(5).

Bucket elevator, screen, one-yard drag scraper, pulleys, belts, lanterns, hose, and extension for elevator, furnished for and consumed on particular highway job, *held* "materials" and "supplies" covered by contractor's statutory bond (St. 1919, p. 487).

> Public Works Act (St. 1919, p. 487) provides that on public work the contractor must give a bond for at least one-half of the contract price of the work, guaranteeing that, if the contractor fails to pay for any materials, provisions, provender, or other supplies or teams, used in the performance of the work contracted to be done, the surety or sureties will pay the same.
>
> [Ed. Note.—For other definitions of "Materials" and "Supply," see Words and Phrases.]

2. Highways 🔑113(5).

Public contractor's statutory bond does not cover purchase price of equipment usable on more than one job, and which becomes part of contractor's general equipment (St. 1919, p. 487).

3. Highways 🔑113(5).

Equipment which will ordinarily be entirely consumed on particular job for which it is purchased is "materials" and "supplies" within public contractor's statutory bond (St. 1919, p. 487).

4. Pleading 🔑214(1).

Demurrer admits truth of allegations in petition.

5. Highways 🔑113(5).

Special demurrer to materialman's complaint seeking recovery on public contractor's statutory bond *held* properly sustained, without leave to amend, for uncertainty regarding date materials were furnished (St. 1919, p. 487).

> Complaint contained copy of notice of claim of lien, which contradicted itself and complaint as to date materials were furnished, which was important because materials were required to be sold to the contractor to be used in carrying out his contract, and must have been furnished after the date of the contract and before the date of filing of the notice of claim of lien, which necessary fact the notice of claim of lien did not clearly show, and, while the complaint might have been amended to conform to the true facts, time for filing notice of claim of lien as required by St. 1919, p. 487, had elapsed, and no new or amended notice curing the defect in the notice filed could have been filed, and a proper and legal notice of claim of lien was a prerequisite to the materialman's recovery against the surety company.

6. Highways 🔑113(5).

Filing of proper notice of claim of lien was prerequisite to materialman's recovery upon public contractor's bond (St. 1919, p. 487).

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by the A. L. Young Machinery Company against I. H. Cupps and others, including the Indemnity Insurance Company of North America. From a judgment of dismissal in favor of Indemnity Insurance Company of North America, plaintiff appeals.

Affirmed.

For former opinion adopted herewith, see 297 P. 538.

Kirkbride & Gordon and Kirkbride, Wilson & Brooks, all of San Mateo, for appellant.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for respondent Indemnity Ins. Co. of North America.

CURTIS, J.

In this action we granted a rehearing for the reason that we failed in the opinion heretofore rendered by us to pass upon the special demurrer interposed to the second amended complaint in this action by the defendant surety company. We are in entire accord with the conclusions reached by us regarding the merits of the general demurrer as set forth in our former opinion, and we express our approval of this opinion by adopting it in its entirety.

It reads as follows:

Plaintiff appeals from a judgment of dismissal in favor of defendant insurance company entered after the trial court had sustained a demurrer to plaintiff's second amended complaint without leave to amend. The facts as set forth in plaintiff's complaint, so far as necessary to be considered on this appeal, are as follows:

On November 26, 1924, defendant Cupps entered into a contract with the county of San Joaquin for the construction of a designated public highway in that county for the total sum of $10,459.50. On December 4, 1924, Cupps filed with the board of supervisors of the county of San Joaquin a bond in the sum of one-half the contract price, naming the defendant insurance company as surety. The bond specifically recited that it was given and executed pursuant to the Public Works Act of 1919 (St. 1919, p. 487). It is then alleged that during the performance of the work under this contract, and between January 13 and February 16, 1926, the plaintiff sold, delivered, and furnished to the contractor certain materials, supplies, implements, and machinery, consisting of one 30-foot steel frame bucket elevator complete; one 36 by 12 inch screen; a one-yard drag scraper; and certain pulleys, belts, lanterns, hose, and extension for the elevator; that there still remains due and unpaid on the above articles the sum of $1,405.75. It is then specifically alleged that the above equipment was "furnished for use under the contract above mentioned and were used in, upon, for and about the work contracted to be executed and performed under said contract, and were totally used up, consumed, destroyed and worn out in, upon, for and about the performance of said work under said contract, and at the completion of said work had no further use or value for the purpose for which they were constructed, and were without salvage value." The date of completion of the work and the filing of the verified claim and withhold notice required by the statute are then alleged, it appearing from such allegations that these steps were all taken within the time and in the manner provided by law. Plaintiff asks judgment against the surety on its bond for the amount of the unpaid balance on the purchase price of the above equipment.

[1-3] The trial court, holding the view that the purchase price of such equipment was not covered by the bond, sustained a demurrer without leave to amend. Respondent surety company contended on the demurrer, and contends now, that it is not liable on the bond for the purchase price of such equipment, on the theory that the bond required by the public works statute allows recovery only for the reasonable rental value of such equipment, when such equipment is in fact rented, and allows no recovery for the purchase price thereof.

As stated above, the bond in question was a statutory bond given and executed under the 1919 act, as it then read. That act provides that on public work the contractor must give a bond for at least one-half of the contract price of the work, which bond must guarantee that if the contractor "fails to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done or for any work or labor done thereon of any kind, that the surety or sureties will pay the same. * * *" The bond issued by respondent is broader in many respects than the bond required by the statute. Both appellant and respondent devote the major portion of their briefs to the question as to whether those provisions in the bond more onerous than those required by the statute can be enforced against the surety. It is not necessary to determine that point on this appeal. It is our opinion that the expressions "materials" and "supplies" found in the statute are sufficiently broad to include equipment of the nature involved herein, when such equipment is purchased for the particular job, and is entirely consumed thereon, except for normal salvage value. It is true, of course, that the purchase price of equipment capable of being used on more than one job, and which becomes part of the contractor's general equipment, is not covered by the statute, but when the equipment is of such a nature that in the usual course of events it will be entirely used and consumed on the particular job for which it was purchased, it is our opinion that such equipment is included within the meaning of "materials" and "supplies," as used by the statute. Respondent cites several mechanics' lien cases which indicate that in those cases the lien extends only to those articles which physically go into the structure against which the lien is sought to be exerted. Those cases are not in point. It has repeatedly been held in reference to the 1919 act, and its predecessors, that such acts are to be more liberally construed than the mechanic's lien statutes, and that the reasons for giving a limited construction to the latter are not applicable to the former. Pacific Wood & Coal Co. v. Oswald, 179 Cal. 712, 178 P. 854; Sherman v. Amer. Surety Co., 178 Cal. 286, 173 P. 161; French v. Powell, 135 Cal. 636, 68 P. 92; Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 P. 702. It has been held under the 1919 act and similar public work statutes, that rental of machinery, money expended on the hiring of mule teams, money spent for provisions, harness, and other equipment including scrapers, freight on mules and equipment etc., are all recoverable against the surety. Williamson v. Egan (Cal. Sup.) 287 P. 503; Pacific Wood & Coal Co. v. Oswald, supra; Bricker v. Rollins & Jarecki, 178 Cal. 347, 173 P. 592, 594; Sherman v. Amer. Surety Co., supra; People's Nat. Bank v. Southern Surety Co. (Cal. App.) 288 P. 827. The theory of these cases is that the statute was intended to cover all those things which have contributed to the improvement, whether directly by physically going into the construction, or indirectly, by being entirely consumed or used in the construction. In discussing the word "supplies," as used in a previous statute, the court in Bricker v. Rollins & Jarecki, supra, stated: "The ordinary meaning of this term in its general and accepted use is such as to include goods, wares, and merchandise of almost every kind and nature, whether used in the household or on the farm, or in any sort of productive or constructive work requiring the labor or service of men or animals or machinery. In the instant case they were furnished to be used and were actually used in advancing the work to be done under this contract, and in that sense entered into and became a component part of it and of the thing produced by it. This being so, we are of the opinion that as to the above classes of claims the trial court was correct in their allowance."

The true test in such cases was indicated by the Supreme Court of South Dakota in the recent case of Dennis v. Enke, 224 N. W. 925. In that case the question involved was whether the seller of a $3,000 tractor could recover from the surety the balance of the purchase price on a bond somewhat similar to the one here involved. We take the liberty of quoting from that case at some length. At page 927 of 224 N. W., that court, after analyzing certain earlier cases, stated:

"This court has indicated in those cases that absolute and entire consumption in the work is not essential to liability, and liability is not necessarily prevented by the fact that there may be some salvage value in the materials or other supplies. It is enough if they were purchased directly and particularly for the work, were proper for the work, and were used therein, and consumed therein to such an extent that their residual value is a salvage value only as distinguished from a new value, as illustrated by pipe cut and threaded in certain lengths, lumber cut up and nailed in place to make a tool shed or a form for cement, etc. That these items have some residual value is of course true, but it is a very different value both in kind and amount from that of new lumber or new pipe in standard lengths and dimensions, and this court has held, under the circumstances of the cases heretofore considered, that the existence of some such residual salvage value did not necessarily prevent liability on the part of the surety.

"The same rule was applied to the matter of minor tools and appliances in the Dennis Case [53 S. D. 646], 222 N. W. 269, where the items involved were two scrapers at $25.50 each, and certain repair items, and where the court below found as a fact (the appeal being from the judgment only) that all of the items were purchased for the purposes of the contract and were practically worn out in carrying out the provisions of the contract."

Again, at page 927 of 224 N. W., it is stated:

"It is a matter of common knowledge that the performance of contracts of this kind requires a plant and equipment suitable therefor, many items of which are expensive and the purchase of which could not be justified by any single contract unless it was extremely large. It is further a matter of common knowledge that this kind of work is generally performed by persons who engage therein as a business and who maintain, for the purpose of the general contracting business, a very considerable amount of equipment intended and designed to be used in that business over a period of several years and in the performance of a number of contracts. We do not think it can be said to be within the contemplation of the parties that the surety on such a bond as this should be liable for the purchase price of tools and appliances which constitute and create, or become a part of, the general plant and equipment of the contractor, as distinguished from those minor tools and appliances which are consumed or practically consumed in the performance of a particular contract. The underlying principle which distinguishes between liability and nonliability is comparatively easy to perceive and grasp, difficult to phrase accurately, and still more difficult to apply precisely in border line cases. There must always be somewhat of a twilight zone in these cases between liability and nonliability dependent upon the facts in particular cases. The problem is similar to that faced by the cost accountant of a manufacturing plant in determining whether a certain tool or appliance should be charged as a direct expense item to a particular job, or should be charged to plant and equipment; the established cost of its use in the particular job being ultimately taken into account by being embraced in the percentage of general overhead expense of plant equipment and factory charged to the particular job.

"In order to create liability on the part of the surety for the purchase price of tools and appliances under these contract bonds, at least the following elements we think must be present: First, the tool or appliance must be purchased specifically and particularly for use in the performance of the particular contract; second, the use of such tool or appliance must be at least proper, if not reasonably necessary, in connection with and about the carrying out of the contract; third, the tool or appliance must be used in or about the performance of the contract; fourth, the tool or appliance must be such that it is reasonably to be expected in the natural course of events that its normal life for the purpose for which it was designed will be practically consumed by its use in and about the performance of the contract, and in this connection the facts of each particular case must be taken into consideration. For example, general experience indicates that a crew of men engaged in the performance of a contract of this kind lose and break numerous small tools and items of equipment, such as shovels, spades, hammers, etc., by reason of which they are for all practical purposes really consumed in the performance of the contract, notwithstanding the fact that such tools, if carefully handled and not lost, would be far from worn out by the actual amount of work for which they are used in the performance of a particular contract. If such small tools are purchased for the performance of the contract, are proper or reasonably necessary therefor, are used in such performance, and in such performance are lost or broken, and such loss or breakage is reasonably to be anticipated, it is entirely possible that the surety on the bond might be liable."

[4] The articles herein involved fully comply with all the requirements suggested by the above case. It is our opinion that if the articles in question were totally used up in the usual and ordinary performance of the contract, so that nothing remained in excess of normal salvage, they then lost their identity as tools, appliances, implements, and machinery, and are included within the broader definition of the words "materials" and "supplies." In such a case, in effect, they entered into and became a component part of the construction work. Certainly it is true that their full usefulness has entered into the work to the same extent as has hay for the horses or food for the men. Each case must be determined on its own facts. In the case at bar, the plaintiff has alleged the articles were purchased for the particular job and were entirely used up and consumed thereon. The truth of these allegations is admitted on demurrer. We are of the opinion that it was error to sustain the general demurrer without leave to amend. It is our opinion that plaintiff not only can, but has stated a cause of action. We do not mean by this to forecast the result of the action which, of course, must await upon the character of the evidence adduced at the trial.

The second amended complaint as against a general demurrer states a good cause of action, and, were there no other questions presented on this appeal, the order sustaining the demurrer would have to be reversed.

Defendant surety company, however, in addition to its general demurrer, also demurred specially to plaintiff's second amended complaint, which pleading we will hereafter refer to as the complaint.

[5, 6] One of the grounds of uncertainty specified in said special demurrer was that it could not be ascertained from said complaint when said implements were sold to the defendant Cupps. In paragraph VIII of the complaint it is alleged that the time of the furnishing and delivery of said implements to defendant Cupps, was between the 13th day of January and the 16th day of February, 1926. In the notice of claim of lien this time is stated in one place as between the 13th day of January, 1923, and the 16th day of February, 1925, and in another place as between the 10th day of January, 1925, and the 23d day of May, 1925.

It is apparent, therefore, that there is a direct conflict between the averments of the complaint as to the time the implements were sold and the statement in the notice of claim of lien, a copy of which is attached to and made a part of the complaint. There is also a conflict in the two statements contained in the notice of claim of lien as to the time of the sale of these implements.

The complaint, therefore, is uncertain, in that it cannot be ascertained therefrom whether said implements were sold to the contractor during the months of January and February, 1926, as alleged in the complaint, or between January 13, 1923, and the 16th day of February, 1925, as set forth in said notice of claim of lien.

The time of sale of said implements becomes important for the reason that they must have been sold to the contractor to be used in carrying out his contract with the county of San Joaquin, which, as appears from the complaint, was dated November 26, 1924. They also must have been purchased before May 26, 1925, the date of the filing of the notice of claim of lien with the officials of the county. If we take the date of sale shown by the allegations of the complaint—"between the 13th day of January and the 16th day of February, 1926"—as the time of sale, then it appears that the implements were sold to the contractor long after the notice of claim of lien was filed. If we take the time given in the notice of claim of lien as the true date—"between the 13th day of January, 1923, and the 16th day of February, 1925"—then it appears that a part, and possibly all, of said implements were sold to the contractor before the execution of the contract.

It thus appears that plaintiff's pleading is in hopeless confusion. Conceding that plaintiff might have amended its complaint to conform to the true facts, the same rule does not apply as to its notice of claim of lien. The statute requires said notice to be filed for record with certain officials of the county within a certain designated time. The time fixed by the statute for filing such a notice had elapsed long prior to the commencement of said action. No new or amended notice curing the defect in the notice which was filed could, therefore, legally have been filed. The filing of a proper and legal notice of claim of lien was a prerequisite to plaintiff's recovery against the defendant surety company.

The special demurrer on the ground of uncertainty was therefore properly sustained by the trial court. As it was impossible for plaintiff to amend its complaint so as to cure this defect—the uncertainty appearing in the notice of claim of lien—the order of the trial court sustaining the demurrer without leave to amend was not erroneous. In fact, no other order could have been proper.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

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213 Cal. 237

GOLDEN v. STATE BAR OF CALIFORNIA.

S. F. 14118.

Supreme Court of California.
July 30, 1931.

1. Attorney and client 🔑52.

Complaint in writing duly verified was not essential to disbarment proceeding.

2. Attorney and client 🔑57.

Concurrence of majority of state bar governors *held* sufficient to sustain disbarment recommendation.

3. Attorney and client 🔑51.

In disbarment proceeding before state bar governors, any members present may act as prosecutors without being disqualified to participate in recommendation.

4. Attorney and client 🔑57.

Charge against attorney not pursued or found upon by state bar governors could not be considered upon review of governors' disbarment recommendation.

5. Attorney and client 🔑53(2).

In disbarment proceeding, state bar governors could not disbelieve attorney's testimony that he paid $50,117.54 obligation merely because petitioner testified that payment was in currency.

> This circumstance gave rise to no more than a suspicion, surmise, or conjecture, and the fact that the board of governors did not believe attorney's testimony was not enough, since their disbelief must be founded on evidence sufficient to support a finding against the attorney.

6. Attorney and client 🔑53(2).

Disbarment proceeding is quasi criminal, and accuser has burden to sustain charges by convincing proof to reasonable certainty; reasonable doubts being resolved in attorney's favor.

7. Attorney and client 🔑53(2).

In disbarment proceeding, evidence *held* insufficient to sustain finding that attorney falsely swore that he had no funds in his possession as trustee belonging to trustor, where trustor had theretofore assigned interest in trust funds.

> Evidence was that, although attorney had trust funds in his possession at the time, the trustor had theretofore assigned in writing her entire interest in the trust funds to friends and relatives, reserving to herself only the right to monthly payments during her lifetime.

8. Attorney and client 🔑53(2).

Evidence of attorney's misappropriation of funds intrusted to him as trustee and of attorney's false swearing *held* insufficient to justify disbarment or suspension.

In Bank.

Petition by **Frank J. Golden** to review a recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred.

Proceeding dismissed without prejudice.

William P. Hubbard, of San Francisco, for petitioner.

J. W. Hawkins, of Modesto, Joe G. Sweet, of San Francisco, and Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the action of the board of governors of the state bar recommending that the petitioner be disbarred.

The board found the petitioner guilty of misappropriation of funds intrusted to him as trustee and while acting in the dual capacity of attorney and trustee for Mary Cynthia Gesford Lott. The petition is based mainly on the contention that the evidence before the board is wholly insufficient to support the findings and conclusion of the board. Preliminarily certain other contentions may be disposed of briefly.

[1, 2] The proceeding was initiated by issuing and serving upon the petitioner an order to show cause, preceded by an informal complaint made against him. It is insisted that a complaint in writing duly verified is essential to prosecution of the charge. This is not so. In the Matter of William F. Herron (Cal. Sup.) 298 P. 474.

Ten members of the board participated in the hearing. Eight of the ten made the findings and recommendation for disbarment. Two dissented, one of whom filed a dissenting opinion stating his conclusion that the evidence was wholly insufficient to support the findings upon which the recommendation was made. The other joined in the dissent. It is contended that the accused was entitled to the active participation of the entire board. We do not so conclude. In the absence of a controlling authority to the contrary, and none has been cited, the concurrence of a majority of all of the members of the board would seem to be sufficient. The dissenting opinion was not made a part of the return. It should have been returned, as this court is entitled to the views of those members of the board who do not concur in the majority action if they desire to express them in a dissenting statement or opinion.

[3] The hearing was had before local administrative committee No. 3 of the city and county of San Francisco, and was heard de novo by the board of governors. It is contended that two of the majority members of the board acted as prosecutors; that they thereby disqualified themselves to sit in judgment and participate in a recommendation. The nature of the proceedings requires that some one elicit the facts. This may be done by any or all of the members present, and we see no impropriety in the designation of a certain member or members to undertake that task. From a practical standpoint such must be the proper procedure, otherwise the investigation would get nowhere unless an outside member of the bar be designated to act for and on behalf of the board, which should not be required in view of the limited powers of the board as investigators of fact.

We find no ruling on the part of the local administrative committee or the board of governors with reference to the admission and production of evidence which has worked to the prejudice of the petitioner. We then come to a consideration of the alleged insufficiency of the evidence to support the recommendation and justify disbarment or other disciplinary order.

Mrs. Lott formerly resided in Napa county. Her name was Mary Cynthia Gesford. Her near living relations are a brother, Henry C. Gesford, a former judge of the superior court of Napa county; a sister, Lillian Johnson, of San Francisco; a sister, Louisa J. Gesford, of San Francisco; a nephew, Charles P. Hunt, residing in Alameda county but engaged in business in San Francisco; and a cousin, Ada W. Neal, a business woman residing in San Francisco. At the time of the investigation under review Mrs. Lott was a widow of the age of seventy-two years. Her husband died in 1925. She had been in poor health for many years, resulting in large measure from the attention and care given to her husband during his declining years. She had known Frank J. Golden, the petitioner, for about forty years, their acquaintanceship having extended from the petitioner's boyhood days in Napa county. For many years prior to her husband's death, and for some time thereafter, she had been at times in straitened circumstances. The petitioner had befriended her in many ways, had advanced money to her for her livelihood when she could obtain means from no other source. He had also acted as her attorney in several lawsuits and she had implicit confidence in him.

Some time prior to June, 1926, Mrs. Lott was apprised of the fact that she would receive a considerable sum of money from what is called the Jennings estate then under administration in Cook county, Ill. Each of the Gesfords, brother and sisters, were to receive equal shares. Mrs. Lott desired to have some one to receive and manage this fund for her. Very naturally, it would seem, she went to the petitioner, whom she often referred to as the best friend she had in the world, and requested that he take charge of it, as her trustee. He suggested that some member of her immediate family act in that capacity. Her relationship with her brother and her sisters was not cordial. She refused to accede to the suggestion and insisted upon the petitioner undertaking the task. She was, however, in close and friendly relationship with her nephew, Mr. Hunt, and her cousin, Mrs. Neal, both of whom were substantial business people and with whom she consulted with reference to her plans. They were in accord with her in her plan to have the petitioner handle the fund, and he accepted the responsibility. Accordingly Mrs. Lott executed to the petitioner an assignment of her interest in the Jennings estate. Shortly thereafter and under date of June 26, 1926, a declaration of trust was executed, signed by both petitioner and Mrs. Lott, in which it was provided, among other things, that as soon as the funds should come into his hands the trustee should pay therefrom such obligations and debts of Mrs. Lott as she and the trustee should determine were justly due; that the trustee should keep the trust funds invested in income producing securities, mortgages, or deeds of trust, and, after paying all debts and other expenses of handling the fund, should pay out and distribute the income from the fund, first by the payment to Mrs. Lott of $300 or more per month, provided that, if the income from the fund should be insufficient, said payment should be made from the principal; that the trustee should pay such further sums to Mrs. Lott as should be mutually agreed upon; that the trustee agrees that the income shall be not less than 6 per cent. per annum on the unexpended balance, and that, if the income should be less than 6 per cent., the trustee shall make up the difference from his own funds; that, if the income should exceed the 6 per cent., the excess should be retained by the trustee as full compensation for administering the trust, including attorney's fees in litigation, if any, affecting the trustor or the trust estate; that the trustee should be liable for any and all losses that might be sustained by the trust estate, either to principal or interest, while the trustee continued to act as such; that upon the death of the trustor the trustee should pay the balance remaining in the fund as directed in the declaration and in accordance with written instructions to be thereafter given by the trustor. The form of this agreement was submitted to Judge Gesford and other relatives of Mrs. Lott, and no objection was raised by them or any of them as to the sufficiency or propriety thereof. The agreement was also submitted to and approved by an eminent member of the bar of San Francisco employed by Mrs. Lott for that purpose.

On June 26, 1926, Mrs. Lott, by letter, gave to the petitioner written instructions to pay to numerous friends and relatives the entire trust estate, after her death, with the residue to her nephew, Mr. Hunt, and to her cousin, Mrs. Neal, and the latter's husband, share and share alike. The instrument took the form, not only of written instructions, but also of a direct assignment to the beneficiaries therein named. In order to confirm these instructions and assignments and to make the terms thereof more certain, the petitioner and Mrs. Lott, under date of June 27, 1926, executed a formal instrument to that effect, carrying out in detail the desire of Mrs. Lott, but in no wise altering the substance and effect of the original trust agreement except that the trustee thereunder should pay to the petitioner the sum of $450 per month.

[4] In the order to show cause served on the petitioner he was charged with entering into an unconscionable agreement with his trustor. The local administrative committee, upon a consideration of the proof, decided not to press this charge. The board of governors have not pursued nor found upon that phase of the charge, and it is not argued in the briefs. For that reason it may be considered as removed from consideration in this proceeding. The controversy is then narrowed to the question of the sufficiency of the evidence to support the findings of the board to the effect that the petitioner has violated his trust in maintaining an inconsistent position and in investing the trust funds to his own profit and in failing properly to account to the trustor upon the termination of the trust.

In July, 1926, the petitioner received from the estate of Jennings by a remittance from Chicago a check in the sum of $53,334. In September of the same year he received the sum of $11,893 as Mrs. Lott's distributive share of the estate of her deceased sister, Rebecca F. Gesford, which estate consisted of the portion of the Jennings estate coming to the deceased sister, and in February, 1929, the petitioner received the further sum of $699.38, the balance due the trustor from the Jennings estate. He thus received into the trust fund the sum of $66,016.38.

From the time of the receipt by the petitioner of this money, Mrs. Lott was furnished money sufficient to keep her in comfortable and at times luxurious quarters and surroundings. She had a companionable nurse who ministered to her wants. She improved in health, gained in weight, appeared happy and contented, and made no complaint of the administration of the trust fund by the petitioner or of the amount of the payments therefrom made to her or on her behalf except as hereinafter related.

Mrs. Lott for some time lived at the Leamington Hotel in Oakland. While residing there and in the early part of 1929 she met one Harry Cobb and one Eva K. Walters. Mrs. Lott had not known Cobb before, and from the record he is shown to be of a lawless and designing character. Mrs. Lott and Mrs. Walters had apparently met before and Mrs. Walters knew much about the personal and family relationship of Mrs. Lott and of the fact that the latter had come into funds. Cobb and Mrs. Walters established themselves in the good graces of Mrs. Lott and began to exercise a dominating influence over her, and seemingly gained complete control over her. About March or April, 1929, they abducted her from or persuaded her to leave the Leamington Hotel and prevented her from communicating with the petitioner. Cobb and Mrs. Walters had interested themselves in the financial affairs of Louisa J. Gesford, who was about eighty years of age at the time she received her allotment of the Jennings estate, and as a result of their activities, so the record shows, the funds of the elderly Louisa were dissipated to a large extent. They persuaded Mrs. Lott that the petitioner was mishandling her estate, caused her to make the complaint before the local administrative committee, had themselves appointed guardians ad litem, and as such and on behalf of Mrs. Lott brought an action against the petitioner for money had and received and caused an attachment to be levied on the petitioner's property. This action is now at issue and is pending in the superior court in and for Los Angeles county. They also brought proceedings in the San Francisco superior court to have Mrs. Lott declared incompetent to handle her own affairs. Cobb brazenly stated to Mrs. Neal that the motive behind his activities was financial gain to himself. The record shows without conflict that Cobb and Mrs. Walters were interlopers and were concerning themselves with Mrs. Lott's affairs, notwithstanding the fact that neither Mrs. Lott nor any of her relatives, nor those who would benefit by the safe administration of the trust or would lose by its maladministration, made no complaint against the petitioner, and notwithstanding the fact that Mrs. Lott continued to place confidence in the petitioner and that Mr. Hunt and Mrs. Neal opposed the appointment of a guardian for Mrs. Lott's estate. The antagonism thus engendered between Cobb and Walters on the one hand and the petitioner on the other has an important bearing on the reasons for the means employed later on the part of the petitioner to thwart the purposes of Cobb and Mrs. Walters, which point unerringly to a consistent endeavor to obtain control of Mrs. Lott's money.

At the hearing before the local administrative committee and also before the board it developed that the petitioner had invested the first moneys received by him from the Jennings estate in $51,000 and accrued interest in promissory notes, totaling in all approximately the amount originally received by the petitioner, secured by a second trust deed on the Leamington Hotel property and by a chattel mortgage on the equipment of the hotel. Straus & Co. held a first trust deed as security for the payment of notes totaling $835,000. The second trust deed was security for several notes totaling some $75,000 which were executed by the hotel company to one Hengen, who was the owner of the real property on which the hotel was built, and said second trust deed notes were issued to represent the purchase price of the realty. The improved property was appraised by Straus & Co. at $1,500,000. It was also appraised by A. H. Breed & Sons to the commissioner of corporations for the purpose of the issuance of a permit at $1,753,500, including the value of equipment, furniture, fixtures, machinery, etc. The petitioner believed and on the record would seem to have been justified in believing that the second trust deed notes so purchased by him were amply secured. The transaction was called in question by the local administrative committee and by the board of governors by reason of the following facts: The petitioner had become interested in the promotion of the Leamington Hotel enterprise and was an officer and director of the corporation. He had invested some $40,000 of his own funds in the common stock of the hotel company long before he entered into the trust agreement. He acquired and owned 43⅓ per cent. of the common stock of the company. He purchased the second trust deed notes from one Howard H. Bru, a man of substantial business interests and financial responsibility in the San Francisco bay section. Mr. Bru had purchased the $75,000 second trust deed notes from Hengen. The record is not clear as to how much Bru paid for these notes, and the inference from the evidence is justifiable that he purchased them at a discount with the aid of the petitioner. The findings of the board are to the effect that the petitioner bought $51,000 of said notes at par with accrued interest when he should have bought them at a discount if Bru bought them at a discount, and that a loss to the trust estate resulted; and the inference is drawn that either the petitioner profited personally by the transaction, or that he permitted Bru to gain thereby an unconscionable profit at the expense of the trust estate. Without going into detail, there is ground for suspicion that the transaction was not in all respects regular, but the evidence is undisputed that the petitioner finally sold the $51,000 trust deed notes to one Herman Schumacher for approximately the face value thereof, and thus recovered to that extent the corpus of the trust in cash.

The accounting feature of the present investigation will now be considered. The local administrative committee and the board of governors went into that subject. The petitioner refused to testify before the local committee as to certain features of the accounting and as to the location of the trust funds. He did this, so he claimed, for the reason that any disclosure there made would become known and enable the so-called Cobb-Walters group further to harass him and permit them to impose on Mrs. Lott. However, he made disclosure as to these matters before the board of governors. He there claimed and now vigorously insists that he has accounted for every dollar of the funds intrusted to his care and has paid over to Mrs. Lott the balance remaining in the fund and obtained a full release from her. In support of his contention he produced his account showing receipts and expenditures which he had theretofore submitted to Edward S. Bell, an attorney independently employed by Mrs. Lott for the purpose, which account was approved by Mr. Bell in writing appended to the account. This account is not as full and complete as it should be as to the particular purposes for which cash expenditures were made, and it may be freely stated that the petitioner is subject to criticism by reason thereof, but the record is devoid of evidence sufficient to support a finding that the account does not represent the facts.

The petitioner also presented to the board a written agreement of settlement, of date June 14, 1930, signed by himself and Mrs. Lott, and approved in writing by Edward S. Bell as Mrs. Lott's attorney, wherein the history of the trust transaction was briefly recited and wherein it was agreed between the parties that the balance in the trust fund properly chargeable to the petitioner was the sum of $50,117.54; that the petitioner should pay to Mrs. Lott the sum agreed to be the trust balance, and that upon payment thereof the petitioner would be fully discharged. The petitioner also presented to the board a receipt, dated June 17, 1930, signed by Mrs. Lott acknowledging payment to her of the sum agreed upon.

[5, 6] The majority of the board found that the petitioner did not pay to Mrs. Lott on the 17th day of June, 1930, or at any other time, said sum of $50,117.54, or any part thereof; that he converted said sum to his own use, and concluded that he was guilty of misappropriation of funds intrusted to his care—conduct involving moral turpitude. The board refused to believe that the petitioner paid the money as shown by said receipt, apparently on the ground that it was paid, as petitioner testified, in currency, and therefore his testimony was inherently improbable and unworthy of belief. The petitioner testified that when the agreement of settlement of June 14th was made with Mrs. Lott he was prepared and offered to pay the amount in cashier's checks and cash, but that Mrs. Lott refused to accept any checks, stating that she was afraid that Cobb and Mrs. Walters and those working on their behalf to have her declared incompetent to handle her own affairs would get possession of the same, and that she wanted cash, only, in order that she might invest the same in gilt-edged bonds on her own behalf. The petitioner was corroborated by documentary evidence to the effect that he had in his possession immediately prior to the final settlement seven cashier's checks for $5,000 each which he was prepared to deliver to Mrs. Lott. When she refused to accept them he testified that he cashed them and delivered the proceeds therefrom, together with $10,000 that he had in his safe and sufficient in addition from his bank account to make the full payment to Mrs. Lott at his brother's home in Oakland on the afternoon of June 17th. There is no evidence in the record contradicting the testimony of the petitioner in this respect or dispelling the genuineness of the written receipt, excepting only the circumstances that the money was paid in cash. This circumstance gives rise on this record to no more than a suspicion, surmise, or conjecture. The fact that the board did not believe the petitioner's testimony is not enough. Their disbelief must be founded on evidence sufficient to support a finding against the accused. This proceeding is quasi criminal in its nature, and, while it is not essential that the proof of guilt be established beyond a reasonable doubt, yet the charges must be sustained by convincing proof to a reasonable certainty, and any reasonable doubts should be resolved in favor of the accused. Bar Association of S. F. v. Goldman, 53 Cal. App. 42, 199 P. 836. The burden of proof was on the accuser. The testimony of the accused as to the accounting and final payment was uncontradicted, except by the circumstances related which in and of themselves are insufficient to brand his statements (corroborated as they are by documentary evidence and the approval of an independent attorney for Mrs. Lott as to the accounting and by a written receipt as to payment), as inherently improbable, and are insufficient to support a finding of guilt.

It is insisted that, when the money was paid on the final settlement, the petitioner knew that Mrs. Lott was undergoing investigation in the superior court as to her competency to handle her own affairs, and that the payment to her of such a large sum of money under such circumstances was a willful neglect of duty on the part of the petitioner, especially since it appears that Mrs. Lott was declared incompetent two days after the payment. It is undisputed on this record that Mrs. Lott was under the baneful influence of Cobb and Mrs. Walters from March to November, 1929. It was during this time that the present proceeding was started for the avowed purpose, on the part of those urging Mrs. Lott to institute the charges and obtain control of Mrs. Lott's funds, of compelling the petitioner to surrender them. It is significant that none of the relatives of Mrs. Lott objected to the petitioner's handling of the trust funds even after the charges were brought against her before the local committee or after suit was brought against him to recover the money or after the incompetency proceedings were initiated. It would seem that, if any objection to the petitioner's course were to be made, it would be by those interested in the residue after the death of Mrs. Lott. On the contrary, Mr. Hunt and Mrs. Neal at all times have allied themselves with the petitioner, testifying in his behalf in this matter and resisting the incompetency proceedings. Furthermore, Mrs. Lott filed an affidavit with the board objecting to the findings of the local administrative committee and in opposition to its recommendation, reaffirming her confidence in the petitioner, declaring her entire satisfaction with the way he had administered the trust fund; that he had made payments to her therefrom as required and expressing her desire that he continue in his capacity as trustee. After this matter had been taken under submission by the board of governors and ten days before their findings and recommendation were made and filed, the board received a three-page letter from Mrs. Lott, posted at San Diego, and entirely in her own handwriting, again reaffirming her confidence in the petitioner, stating that she had received the 50,000 odd dollars on June 17, 1930; that the money had been invested by her in bonds which she had theretofore stated were bonds of the Great Western Power Company, the Pacific Gas & Electric Company, and the Southern California Edison Company, and that said bonds were in her safekeeping; that she had not willingly made the charges against the petitioner, but had been influenced so to do by Mr. Cobb; that she would gladly give her deposition to substantiate her statements if the same were desired, and if so to get in touch with her attorney, Mr. Edward S. Bell, Latham Square building, Oakland.

The foregoing affidavit with reference to the recommendations of the local administrative committee and the letter from Mrs. Lott above referred to may not be said to be evidence in a strict sense, but they suggested a field of investigation which in fairness to the petitioner should have been entered upon, in view of the fact that the burden of proof was upon the board to establish by convincing evidence the guilt of the accused.

The board further found that the petitioner had sworn falsely as to material matters. No specification of the particulars in which he is declared to have committed perjury are incorporated in the findings. From the briefs it is disclosed that in two instances he is claimed to have sworn falsely. The first is a statement or statements incorporated in an affidavit executed by the petitioner and filed in the case of the Scott Company et al. v. Oakland Title Insurance and Guaranty Company, wherein the petitioner denied that, while he was acting as attorney for Howard H. Bru, he received a large or any sum of money in which said Bru was interested or which in any way appertained to said second trust deed, and denied that he had made any personal profit in the transaction whereby said Hengen assigned said second trust deed to Bru, and denied that any of his own money was invested in said trust deed or that he expected to gain a profit for himself in the transaction. Aside from the fact that the denials in the affidavit were not in contradiction of anything testified to by the petitioner before the board, it may be said that the petitioner was not charged with an offense relating to this matter in the order to show cause (see San Francisco Bar Ass'n v. Oppenheim, 186 Cal. 75, 198 P. 1069), and it cannot be said from the evidence whether the denials were true or false.

[7] The second matter related to the sworn statement of the petitioner when he was being examined upon supplementary proceedings in connection with an endeavor to collect a judgment against Mrs. Lott. He testified that he had no funds in his possession belonging to Mrs. Lott. This was at a time when he was in possession of the trust fund. The petitioner sought to justify his statements upon such examination upon the ground that Mrs. Lott had theretofore assigned in writing her entire interest in the trust funds to friends and relatives, reserving to herself only the right to the monthly payments during her lifetime. On the facts it is an exceedingly debatable question whether Mrs. Lott, in view of the assignment, could have compelled, as against the objection of the assignees, the payment to her of any more than the monthly allowance, and the petitioner testified that at the time of his said examination in supplementary proceedings Mrs. Lott had been fully paid up to that time under the contract. We see no reasonable basis for the finding of false swearing on the part of the petitioner under the evidence here presented.

[8] The action against the petitioner in Los Angeles county was at issue when the petitioner was examined before the board and is still pending. In that action the question of the validity of the trust agreement and the sufficiency of the accounting are involved. At all times the petitioner has been willing to have an adjudication in that case. On one occasion he went accompanied by his present attorney from San Francisco to Los Angeles for the purpose of trying the case, but the cause was continued because no department of the court was available to try the same. Anything said in this opinion, or the conclusion herein reached, should not be taken or considered as an adjudication of the issues involved in that litigation. The only effect to be ascribed to our determination in the present matter is that the evidence before us is insufficient upon which to base an order of disbarment or of suspension from practice.

In view of the pendency of the action in the superior court in and for Los Angeles county, and in view of the unsatisfactory state of the record herein, we think this proceeding should be dismissed without prejudice, to await the determination of the issues in said pending action.

It is so ordered.

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213 Cal. 367

WHITE MALLARD OUTING CLUB v. RECLAMATION DIST. NO. 1004.

Sac. 4459.

Supreme Court of California.

Aug. 12, 1931.

Waters and water courses 🔑156(4).

Where grantor reserves privilege of constructing and maintaining canal across lands conveyed, purchaser's assignee could not recover damages caused by, nor obtain injunction restraining, flooding of lands, where court found that flooding, if any, was necessary to enjoyment of water privilege.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by the White Mallard Outing Club against the Reclamation District No. 1004, a public corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

Rich & Weis, of Marysville, and Lawrence Schillig, of Yuba City, for appellant.

Rutledge & Rutledge, of Colusa, for respondent.

PRESTON, J.

The judgment appealed from must be affirmed and it is so ordered. Our reasons are to be found in the following observations:

Prior to 1917, Moulton Irrigated Lands Company and Gould Land Company, corporations, were the owners of a large area of land in Colusa county, the easterly boundary of which was Butte creek. In said year these companies entered into an agreement with William G. Henshaw to convey to him that portion of said lands, consisting of about nine hundred acres, bounded on the north by property of the Murdock Land Company, on the east and south by the waters of Butte creek and on the west by the Crocker levee and by a slough known as Drumheller slough, leading southeasterly from the south end of the levee to Butte creek. This tract lay between Butte creek and the remaining lands of the corporations.

In conveying these lands the then owners desired to retain for their remaining lands their riparian and other rights in the waters of Butte creek, together with the privilege of conducting said waters across the lands to be conveyed, and, accordingly, it was provided that they were to have the privilege of constructing and maintaining a canal, not to exceed fifty feet in width at the bottom, westerly across said lands, connecting said Butte creek with the east side barrow pits of said Crocker levee. The agreement of sale also provided for the dredging and deepening of the barrow pits from the point where the proposed canal would cut it, southerly to the point where it connects with said Drumheller slough. The slough itself was also to be cleaned and deepened, all for the purpose of drainage into Butte creek of surplus waters falling or used on the corporations' lands. Said corporations likewise reserved the right of private navigation up and down said slough, with the added privilege of entering upon the lands to be conveyed for improving and maintaining said diversion and drainage works.

These improvements, substantially as provided for, were constructed prior to 1918 and water was conducted through said canal to said barrow pits and there diverted and used upon the corporations' lands. But to properly use said waters, it was necessary to cross the said Drumheller slough, and this, of course, in view of the slope and deepening thereof, required the construction of a dam across the slough. This, too, was erected prior to 1918. Later, and in 1924, a more permanent and perhaps higher dam was installed, with a large pipe underneath to be used in operating it and kept open or closed by respondent at its option in using the water. It is around the manipulation and use of this pipe that the controversy before us centers.

It should be further noted that in 1921 said lands were conveyed to Henshaw by a deed containing substantially the covenants of the agreement. In 1923 plaintiff succeeded to these lands. Defendant has succeeded to the rights of said corporations to the use, maintenance, and control of said diversion and drainage works.

Plaintiff, complaining about the overflow of its lands, caused by manipulation of said pipe in the dam across said slough, sued for an injunction against threatened injury and for damages resulting to it from the operations during the year 1927. Defendant set up its rights under said contract and deed and claimed to have been faithfully following their provisions. Defendant was sustained by the court below with ample findings of fact, followed by a judgment from which plaintiff appeals.

As above noted, plaintiff complains only of the flooding resulting from the closing of the pipe underneath said dam. In other words, it admits a servitude upon its lands in favor of respondent, but denies the extent of the burden asserted by respondent. The essence of the complaint is found in certain paragraphs of the agreement, which may be paraphrased to read as follows: "* * * Such work to be reasonably adequate to protect the lands hereby conveyed from flood by reason of the conducting or discharge into said waterways of drainage water from the lands now owned by the corporations, or of water necessary for irrigation as contemplated by the terms hereof. * * * The rights of the corporations to use each such slough, barrow pit or canal * * * are conditioned upon the corporations, their successors or assigns * * * keeping the waterway so used clear so that the waters may freely flow therein to the end that the lands to be conveyed shall be protected from drainage or irrigation waters to the extent as herein provided. * * *" But it must be noted that by other clear provisions the right to construct and maintain the canal, together with the right to make convenient, effective, and beneficial use of the waters extracted from Butte creek, is also given.

The court finds that the flooding, if any, as now practiced, is necessary to the use and enjoyment of this water privilege. This finding must be removed for appellant to prevail. We are in no way referred to an absence of evidence to support it, however; appellant rests solely upon the interpretation of said provisions that respondent must not cause any backwater upon the land or to any extent retard the free flow of water through the various channels. This, as already stated, is not in accord with the interpretation of the covenants as a whole. When it may be said that defendant is unnecessarily flooding these lands, then plaintiff will have a cause of action in this behalf. Besides the court further finds that no greater overflow prevails than would have prevailed had the canal not been constructed or the slough deepened or obstructed by said dam, the lands in a natural state being wet during the summer months.

Under the findings there is nothing at this time of which appellant may legally complain.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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213 Cal. 406

PEOPLE v. MALONE et al.

Cr. 3445.

Supreme Court of California.

Aug. 17, 1931.

1. Criminal law 🔑304(1).

Court takes judicial notice that certain date fell on Sunday.

2. Courts 🔑85(2).

Provisions of court rule following substantially language theretofore used in repealed law are to be interpreted in same manner.

3. Time 🔑10(1).

Generally, when last day of performance of act provided by law falls on Sunday or holiday, that day is excluded in computation of time.

4. Time 🔑10(9).

Notice and application presenting grounds of appeal six days after oral notice of appeal were within time, where fifth day fell on Sunday (Judicial Council Rule 2, § 7; Pol. Code, §§ 12, 13).

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Odell Malone and another were convicted of burglary, and they appeal. On motion to dismiss appeal.

Motion denied.

For opinion of District Court of Appeal herewith adopted in part, see 297 P. 964.

Rowen Irwin and W. C. Dorris, both of Bakersfield, for appellants.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Ray Bailey, Dist. Atty., and Thomas Scott, Jr., Asst. Dist. Atty., both of Bakersfield, for the People.

WASTE, C. J.

Following their conviction in the Superior Court upon charges of the commission of a felony, the defendants Malone and Brown appealed to the District Court of Appeal. The Attorney General moved to dismiss the appeal on the ground that it was not perfected as required by section 7, rule II, Rules of the Supreme Court and District Courts of Appeal, which requires that an appellant "must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon." The rule further provides: "If such application is not filed within said time, *the appeal shall be dismissed.* * * *" (Italics ours.)

In the case of these defendants, the judgment was entered in the Superior Court, and notice of appeal orally given on July 15, 1930. The five-day limitation fixed by the rule, supra, expired with Sunday, July 20, unless the fact that the fifth day was a holiday excluded it from the calculation. Civ. Code, §§ 10 and 11; Code Civ. Proc. §§ 12 and 13; Pol. Code, §§ 12 and 13. The District Court of Appeal of the Fourth District took the view that the Code sections, supra, apply, and refused to dismiss the appeal. We are satisfied with the decision of that court, per Mr. Justice pro tem. Lamberson, concurred in by Mr. Presiding Justice Barnard and Mr. Justice Jennings, and adopt the following portion as the opinion of this court:

[1] This court will take judicial notice of the fact that July 20, 1930, the fifth day after the giving of notice of appeal, fell on Sunday.

[2] The provisions of the rule of the Judicial Council above cited follow substantially the language theretofore used in section 1247 of the Penal Code prior to its repeal in 1927 (St. 1927, p. 1048), and are to be interpreted in the same manner. The provisions of that section and of the rule of the Judicial Council have been held to be mandatory in effect. People v. Riga, 104 Cal. App. 477, 285 P. 1069; People v. Shaw, 81 Cal. App. 312, 253 P. 747. In the latter case it was held that even though the objection is not raised by the respondent, the court would have no jurisdiction to proceed if it should appear to the

court that the appellant has failed to comply with the provisions of section 1247 of the Penal Code.

In none of the cases, however, do we find that the question which has arisen here was before the court.

Section 12 of the Political Code provides as follows: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

Section 13 of the Political Code provides: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law, or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed."

Like provisions are also contained in the Civil Code and Code of Civil Procedure, and section 4480 of the Political Code says that "with relation to each other, the provisions of the four codes must be construed * * * as though all such codes had been passed at the same moment of time, and were parts of the same statute."

[3] An examination of the California cases discloses that generally speaking when the last day of performance of an act provided by law falls on a Sunday or a holiday, that day is excluded in the computation of time and the act may be performed on the next succeeding day. It has been so applied in the case of service of notice of appeal (Estate of Rose, 63 Cal. 346), in the case of filing an undertaking on appeal (Robinson v. Templar Lodge, etc., 114 Cal. 41, 45 P. 998; Rauer's Law, etc., Co. v. Standley, 3 Cal. App. 44, 84 P. 214), to the service or presentation of a bill of exceptions (Derr v. Busick, 63 Cal. App. 134, 218 P. 280), to the filing of points and authorities upon appeal (Troy, etc., Co., Ltd., v. Drivers' etc., Co., 13 Cal. App. 115, 109 P. 36), to an application for relief from a judgment made under section 473 of the Code of Civil Procedure (Bell v. Krauss, 169 Cal. 387, 146 P. 874), and to the time for commencing an action to foreclose a mechanic's lien (Mox v. Leventhal, 89 Cal. App. 253, 264 P. 562).

Those of the above cases which relate to the perfecting of appeals are peculiarly applicable to the condition under consideration, because they cover similar situations, although they are civil and not criminal cases.

In the case of People v. Preciado, 31 Cal. App. 519, 160 P. 1090, it was said, quoting from Estate of Nelson, 128 Cal. 242, 60 P. 772: "'The right of appeal is conferred by the Constitution, and statutes and rules of procedure for its exercise are to be liberally construed. We are not disposed to dismiss an appeal upon grounds that are purely technical, where there has been no violation or disregard of any express rule of procedure.'"

In the case of People v. Bryant, 207 Cal. 450, 278 P. 1025, involving a motion for dismissal of a criminal appeal under section 1247 of the Penal Code, the court said: "It is the policy of this court, of course, to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technicalities."

The outstanding exception to the general rule hereinbefore stated is found in the interpretation by the courts of that part of section 660 of the Code of Civil Procedure, which provides in substance that the power of the court to pass upon a motion for a new trial shall expire within two months after the verdict of the jury or service on the moving party of notice of the entry of the judgment, and that if such motion is not determined within said two months the effect shall be a denial of the motion, without further order of the court. This provision constitutes a limitation upon the power of the court and is to be distinguished from the rules governing the procedure to be followed by the parties to the action. No particular stress is to be laid upon the use of the word "within," because an examination of the cases hereinbefore cited, particularly those relating to the service of notice of appeal and the filing of an undertaking on appeal, discloses that the word "within" was used in the sections of the Code of Civil Procedure under consideration. Section 939 of the Code of Civil Procedure provides that "an appeal may be taken from any judgment or order of a superior court * * * within sixty days from the entry of said judgment or order." Section 940 of the Code of Civil Procedure formerly provided in part as follows: "The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed. * * *"

[4] We are of the opinion that the provisions of the Political Code hereinbefore cited are applicable to the filing of the notice and application prescribed by section 7 of rule II of the rules of the Judicial Council, that each of the appellants acted in substantial compliance with said rule, and that the motion to dismiss the appeal should be denied.

In so far as there is anything in People v. Riga, supra, contrary to the holding here, the holding in that case must give way to the decision in the present case.

The motion of the Attorney General to dismiss the appeal is denied, and the cause is retransferred to the District Court of Appeal of the Fourth Appellate District for consideration of the questions raised by the appeal.

We concur: SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

213 Cal. 394

NORDQUIST v. MALMBERG.

Sac. 4415.

Supreme Court of California.

Aug. 15, 1931.

1. Husband and wife ⚷49½(7).

That husband paid taxes and repairs on property conveyed to wife alone, purchase price being paid by husband, is not always sufficient to overcome presumption of gift to wife.

2. Husband and wife ⚷49½(7).

Presumption that property conveyed to wife alone and paid for by husband was intended as gift to wife *held* not overcome by statutory presumption respecting resulting trusts (Civ. Code, § 853).

> Civ. Code, § 853, provides that, when transfer of real property is made to one person and consideration therefor paid by or for another, trust is presumed to result in favor of person by or for whom such payment is made.

3. Husband and wife ⚷49½(8).

Finding that conveyance to wife alone, price being paid by husband, was intended as gift to wife, *held* supported (Civ. Code, § 853).

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Peter Nordquist against E. A. Malmberg, as administrator of the estate of Christina Nordquist, deceased. From a decree in favor of defendant, plaintiff appeals. Affirmed.

G. B. Hjelm and Harold L. Hjelm, both of Turlock, for appellant.

W. Coburn Cook, of Turlock, for respondent.

SEAWELL, J.

Appeal from a decree in favor of defendant administrator decreeing that certain real property situate in the city of Turlock and described in a certain deed executed by third parties in which the wife of appellant since deceased, was named as the sole grantee, the purchase price of which was paid by appellant husband, was a gift from said husband to his wife. Said real property when conveyed, November 17, 1917, was approximately of the value of $1,200. The appellant, Peter Nordquist, and his deceased wife, Christina Nordquist, were of Swedish descent, if not of Swedish birth. They intermarried in Minnesota in 1915. The wife had been married twice before and the husband had been married once. Both had children by said former marriages. Both had small estates before intermarriage, ranging in value from $2,000 to $3,000, respectively. They removed from Minnesota to the city of Turlock, Cal., on October 10, 1917, and shortly after their arrival at Turlock entered into negotiations which terminated in the purchase, on November, 17, 1917, of the home owned by Arvid Anderson and wife and situate in the city of Turlock at the price of $1,200, the whole of which sum was the separate funds of appellant. The deed was duly recorded. Mrs. Nordquist was the aunt of Mrs. Anderson. Mrs. Nordquist was made the sole grantee in said deed. This was with the consent of appellant husband. About one year thereafter a second deed, describing the same premises, was executed by the Andersons to Mrs. Nordquist. This deed contained the clause "as her sole and separate property." Said second deed was made and executed without the knowledge of appellant. Said deed, however, upon being duly recorded, was placed in a joint depository of said spouses, where it seemingly remained until Mrs. Nordquist's death, which occurred in 1926, approximately eight years after its execution. The real property in suit was inventoried as the separate property of decedent, and, by the decree of distribution appellant, as the heir of said decedent, was awarded a one-third interest therein. Appellant was not at any time represented by counsel at said probate proceedings, and, although present when the petition for distribution came before the court, he made no objection thereto. The probate judge, nevertheless, thereafter, upon motion made by counsel retained by him, set aside said decree of distribution in order to give him an opportunity to litigate the merits of his claim to the effect that he had no intention of making a gift of said property to his wife, and, inasmuch as he had paid from his separate estate the whole consideration therefor, a trust resulted in his favor, as provided by section 853, Civil Code.

[1, 2] Appellant testified that he had paid all taxes levied against the property during the eight years he and his wife resided thereon, and had made repairs to render the residence habitable in the sum of approximately $170. Such acts, although constituting acts of ownership, are not in every case sufficient to overcome the presumption of gift arising from relationship. Kimbro v. Kimbro, 199 Cal. 344–347, 249 P. 180. Nor is the presumption that the property was intended as a gift to the wife as her separate property overcome or affected by the presumption arising by virtue of the facts recited in section 853, Civil Code. Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pa. 657; Faylor v. Faylor, 136 Cal. 92, 68 P. 482; Hamilton v. Hubbard, 134 Cal. 603, 65 P. 321, 66 P. 860; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180.

[3] The sole question presented is as to the sufficiency of the inferences arising from the acts and the several major facts and circumstances disclosed by the transaction and offered in rebuttal of the testimony given by the appellant, the principal witness on his own behalf. While the way may have been open upon the record for the trial court to have decided the case either way, we cannot say that its findings are not supported by the evidence.

The court made several findings, but we deem it unnecessary to refer specifically to all of them, inasmuch as the entire cause is ruled by the finding that the appellant, by causing the deed of November 17, 1917, to be executed in favor of his said wife, thereby intended to make a gift to her of the real property therein described. We have given no probative value whatsoever to the second deed, and it is not regarded as an important factor in the case. The same may be said concerning the issues of estoppel and the statute of limitations.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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213 Cal. 233

JOINT POLE ASS'N v. STEELE et al.

S. F. 13456.

Supreme Court of California.

July 30, 1931.

Rehearing Denied Aug. 27, 1931.

1. Fraudulent conveyances 🔑122(3).

Creditor taking assignment of insolvent debtor's contract to secure payment of due debts and future advances was not fraud upon other creditors, no bankruptcy proceedings having been taken.

2. Execution 🔑35.

Execution creditor was not entitled to sums due debtor under contract assigned to another creditor before levy, notwithstanding assignment was instrument of security only.

3. Fraudulent conveyances 🔑27.

Written assignment of contract as security, duly executed and all delivery and change of possession that could be made being made, *held* valid pledge (Civ. Code, § 3440).

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Interpleader by Joint Pole Association, a voluntary association, against J. A. Steele and others, including the Acme Gravel Company. From a judgment in favor of the Acme Gravel Company, J. A. Steele and another appeal.

Affirmed.

L. L. Steele, of Oakland, for appellants.

Augustin Donovan and James R. Agee, both of Oakland, for respondent.

PRESTON, J.

On March 9, 1927, both respondent Acme Gravel Company and appellant J. A. Steele were creditors of defendant Harry B. Williams, the former in the sum of $1,572.60, the latter in the sum of about $2,500. Apparently Williams was a contractor engaged in laying cement sidewalks, to whom respondent had furnished materials for that purpose and expected to supply further materials thereafter. On March 7, 1927, Williams had entered into a contract in writing with the plaintiff, Joint Pole Association, to repair holes in cement sidewalks and to receive therefor the agreed price of "twenty cents (.20) per surface foot." On said March 9th respondent Gravel Company took an assignment of said contract from said Williams which recited a consideration of $1,572.60, and provided that "all monies due or to become due" under the contract were assigned to it.

Formal notice of this assignment was given to plaintiff Pole Association on September 8, 1927. Appellant Steele, however, had, on May 24, 1927, reduced his claim to judgment and on June 24, 1927, the sheriff of the city and county of San Francisco levied an execution by way of garnishment upon plaintiff Pole Association seeking possession of all sums due Williams under the terms of said contract above referred to. With both parties to this appeal claiming the fund, plaintiff interpleaded them and asked the court and was allowed by it to pay the sum due to Williams, to wit, $1,010.88, into court. Williams was also made a defendant. He disclaimed any interest in the fund, however, and cast his lot with respondent in the controversy.

Issues were made up between respondent and appellant Steele as rival claimants. The case was tried by the court without a jury. Findings were made and judgment followed decreeing the whole of said sum to respondent gravel company. From said judgment, this appeal followed.

[1] Appellant claims that there was fraud between respondent gravel company and said Williams. The court found contrary to this contention, and we see no reason to disturb its finding in this respect. Apparently, as above noted, Williams was in the business of contracting for the construction of cement

sidewalks, and respondent was furnishing him with materials to carry on his business, and, for the purpose of securing payment of sums due for materials already advanced, and for further materials to be advanced thereafter, it took the assignment in question. Even though it is conceded by all parties that Williams then and at all times herein involved was insolvent, we cannot see that this fact is of controlling importance. Appellant took no steps to bring Williams before the bankruptcy court. No fault can be found with respondent's effort to secure itself both for past debts due it and for its future advances.

[2] Appellant, however, devotes the greater portion of his brief to the support of the contention that said assignment, taken in connection with the other facts and circumstances of the case, shows that it was but an assignment for security, and as such does not meet the requirements of the law as to chattel mortgages or as to pledges; consequently it was void as to him as an execution creditor. Considering all the facts and circumstances of the transaction, particularly the fact that at the time of assignment no sums had been earned thereunder, coupled with the ledger account kept by respondent of its transactions with Williams, and other facts not necessary to dwell upon, we are inclined to agree that the transaction between them was entered into by respondent to secure itself both as to existing indebtedness and as to future advances of construction materials, and said assignment was therefore an instrument of security only. But this observation does not entitle appellant to a reversal of the judgment.

[3] The assignment was a pledge, pure and simple, and in our opinion is valid as such. The contention that it was not supported by change of possession of the property and is therefore void under section 3440 of the Civil Code cannot be maintained. The instrument of assignment was duly executed, and all the delivery and change of possession that could be made of this chose in action was made. As early as Goldstein v. Hort, 30 Cal. 372, 375, 376, Currey, C. J., stated the rule as follows: "A delivery of the possession of the pledged property must be made to the pledgee, otherwise his right cannot be consummated. When the property is of a character or quality not capable of manual delivery, such as debts and choses in action, the same may be pledged by a written assignment or other effective means of transfer, as the transfer of the capital stock of a corporate company by the delivery of the scrip or certificate; or of goods at sea by an assignment of the bill of lading, which is deemed equivalent to actual possession, because it is a delivery of the means of obtaining possession."

Again Rhodes, J., stated the rule in Brewster v. Hartley, 37 Cal. 15, 25, 99 Am. Dec. 237, as follows: "Incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged." See, also, Gay v. Moss, 34 Cal. 125; Works v. Merritt, 105 Cal. 467, 38 P. 1109; 21 R. C. L., p. 648, § 14; 49 C. J., p. 918, § 44.

It is not contended by respondent that the assignment meets the test of a valid chattel mortgage. If Williams was insolvent at the time he gave a preference to respondent, appellant could have then acted to secure its just proportion of the insolvent's estate, but he did not avail himself of this remedy. There is no relief for him in this proceeding.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; NOURSE, Justice pro tem.

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213 Cal. 397

OREGON-CALIFORNIA LIVESTOCK CO. v. McDONALD et al.

Sac. 4438.

Supreme Court of California.
Aug. 15, 1931.

1. Bills and notes 🔑527(2).

Evidence in action on notes *held* to support finding that holder agreed to take live stock and lien on realty covered by mortgages securing indebtedness in full settlement of personal liability of makers.

2. Appeal and error 🔑1011(1).

Appellate court may not disturb findings based on conflicting evidence.

3. Appeal and error 🔑843(2).

Whether money received from sale of live stock was credited on indebtedness before or after execution of renewal note *held* immaterial under court's findings.

This was so since the court found that holder of note agreed to take live stock and mortgage lien on realty in satisfaction of personal liability of makers, thereby rendering amount of unpaid indebtedness immaterial.

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by the Oregon-California Livestock Company against L. L. McDonald and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. T. Sharp, of Alturas, for appellant.

C. S. Baldwin, of Alturas, for respondents.

CURTIS, J.

This action was instituted to recover on three promissory notes, executed by the defendants L. L. McDonald and B. L. McDonald and secured by a mortgage upon certain real property and personal property. The mortgage was executed by the defendants above named and by defendant Mary E. McDonald in favor of defendant J. W. Seimens. The plaintiff became the owner thereof by assignment through the said Seimens. The real property described in said mortgage consisted of a quarter section of land in Modoc county, and the personal property therein described consisted of 229 head of cattle and their increase. The action was dismissed as to defendant Seimens, for the reason that no personal service of summons has been made upon him. While the defendant Mary E. McDonald did not sign either of said promissory notes as maker thereof or otherwise, she did sign and execute the mortgage given to secure same, which, after referring to the principal amount secured by said mortgage, with interest and charges and attorneys' fees, contains a further covenant reading as follows: "And we do for ourselves, our heirs or assigns (do) covenant and agree to pay all of said sums of money hereinbefore mentioned."

The action was tried, and the court below rendered judgment for the amount due on the promissory notes, with costs and attorneys' fees, and for the foreclosure of the mortgage, directing the sale of the real property described in the mortgage and the application of the proceeds of the sale to the satisfaction of the judgment, but declined to render personal judgment against said defendants or any of them.

Plaintiff, the appellant, contends in the first place that it is entitled to a personal judgment against the defendant Mary E. McDonald under and by virtue of the provisions of the mortgage quoted above to the same extent and in the same manner as if she had with her codefendants signed the original promissory notes. From the view we take of the case it will not be necessary for us to decide this point.

[1] The court found in pursuance to the allegations of the answer of the defendants that in November, following the execution of the promissory notes in April, 1923, the plaintiff agreed with defendants that, if they would deliver to plaintiff the possession of said live stock mentioned in the mortgage and concede to plaintiff the ownership of said stock, it would release said defendants from all personal liability on said promissory notes and mortgage. The court also in its findings expressed this agreement in the following words: "That is to say, plaintiff agreed to take said cattle and the said lien on said real estate in full settlement and satisfaction of all debts owing to it by the said McDonalds, or either or any of them." The court further found that in pursuance of said agreement "the said L. L. McDonald did deliver and cause to be delivered to plaintiff all of said cattle, and at the time of the agreement for the delivery of said cattle paid to plaintiff the sum of $700 that he had received from the sale of certain of said cattle."

[2] There is ample evidence in the record to support these findings. It is conceded that said live stock was delivered to the plaintiff as found by the court, and that plaintiff sold the same and kept the entire proceeds of said sale. The defendant L. L. McDonald testified that, at the time said cattle were delivered to the plaintiff, the agent of plaintiff, C. L. Jamison, accepted said cattle in full settlement of the personal liability of the McDonalds for said indebtedness, and agreed to take the mortgage lien upon the said real and personal property in full settlement and satisfaction of the said indebtedness. While Jamison denied that any such agreement was made by him, no question is made as to the authority of Jamison to bind his principal by his said agreement. The testimony of Jamison therefore merely created a conflict in the evidence, which the trial court resolved in favor of said defendants. Under these circumstances, it is not within the province of a reviewing court to disturb or in any way modify the findings in question.

[3] A further contention is made by appellant that the court erred in crediting upon the amount due on said promissory notes the sum of $3,000 received from the sale of a portion of said live stock. It is contended that this amount was received by plaintiff and applied on the indebtedness represented by said promissory notes prior to their execution; it being conceded that the promissory notes sued upon were in part renewals of prior promissory notes representing the same indebtedness. The time when this $3,000 was credited on said indebtedness becomes immaterial, in view of the finding of the trial court that plaintiff agreed to take the cattle and the mortgage

lien on the real property in full settlement and satisfaction of said indebtedness so far as the McDonalds were personally liable therefor.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

213 Cal. 362

LANKTREE v. SPRING MOUNTAIN ACRES, Inc., et al.

Sac. 4380.

Supreme Court of California.

Aug. 8, 1931.

1. Corporations 🔑437.

Deed delivered by grantor to another for delivery to grantee corporation when organized, duly accepted thereby, and recorded, vested title in corporation.

2. Corporations 🔑437.

Incorporators' mutual promises to convey ranches to corporation *held* sufficient consideration for deed.

3. Licenses 🔑39.

Grantor procuring temporary revocation of permit to issue stock *held* not entitled to cancellation of deed to corporation because stock certificate was not issued to her.

4. Cancellation of instruments 🔑24(2).

Grantor not rescinding contract, nor offering to restore benefit received from other parties' expenditures for improvements on land, *held* estopped to claim cancellation of deed to corporation.

In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Harriet C. Lanktree against the Spring Mountain Acres, Inc., and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Harry I. Stafford, of San Francisco, Allen C. Cunha, of Oakland, and Edward A. Cunha, of San Francisco, for appellant.

Nathan F. Coombs, of Napa, for respondents.

SHENK, J.

This is an appeal from a judgment for the defendant in an action to set aside a deed.

For many years the plaintiff was the owner of a ranch called "Spring Mountain Ranch," comprising some 688 acres, and situated in Napa and Sonoma counties, this state. Prior to July, 1927, the property had become run down, the buildings dilapidated, and the owner had become financially involved. The Bank of America, St. Helena branch, held a trust deed against this property securing a loan of $3,900 which the bank was threatening to foreclose. Wilbur J. Lanktree, son of the plaintiff, and acting in her behalf, approached the defendant Roberts to enlist his interest in aiding the plaintiff in her financial difficulties. Mr. Roberts was in association with the defendant Robinson as building contractors in Oakland and elsewhere, conducting their business through the medium of a corporation called Roberts-Robinson Company. At the solicitation of the son, Mr. Roberts visited the plaintiff's ranch, and, after a considerable lapse of time, became interested in a proposition to improve said ranch and convert it into a resort of mountain cabins, golf course, etc., as well as to conduct ranching operations in conjunction with an adjoining 240-acre ranch acquired by Mr. Roberts. During his investigation and negotiations with the plaintiff, Mr. Roberts advanced money to pay taxes and incidental expenses on the plaintiff's ranch. Finally an agreement was reached whereby a corporation was to be formed under the name of Spring Mountain Acres, Inc. To this corporation the title to the two ranch properties was to be conveyed and the capital stock of the corporation was to be 250 shares of the par value of $100 each; 123 shares were to be issued to the plaintiff, 64 shares to Mr. Roberts, and 63 shares to Mr. Robinson. The defendants Roberts and Robinson agreed to assume and pay the $3,900 obligation secured by the trust deed on the plaintiff's property.

Pursuant to the agreement, the plaintiff, in January, 1928, executed a deed conveying title to her ranch to "Spring Mountain Acres, Inc.," and delivered it to Mr. Roberts for the purpose of carrying out the transaction. Thereafter, in March, 1928, the corporation was organized by the plaintiff, Roberts, and Robinson; a qualifying share of stock having been issued to each. The plaintiff, as secretary of the corporation, joined in an application to the commissioner of corporations for a permit to issue the stock upon the representation to the commissioner that the two ranches were to become the property of the corporation. The permit was issued upon the condition, among others, that the lands should be conveyed to the corporation free and clear of all incumbrances. The 240-acre ranch was deeded to the corporation free and clear, and the deed to the Spring Mountain Ranch executed by the plaintiff to said corporation was filed for record on July 13, 1928.

Five days later this action was brought to set aside and cancel the deed, alleging in the first count that the deed had never been delivered and had been recorded without authority and in violation of an alleged trust on the part of Roberts, and in the second count that there was no consideration for the deed.

The trial court found that delivery of the deed had been accomplished; that there had been no violation of any alleged trust relation existing between the plaintiff and the defendant Roberts; that there was a good and valid consideration for the deed; and that the plaintiff was estopped by her conduct from claiming a cancellation of said deed. Judgment for the defendants was accordingly entered.

It is contended on this appeal (1) that there was no delivery of the deed to the defendant corporation; (2) that there was no consideration for the deed; and (3) that the permit of the corporation commissioner was not complied with, and that therefore the corporation never became entitled to issue the certificate of stock to the plaintiff.

[1, 2] The evidence is sufficient to sustain the finding that the deed was delivered. It was handed by the plaintiff to Mr. Roberts in pursuance of the agreement to consummate the conveyance of the title to both ranches to the corporation to be formed. A deed executed to a corporation prior to its organization, but, as here, delivered to another with the intention to have it delivered to the corporation after its organization, and duly accepted by the corporation and recorded, vests title in the corporation. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 P. 295; Clark & Marshall, Private Corporations, vol. 1, § 111a, p. 336; Thompson on Corporations (3d Ed.) vol. 4, § 2521. The mutual promises of the incorporators here in evidence were a sufficient consideration for the plaintiff's deed. West v. Crawford, 80 Cal. 19, 21 P. 1123. This is especially so since in compliance with said agreement the 240-acre adjoining ranch was conveyed to said corporation before the plaintiff's deed was delivered to the corporation.

[3] At the instance of the plaintiff, the permit of the corporation commissioner was temporarily revoked, and the stock certificates therefore have not been issued. However, upon the acceptance of her deed by the corporation, the plaintiff became the equitable owner of her proportion of the stock. The stock certificate would be evidence only of such ownership. In any event, the plaintiff is in no position to insist, under the circumstances here shown, that the deed be canceled because the certificate had not been issued. The actual payment of the $3,900 trust deed note was not made a condition precedent to the passing of title to the corporation. The defendants Roberts and Robinson assumed the obligation, and accordingly took effectual steps to prevent a sale under the trust deed.

[4] The plaintiff did not rescind the transaction or offer to restore to the defendants, or any of them, the benefit she had received from the expenditure by the defendants Roberts and Robinson of over $3,200 in repairs and improvements on her ranch, paid and expended in reliance upon the validity and sufficiency of her deed to the corporation. At the trial, the plaintiff, through her counsel, disavowed any intention to restore, and expressly refused to make any restitution on account of the expenditures made for the benefit of Spring Mountain Ranch. These facts were sufficient upon which to base the finding and conclusion of the court that the plaintiff was estopped from claiming a cancellation of the deed.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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213 Cal. 356

KOHLER v. THOMAS et al.

Sac. 4456.

Supreme Court of California.

Aug. 8, 1931.

1. Adverse possession ⚷114(1).

Evidence *held* insufficient to establish title to land in plaintiff by adverse possession (Code Civ. Proc. § 322).

2. Adverse possession ⚷31.

That adverse claimant had land resurveyed with knowledge and without objection on part of record owner *held* not such constructive notice of adverse claim as would satisfy statute (Code Civ. Proc. § 322).

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action to quiet title by Theodore A. Kohler against Frank V. Thomas and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

E. H. Armstrong, of Grass Valley, for appellant.

W. E. Wright, of Nevada City, and Nilon, Hennessy & Kelly and Lynne Kelly, all of Grass Valley, for respondents.

SHENK, J.

This is an appeal from a judgment for the defendants in an action to quiet the plaintiff's title to real property in Grass Valley. The court granted a motion for a nonsuit after both sides had introduced evidence and rested.

The action covered numerous pieces of property, but was finally narrowed down to a controversy over the title to what is called "Old Block Mining Claim," consisting of about ten acres of unimproved land. The original claim was patented to Reuben Thomas, father of the defendant Frank V. Thomas, in 1871. The defendant Thomas acquired a three-sevenths interest in the property in 1904. In 1912 he conveyed his interest therein to one Hughes. Thereafter on July 11, 1921, he reacquired said three-sevenths interest. In 1925 he acquired the remaining four-sevenths.

In 1919 the plaintiff commenced an action for an unpaid grocery bill against the defendant Thomas in the justice's court of Grass Valley township and levied an attachment against said real property. The action went to judgment, execution was issued, and the constable went through the form of selling the property to satisfy the judgment and issued his deed. The evidence shows that the property was sold under execution and the constable's deed was issued six months prior to the time the defendant reacquired the three-sevenths interest, and that from the time the action was commenced until six months after the issuance of the constable's deed the defendant Thomas had no interest in said property. Upon this showing the plaintiff during the trial very properly ceased to press his claim of title based on the constable's deed, but insisted upon the sufficiency of his proof of title by adverse possession. The trial court held that the proof in this respect was fatally lacking in that the essential elements of actual, continuous, uninterrupted and adverse possession by the plaintiff for the statutory period was not shown to exist.

[1, 2] The real property is vacant land adjoining property owned by the defendant Thomas and on which he resided. The land involved herein was not inclosed by a fence or otherwise, although a wire fence on the east side thereof had existed for many years. The plaintiff had never lived on the property. The only semblance of occupancy on his part was that many times during the course of the years he and his family had gone into the property for a picnic or outing, the plaintiff's son had been thereon many times hiking and hunting, and the plaintiff had authorized others at times to cut and remove manzanita wood therefrom. There is no evidence that the plaintiff or any member of his family or anyone authorized to act for him ever resided on the property. Furthermore, the plaintiff never advised the record owner during the time he claimed the prescriptive right to have attached that he was claiming adversely to such owner. The defendant Thomas did not know of the adverse claim until the present action was filed, and there is nothing in the evidence upon which he or his predecessor may legally be charged with notice of the adverse claim on the part of the plaintiff. The fact that the plaintiff had the land resurveyed with the knowledge and without objection on the part of the defendant Thomas is not such constructive notice as would satisfy the statute (Code Civ. Proc. § 322). Hart v. All Persons, etc., 26 Cal. App. 664, 148 P. 236.

From a review of all the evidence it must be declared that a prima facie case was not presented in favor of the plaintiff and the court properly granted the motion for nonsuit.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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213 Cal. 403

GREEN v. STATE BAR OF CALIFORNIA.

L. A. 12540.

Supreme Court of California.

Aug. 15, 1931.

Attorney and client 🔑58.

Attorney misleading court by giving false testimony concerning nonexistent person should be suspended from practice for one year (Code Civ. Proc. § 282 (4).

In Bank.

Proceeding by E. S. Green to review a recommendation of the State Bar of California for petitioner's disbarment.

Petitioner suspended from practice of law for one year.

Earle Stuart Rhode and E. S. Green, in propria persona, both of Los Angeles, for petitioner.

Benjamin F. Bledsoe and William M. Farrer, both of Los Angeles, for respondent.

WASTE, C. J.

Petitioner, E. S. Green, was brought before local administrative committee No. 3 of the State Bar for the county of Los Angeles, to show cause why he should not be disbarred, suspended, or reproved for conduct alleged to involve moral turpitude. At the conclusion of its hearings, the local committee made findings upon which it based a recommendation that petitioner be suspended from the practice of the law for the period of one year The board of governors adopted the findings, but has recommended that petitioner be disbarred. This is a proceeding to review the action and recommendation of the State Bar.

There is no merit in petitioner's points questioning the completeness of the record filed herein or attacking the regularity and validity of the proceedings taken against him. Nor do we think petitioner's client was coerced or compelled to divulge confidential communications bet[illegible] herself and petitioner. We therefore pa[illegible] a consideration of the circumstances giv[illegible] rise to petitioner's difficulties.

On May 11, 1929, Fannie K. Harder, a client of petitioner, purported to transfer and assign her interest in certain valuable securities, then held by the Title Guarantee & Trust Company, to one Frances Ficker; the latter name being the maiden name of the said Fannie K. Harder. The purported transfer to "Frances Ficker" was apparently prompted by the desire to avoid the levy of an attachment issued in the case of Platina Eschelbach v. Fannie K. Harder. A motion was subsequently made in the Eschelbach Case to set aside this purported transfer and to subject the securities, so fraudulently transferred, to the lien of the attachment. It is found by the local administrative committee that at the hearings on this motion, held respectively on June 27 and July 23, 1929, the petitioner had appeared for the defendant Fannie K. Harder, both as attorney and as witness, and testified under oath that he knew Frances Ficker to be an existing person and that she was his client and had been introduced to him by Mrs. Fannie K. Harder at the latter's home. The committee also found that prior to either of the two court hearings on the motion, the petitioner had been informed and advised by his client, Fannie K. Harder, that her maiden name was Frances Ficker, and, knowing that Fannie K. Harder and Frances Ficker were one and the same person, and knowing that Frances Ficker was the maiden name of Fannie K. Harder, petitioner deliberately misled the court, and falsely testified as to the facts of the case, and permitted his client to testify in his presence to facts which the petitioner then knew to be false, and maintained silence before the court when he owed the duty to the court of bringing out the true facts, thereby working a fraud upon the court.

We have carefully examined the record in this proceeding, and conclude that while the evidence is conflicting in some particulars, there is ample to support the findings above narrated. In fact, petitioner himself testified before the investigating committee that he had never been introduced to any one by the name of Frances Ficker, nor had he ever handled any legal business for any one by that name. A reading of the entire record fails to convince us that petitioner was unaware of the fraud being practiced upon the court. His conduct was such as to constitute a violation of his duty as an attorney and officer of the court never to "mislead the judge or any judicial officer by an artifice or false statement of fact." Code Civ. Proc. § 282 (4).

In Bruns v. State Bar (Cal. Sup.) 1 P.(2d) 989, we suspended the offending attorney for a period of three months for an attempt to mislead the court by means of the inclusion of a false averment of fact in a pleading filed on behalf of a client. Petitioner's conduct is more reprehensible and deserving of greater condemnation and more severe punishment because his deception of the court resulted from the giving of false testimony while under oath in court.

It is therefore ordered that petitioner be suspended from the practice of the law in all the courts of this state for a period of one year, said suspension to become effective thirty days from the service of notice of the within order, said service to be made upon him by the clerk of this court by means of the United States registered mail.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

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213 Cal. 446

In re SILVA.

Sac. 4556.

Supreme Court of California.
Aug. 24, 1931.

1. Appeal and error ⚷640.

Where appeal is regularly taken and presents clerk's transcript and purported reporter's transcript, motion to dismiss appeal because transcript is incomplete must be denied.

2. Appeal and error ⚷931(1).

Every intendment favors findings and judgment below.

3. Appeal and error ⚷907(4).

Where transcript omits some of testimony, presumption is, in absence of anything to contrary in record, that omitted evidence authorized findings and judgment.

4. Appeal and error ⚷663(2).

Judge's certificate ostensibly authenticating reporter's transcript as complete report of proceedings does not conclude Supreme Court, where transcript is manifestly incomplete (Code Civ. Proc. §§ 473, 953, 953a).

5. Appeal and error ⚷648.

Notwithstanding filing of transcript on appeal, trial court *held* authorized to amend certificate thereto inadvertently stating that transcript was complete (Code Civ. Proc. §§ 473, 953).

6. Appeal and error ⚷648.

Proper procedure, whereby inadvertently omitted papers, etc., may be included in reporter's transcript certified and filed on appeal, is by application in first instance to trial court (Code Civ. Proc. §§ 473, 953).

7. Appeal and error ⚷650.

That respondent failed to bring judge's amended order of certification to transcript before Supreme Court by suggestion of diminution of record did not preclude Supreme Court from considering amended certificate under statute (Code Civ. Proc. § 953).

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Petition by Marie S. Canisso to have Mary Lopes Silva, an infant, declared an abandoned child. From a judgment for petitioner, the parents of the child appeal. Motion to dismiss the appeal.

Motion denied, and judgment affirmed.

Superseding opinion of District Court of Appeal in 295 P. 876.

T. F. Lopez, of Fresno, for appellants.

S. V. Cornell, of Turlock, for respondent.

WASTE, C. J.

[1] This is an appeal from a judgment declaring the infant daughter of the appellants to be an abandoned child. There is also a motion to dismiss the appeal on the ground that the transcript of the evidence is incomplete. The appeal was regularly taken, and we have before us a clerk's transcript and what purports to be a reporter's transcript. The motion must therefore be denied, and the appeal considered on the merits. Waymire v. California Trona Co., 176 Cal. 395, 398, 168 P. 563.

The proceeding is one prosecuted under subdivision 1 of section 15 of the Juvenile Court Law (Stats. 1915, p. 1225, and amendments; 1 Deering's Gen. Laws 1923, p. 1535, Act 3966), which provides, in substance, that a child left in the care and custody of another by his parents "without any provision for his support, or without communication from such parent or parents, for the period of one year with the intent to abandon," is deemed to be an abandoned person. Mary Lopes Silva, the child, about whom this proceeding revolves, is the infant daughter of the appellants. Several years prior to the commencement of this proceeding, the care and custody of the child was intrusted to the respondent Marie S. Canisso, a neighbor. The original understanding between the parties was that the child might remain with the respondent and her husband for a two weeks' period. For one reason or another, the child was permitted to remain with respondent uninterruptedly for approximately five years, during all of which time the respondent adequately cared and provided for her. Upon this and other evidence, the trial court found that the minor had been left in the care, custody, and control of the respondent for more than a year without any provision for her support and with the intent of her parents to abandon her. The appealing parents question the sufficiency of the evidence to support this finding.

[2, 3] The reporter's transcript does not contain all of the evidence adduced before the trial court for the reason that no reporter was present during the time respondent was testifying on direct examination. The following statement appears on page 1 of the reporter's transcript: "Mrs. Marie S. Canisso [the respondent] re-called for cross-examination." Inspection of the entire record fails to disclose a report of respondent's direct examination. The face of the transcript thus gives rise to an inference that at best it is but an incomplete and partial record of the proceedings had before the trial court. Without the benefit of the entire record, we cannot say that the evidence is insufficient to support the finding of an abandonment. Every intendment is in favor of the findings and judgment of the court below, and in support thereof it will be presumed that the omitted evidence authorized the same unless there is something in the record to overcome the presumption. Coleman v. Farwell, 206 Cal. 740, 742, 276 P. 335; Shepard v. Yale, 94 Cal. App. 104, 106, 270 P. 742; Owen v. Morton, 24 Cal. 373, 377, 378.

[4] Appellants contend that this presumption is inapplicable to the present case for the reason that we are precluded from going behind the trial court's certificate which purports to settle and authenticate the reporter's transcript as a complete report of all the proceedings had and taken before it. In support of this proposition, the appellants cite, among others, the case of Bell v. Brigance, 194 Cal. 445, 229 P. 27, 28. It was necessary, in that case, to determine whether or not the trial judge's certificate that the transcript was full and complete should prevail over the reporter's certificate that it was

incomplete and but a partial report of the proceedings. We held that the "certificate of the judge is the only certificate required or provided for by section 953a, supra, and is the only authentication of the transcript to which this court will look. The reporter's certificate may have been of assistance to the judge below * * * but it adds nothing to the authenticity of the transcript in question." It is intimated in the decision that, if a proper and contrary showing be made, the certificate of a trial judge as to the completeness of a transcript need not prove a stumbling block to the proper disposition of a cause. It is there declared that respondent "has not pointed out a single particular in which it [the reporter's transcript] fails to contain the matters required by the sections of the code. * * * No affidavits are presented here in support of his claim that a complete record has not been transmitted to this court. His contention must therefore give way in the face of the certificate of the judge attached to the transcript."

In the instant case, we have ample evidence before us to overcome the effect of the certificate attached to the transcript. In addition to the failure of the transcript to include a copy of respondent's testimony given on direct examination, it is admitted that the reporter was not in the courtroom while the respondent was testifying on direct examination. More important still, we have before us a certified copy of an order of the trial judge amending and correcting his original certificate to the transcript to conform to the facts. This amended certificate reads, in part:

"Whereas, * * * the Judge of the above entitled court, did certify that said transcript was a full, true, correct and fair transcript of the proceedings had at the trial and of the testimony offered or taken, and

"Whereas, said certificate was and is contrary to fact and contrary to the records and files of this court in the above entitled matter, and was inadvertently made, and it appearing proper that said certificate should be amended and corrected to conform to the truth and to the records and files of this court,—

"Now, Therefore, it is hereby ordered that said certificate be and the same is hereby amended to read as follows. * * *" The amended certificate then declares the reporter's transcript to be full, true, and correct, "except that said transcript does not contain any record of the direct examination of the petitioner in said matter, to-wit: Marie S. Canisso [respondent here], and that there was no official court reporter present at the time of the direct examination of the said Marie S. Canisso."

[5-7] We find no merit in the point that the court below was without authority to amend its certificate subsequent to the filing of the transcript in this court. It has repeatedly been held that a court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. Dowd v. Superior Court, 69 Cal. App. 4, 7, 230 P. 961, 962, and leading cases therein cited. A trial court may correct and augment an incomplete reporter's transcript, inadvertently settled, even subsequent to its filing in an appellate court. In the case last above cited it is held that the trial court might with propriety amend a settled transcript then on file in the appellate court, by adding thereto certain inadvertently omitted instructions. Such a course is declared to be proper because "the record on appeal, as certified to by the trial court, did not speak the truth." In fact, the proper procedure whereby inadvertently omitted papers, etc., might be included in a reporter's transcript duly certified and filed in an appellate court is by way of application, in the first instance, to the trial court for relief. Martin v. Pac. Gas & Elec. Co., 195 Cal. 544, 546, 234 P. 321. If a trial court may thus substantially amend its record on file in an appellate court so as to cause it to "speak the truth," we perceive of no good reason why it may not amend its certification thereof for the same reason. In Lapique v. Superior Court, 40 Cal. App. 582, 584, 181 P. 227, 228, it is intimated that, "if the order of settlement was made through mistake, inadvertence, surprise, or excusable neglect," relief may be had under section 473 of the Code of Civil Procedure. It may well be that the amended order of certification made herein was by way of relief under that section. Nor are we precluded from a consideration of such amended order of certification by reason of respondent's failure to bring it before us by suggestion of diminution of the record. Section 953 of the Code of Civil Procedure declares, in part: "If it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, *or on its own motion*, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal." (Italics ours.) A certified copy of the amended order of certification has been filed here, and we may with propriety, and under the authority of the above Code section, consider such amended order as though we had, of our own motion, required its production.

It being definitely established that the reporter's transcript now before us does not contain all of the testimony adduced before the court below, we are not in a position to declare the evidence insufficient to support the trial court's finding of an abandonment. Under the authorities already cited, it must be presumed that the testimony of respondent given on direct examination, and not included in the reporter's transcript, authorizes and sustains the finding.

The motion to dismiss is denied. The judgment must be, and it is hereby, affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.

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213 Cal. 370

ROBINSON v. HOALTON et al. (STEWART, Intervener).

Sac. 4388.

Supreme Court of California.

Aug. 12, 1931.

1. Gifts 🔑49(1).

Evidence sustained finding that father gave son all personalty on farm.

2. Evidence 🔑588.

Province of court in juryless trial is to weigh evidence as whole and determine which of conflicting statements to accept.

3. Gifts 🔑18(1).

Rule that oral gift is invalid in absence of actual or symbolical delivery is not always strictly applied, especially when parties are members of family occupying same house.

4. Gifts 🔑19(2).

Where parties are members of family occupying same house, it is sufficient, as regards delivery, if gift was completed and donor relinquished and donee acquired control and dominion over property.

5. Gifts 🔑49(3).

That father, after alleged gift of personalty to son, returned property for taxes as his own, did not conclusively show invalidity of gift.

Fact that father during the three years before his death continued to return personalty as his own did not conclusively show invalidity of gift, especially where it appeared that, after making valid conveyance of real property to son, father also returned such property to tax collector as his own, indicating that, notwithstanding transfer of both personal and real property, father simply followed course previously pursued by him in returning property for taxes.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by W. A. Robinson against Georgia M. Hoalton and another, with a cross-complaint by defendants and a complaint in intervention by Harriet W. Stewart, as administratrix of the estate of Alba G. Robinson, deceased. Judgment for plaintiff, and the intervener appeals.

Affirmed.

Eugene Selvage, of Eureka, for appellant.

Irwin T. Quinn, of Eureka, for respondent.

CURTIS, J.

This action was instituted to foreclose a mortgage given to secure a promissory note for $2,200, executed in favor of the plaintiff by the defendants. In their answer the defendants did not contest the execution and delivery of the note and mortgage, but set up as an affirmative defense to said action that the money, loaned them and to secure which said note and mortgage were given, was not the money of the plaintiff, but that it belonged to and was the money of Minnie Robinson. A cross-complaint was filed by defendants, setting up the same facts as were alleged in defendants' affirmative defense, and praying that the action abate for the reason that it was not prosecuted by the real party in interest. An amended cross-complaint was later filed, the allegations of which were not materially different from those of the original cross-complaint. An answer to this amended cross-complaint was filed by the plaintiff. This was the condition of the pleadings at the time the case was called for trial when, by leave of court, a complaint in intervention was filed by Harriet W. Stewart, as administratrix of the estate of Alba G. Robinson, deceased. An answer to the complaint in intervention was made by plaintiff and the action proceeded to trial manifestly upon the complaint, the complaint in intervention, and the answer thereto. The defendants evidently abandoned their cross-complaint, as no mention thereof is to be found in the findings or the judgment. The same attorney represented both the defendant cross-complainant and the plaintiff in intervention. The appeal from the judgment, which was in favor of the plaintiff and against both defendants and the intervener, was taken only by the intervener. The only parties therefore before this court are the plaintiff and the intervener. In her complaint in intervention, the intervener, as the administratrix of the estate of Alba G. Robinson, deceased, claimed that the money loaned to the defendants and secured by said note and mortgage, was the property of the said estate, and asks for a decree declaring that plaintiff holds said note and mortgage in trust for said intervener.

The trial resulted in a judgment and decree in favor of the plaintiff, foreclosing said mortgage and declaring that the entire proceeds of the sale be paid to the plaintiff. This judgment was predicated upon findings and conclusions of the trial court, fully supporting said judgment.

W. A. Robinson, the plaintiff herein, is the son of Alba G. Robinson, deceased. The defendant Georgia M. Hoalton, the intervener Harriet W. Stewart, and Minnie Robinson are the daughters of said deceased, and sisters of the plaintiff. During his lifetime Alba G. Robinson was the owner of a small dairy farm near Rio Dell in Humboldt county. He made his home with his wife and children on this farm for many years prior to his death. Some years before the death of their father, the defendant Georgia M. Hoalton, then Georgia M. Robinson, and Harriet W. Stewart, then Harriet W. Robinson, having married and made homes for themselves, left the family homestead. The plaintiff and Minnie Robinson never married during the lifetime of their parents. They remained with their father and mother on the farm until the death of the father. Minnie Robinson was defective mentally; she never married, and the plaintiff never left the farm until some time after the death of his parents. He assisted his father in the care of the farm and, after old age had rendered the father physically unable to perform manual labor, the plaintiff assumed active management of the farm and performed practically all the labor required for its upkeep.

On January 16, 1913, Alba G. Robinson executed a grant deed of the farm to the plaintiff, reserving, however, a life estate therein to himself, his wife and his incompetent daughter, Minnie Robinson, with a stipulation therein that the plaintiff should pay to Georgia M. Hoalton, one of the defendants, and Harriet W. Stewart, the intervener, the sum of $500 each. It was following the execution and delivery of this deed that the plaintiff assumed and actually took practically the entire management of the farm. Alba G. Robinson died intestate on November 9, 1916, his wife having predeceased him. After the death of his parents, the plaintiff continued to operate the farm and to provide a home for his incompetent sister. In the course of time he paid the sum of $500 to each of his sisters, Georgia M. Hoalton and Harriet W. Stewart, as directed by the grant deed from his father. In January, 1921, plaintiff sold considerable personal property, consisting of some fourteen head of cows, a horse, a plow, a disc harrow, mowing machine, and rake, for which he received between $2,300 and $2,400. Of this amount he loaned to the defendants Georgia M. Hoalton and her husband the sum of $2,200 and, to secure the payment thereof, received from them the note and mortgage which are the subject of this action. At the time of the execution and delivery of the deed from Alba G. Robinson to the plaintiff, there was a small amount of personal property on the farm belonging to the father. No mention of this personal property was made in said deed, and there was no written evidence of the sale or gift of it to the plaintiff by his father. The plaintiff, however, testified that at the date of the delivery of said deed, his father gave to him all the personal property then on the farm. The court found in accordance with this testimony. It further found that plaintiff "sold said personal property in January of 1921 and that thereafter and on April 18, 1921, he loaned some of the funds derived upon the sale of said personal property to the defendants, secured by a mortgage as set forth in the complaint. That said funds were plaintiff's own personal property," and that neither Harriet W. Stewart, as administratrix, nor the estate of Alba G. Robinson, deceased, had any interest in the same, nor did plaintiff hold the same in trust for the intervener.

[1, 2] This finding is in our opinion fully sustained by the evidence. The plaintiff testified that his father at the time he executed the deed to the real property referred to above, "turned over" the personal property then situated on the ranch. His testimony was as follows:

"Q. What did your father tell you at that time? A. * * * he would turn the thing over to me. He said I worked there long enough, and cooked and helped around the house. He was getting old and he was not able to do work. * * * "Q. Well your statement was that he will turn the thing over to you. He didn't say anything about turning the farming wagon over to you? A. I said the things, farming things.

"Q. He said I will turn the farming implements over to you? A. Yes sir. * * *

"Q. Did he say I will turn the stock over to you? A. Yes sir."

While in other parts of Robinson's testimony are found statements which to a certain extent might be held to conflict with these just quoted as to the exact words used by the elder Robinson on the occasion mentioned, it was the province of the trial court to weigh the evidence as a whole and determine for itself which of the conflicting statements, if there was any conflict in them, to accept. Having found that "Alba G. Robinson did during his lifetime convey all of the personal property on the Robinson ranch near Rio Dell in said county and state, to his son, W.

A. Robinson," we must assume that the trial court accepted the testimony of the plaintiff set out above as the true account of the transaction, which took place between father and son regarding the personal property, at the time the father made the conveyance of the real property.

[3, 4] It is contended by appellant, however, that even if we accept the evidence of the plaintiff as above related, still it is not sufficient to show a gift of the personal property by the father to the plaintiff, for the reason that a verbal gift is not valid unless there is an actual or symbolical delivery of the thing to the donee. While this is undoubtedly the general rule, it is not always strictly applied, especially when the parties to the gift are members of the same family and occupy the same house as a home. "The rule as to delivery is not so strictly applied to transactions between members of a family living in the same house, the law in such cases accepting as a delivery acts which would not be so regarded if the transactions were between strangers living in different places. It is not required that the thing given should be removed from their common residence. It is sufficient, if it clearly appears that the donor has relinquished, and the donee has acquired, all dominion over and control of the property, but even in such cases there must be something to show that the gift was completed." 28 Cor. Jur. 638. This exception to the rule we think is fully met by the facts in this case. While the property in question was not in the house in which the parties resided, it was upon the lands upon which they made their home. Most of the property was used in the care of the ranch and for the common good of both parties to the gift. The father having made final disposition of all his real property, it is only natural to suppose that he would take the same action regarding his personal property. As evidence that he had surrendered all control over his personal property, it appears that after the gift thereof to the plaintiff, the latter not only assumed entire charge of the ranch, but from that time on dealt with the personal property as his own, without any objection from his father. Furthermore, for almost five years after the death of his father and until its sale in January, 1921, he continued to use and treat the property as his own, even to the extent of selling the whole thereof without any objection or question by the appellant or her sister, Mrs. Hoalton. After the sale and in the following April he loaned the greater part of the money received from said sale to Mrs. Hoalton as his own money, neither of these two sisters disputing his right to do so. It was not until this action was brought in September, 1927, over ten years after the death of the father and more than five years after the personal property was sold and the loan made to the Hoaltons, that either Mrs. Hoalton or Mrs. Stewart made any claim that their brother was not the absolute owner of said personal property, or the proceeds of the sale thereof. And another full year went by before the intervener, having in the meantime been appointed administratrix of her father's estate, made claim that the money derived from the sale of said personal property belonged to her father's estate.

We think this evidence is sufficient to show that the elder Robinson relinquished to his son, and the latter acquired all dominion and control over, said personal property at the date shown therein, and that the gift was completed at said date. Furthermore, it seems inconceivable to us, if these two sisters had any question as to their brother's right to said personal property, that they would have remained silent during all these years and made neither claim to the property, either as heirs of their father or otherwise, nor protested against their brother's continued assumption of ownership over it. The further fact is significant that one of them went to the extent of borrowing from the brother as his money, practically the whole amount for which the personal property was sold.

[5] Appellant relies with considerable assurance upon the fact that the elder Robinson, during the three years intervening between the time when plaintiff claims a gift of the property to him and the death of his father, returned this personal property to the county tax collector as his own property. Appellant contends this evidence shows conclusively that the father had not relinquished all control over said personal property. We do not regard this evidence in any such conclusive aspect. It was only one of the circumstances to be considered by the trial court in passing upon the validity of the asserted gift. This evidence is considerably weakened in our opinion by the further showing that the elder Robinson, after the conveyance of his real property, returned the same for three successive years as his own property. Evidently in making his annual return to the county assessor, after the transfer of his property, he simply followed the course pursued by him in the years preceding the transfer. No question is made as to the validity of the transaction involving the transfer of his real property. The circumstance, therefore, that in his assessment returns for these years, he had also included the personal property as his own cannot be given any great significance. At most it would not be determinative of the validity of the gift of the personal property.

From the foregoing we conclude in the first place that, under the circumstances surrounding the parties, the evidence was sufficient to show a gift of said personal property by the elder Robinson to his son, the plaintiff herein, and that the conduct of the intervener and her sister, Mrs. Hoalton, for a period of over eleven years after the death of their father, was inconsistent with any theory that they, as heirs of their father or otherwise, ever had any interest in the personal property in question, or to the proceeds of its sale. After remaining silent all those years, it would tax the credulity of any court to believe that the belated assertion of their claim rested on any substantial grounds.

The judgment in our opinion should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

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213 Cal. 322

FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 12809; S. F. 14225.

Supreme Court of California.

July 31, 1931.

Rehearing Denied Aug. 27, 1931.

1. Master and servant 🔑361.

National bank operating, as executor, cigar business on behalf of estate *held* personally liable, to employee in business, not only for wages, but in compensation for injury, such employee being, under statute, "employee" of bank (St. 1917, p. 835, § 8; § 7, as amended by St. 1929, p. 306; p. 858, § 30 (e) (1), as amended by St. 1929, p. 1167, § 1).

> Since, under provision of Workmen's Compensation, Insurance and Safety Act, St. 1917, p. 835, § 8; § 7, as amended by St. 1929, p. 306, employee in business operated by bank as executor was "employee" of bank, it was personally liable in compensation for injuries to employee, of which liability it could be relieved only by finding of Industrial Accident Commission under the act, St. 1917, p. 858, § 30 (e) (1), as amended by St. 1929, p. 1167, § 1, that it had complied with act in protecting itself by procuring proper and adequate compensation insurance.
>
> [Ed. Note.—For other definitions of "Employé," see Words and Phrases.]

2. Banks and banking 🔑2.

In California, word "banking" includes business carried on by trust companies (St. 1909, p. 87, § 2, as amended by St. 1913, p. 137, § 2).

> [Ed. Note.—For other definitions of "Banking," see Words and Phrases.]

3. Insurance 🔑435.

Compensation insurer of bank with powers of trust company *held* liable for injuries sustained by employee in cigar business operated by bank as executor (St. 1917, p. 835, § 8; § 7, as amended by St. 1929, p. 306; St. 1909, p. 87, § 2, as amended by St. 1913, p. 137, § 2).

> Policy issued to bank insured bank against liability for injuries sustained by its employees in course of its banking business, classification of operations reading as follows: "Banking: Clerical Office Employees * * * including all Executive Officers." However, there were other provisions sufficiently broad and comprehensive to include employee in question, one particular provision of policy providing that agreement should apply to injuries so sustained by reason of business operations described in declarations which, for purpose of insurance, should include all operations necessary, incident, or appurtenant thereto or connected therewith, whether such operations be conducted at work places defined and described in declarations or elsewhere in connection with or in relation to such work places.

4. Partnership 🔑63.

In California, partnership is not usually considered as legal entity.

5. Insurance 🔑146(3).

In case of ambiguity, policy should be strictly construed against insurer who prepared it.

6. Partnership 🔑264.

Transfer of interest of any one partner dissolves partnership, no matter how many remain.

7. Insurance 🔑328(9).

Code provision that transfer of interest by one of "several" partners to others does not avoid insurance applies though there are but two partners (Civ. Code, § 2557).

> Civ. Code, § 2557, provides that a transfer of interest by one of "several" partners, joint owners, or owners in common, who are jointly insured, to others, does not avoid insurance, notwithstanding agreement that insurance shall cease upon alienation of thing insured. While word "several" sometimes means more than two, it also means different and separate and is often used to designate a number greater than one.
>
> [Ed. Note.—For other definitions of "Several," see Words and Phrases.]

8. Insurance 🔑311½.

Provision that transfer of partner's interest to others does not avoid insurance, being remedial, should be liberally construed (Civ. Code, § 2557).

9. Insurance 🔑332¼.

Transfer of interest of one of two insured partners to remaining partner *held* not to avoid workmen's compensation policy (Civ. Code, § 2557).

10. Insurance 🔑332¼.

Provisions of workmen's compensation policy that liability shall not be affected by employer's death *held* applicable, where death occurred prior to employee's injury.

11. Insurance 🔑392(8).

Insurer *held* not estopped, by reason of having sent bill for premium after injury, to deny liability on workmen's compensation policy, record not showing knowledge of facts allegedly constituting defense, or agency of person having knowledge.

In Bank.

Proceedings under the Workmen's Compensation Act by Mabelle Bojens and others, widow and dependent children, for the death of Rinehard Bojens, employee, opposed by the First National Trust & Savings Bank of San Diego, as executor of the estate of Charles Williams Hascall, deceased, employer, the Occidental Indemnity Company, insurer, and others. To review an award of the Industrial Accident Commission in favor of claimants and against employer, dismissing proceedings as to insurer and others, employer petitions for writ of review.

Award annulled and matter referred to Commission for further order consistent with opinion.

Superseding, and in part adopting, opinion of District Court of Appeal reported in 294 P. 87.

James G. Pfanstiel and Eugene Daney, both of San Diego, for petitioner.

Edward O. Allen, of San Francisco, and F. Britton McConnell and Jennings & Belcher, all of Los Angeles, for respondents.

CURTIS, J.

Petitions for transfer to this court of this proceeding, after decision by the District Court of Appeal of the Fourth District, were filed by the Occidental Indemnity Company and by the Industrial Accident Commission. These petitions we granted, and the whole matter is now before us as presented upon the original pleadings of the parties filed in the District Court of Appeal.

At the time of granting said petitions we were and still are in perfect agreement with the opinion of the District Court of Appeal in so far as it annulled the order of the commission dismissing the Occidental Indemnity Company from liability. We were in doubt, however, as to the correctness of the opinion in failing to annul the order of the commission dismissing the First National Trust & Savings Bank of San Diego and its insurance carrier, the Fidelity & Casualty Company of New York, from liability.

[1] There is no contention but that the First National Trust & Savings Bank of San Diego was during all of the times mentioned in the proceeding a corporation organized, existing, and doing business under the laws of the United States of America, and as such was authorized to carry on the banking business, both savings and commercial, and also to transact a general trust business. Being incorporated as a trust company, it had the power and authority to act as the executor of the last will of a decedent when appointed to act in that capacity by any court of competent jurisdiction. While acting as the executor of the will of a deceased, if it undertook to carry on any business on behalf of the estate of said decedent, it became personally liable to all persons employed by it in such business, not only for their wages, but, in our opinion, for compensation in case any of such employees sustained a compensative injury while in its employ. "While an executor or an administrator is bound to perform his decedent's contracts, except as authorized by will, or by statute, he cannot by virtue of his general powers as such make any contract which binds the estate, or create any debt or liability against the deceased, or the estate, which will authorize a judgment de bonis decedentis, even though it is made in the interest of and for the benefit of the estate he represents, and although he is described in such contract as personal representative." 11 Cal. Jur., p. 1046. "An executor or administrator does not, by his contracts, bind the estate he represents, but he is personally liable on his contracts for necessary matters relating to the estate, such as for services rendered in the performance of his duties as such." 11 Cal. Jur., p. 1048; Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P. 922, 52 L. R. A. (N. S.) 1152, Ann. Cas. 1915D, 742; Southern Pacific Co. v. Swanson, 73 Cal. App. 229, 238 P. 736. Under the provisions of the Workmen's Compensation, Insurance and Safety Act (sections 7 [as amended by St. 1929, p. 306] and 8), Bojens was an employee of the First National Trust and Savings Bank of San Diego. The latter was, therefore, personally liable in compensation for the injury to him and can only be relieved of this liability by a finding of the Industrial Accident Commission that it has

complied with the Workmen's Compensation Act in protecting itself by securing proper and adequate compensation insurance. Section 30 (e) (1), as amended by St. 1929, p. 1167, § 1. We think there can be no question but that this result followed from the facts shown herein. The bank, acting as executor, employed Bojens to perform certain duties for it in the settlement of said estate. As already noted, while the bank as executor employed Bojens, it was liable to him in its individual capacity for his wages. The amount paid as wages to Bojens would, if legally incurred, be allowed the bank by the court upon the settlement of the bank's annual or final account. Being the employer of Bojens at the time of the injury of the latter, the bank was liable for compensation to him on account of said injury, the same having arisen out of and in the course of his employment. It is therefore clear that the commission was in error in finding that the First National Trust & Savings Bank was not individually liable for the payment of compensation arising from the injuries sustained by Bojens.

[2, 3] As we have seen, the bank at the time of Bojen's injury carried compensation insurance with the Fidelity & Casualty Company of New York. The policy issued to the bank by this company insures the bank against liability for injuries sustained by its employees in the course of its banking business. This appears in certain "declarations" set forth therein under the head of "Classification of Operations." The classification of operations reads as follows: "Banking: Clerical Office Employees * * * including all Executive Officers." By section 2 of the California Bank Act (as amended by St. 1913, p. 137, § 2), "Banks are divided into the following classes: (a) Savings banks; (b) Commercial banks; and (c) Trust companies." In the Estate of Wellings, 192 Cal. 506, 519, 221 P. 628, 634, this court held "that it was competent for the Legislature, considering the business which trust companies are doing in this state, to define such business as banking." It would appear, therefore, that the word "banking" in this state, by legislative enactment and judicial sanction, has been accorded a meaning sufficiently comprehensive to include the business carried on by trust companies. Therefore, when the policy of insurance issued by the Fidelity & Casualty Company purported to cover the employees of the First National Bank of San Diego employed by it in its banking business, by its very terms it covered those employees of the bank whose duties were confined to the trust department carried on by the bank. It might be questioned whether the classification "Clerical Office Employees" would cover Bojens, who was, as we have seen, employed in the cigar business, which the bank as executor was carrying on. There were other provisions of the policy, however, which in our opinion extended the coverage provisions of the policy to all employees of the bank whether expressly included in the above classification or not. The policy issued by the Fidelity & Casualty Company was a standard form of policy provided by the law of this state. It contained provisions regarding occupations of the insured other than, and in addition to, those set forth in the "declarations" of the policy identically like those in the policy of indemnity considered by this court in the case of Ocean Accident & Guarantee Corp. v. Ind. Acc. Com., 194 Cal. 127, 228 P. 1. We there held that the description in the declarations of classes of occupations in which the insured might engage was not intended as limiting the list of operations, but only as fixing a premium rate applicable to the particular operations described therein; and that, even though the insured was engaged at the time of the injury in work outside the terms and limitations expressed in said classifications, the effect was not to take the employer or employee outside the protection of the policy, but only to require the employer to pay a different premium than that provided for the particular employments specified in the declarations. The court in that opinion followed its prior ruling expressed in the case of Worswick Co. v. Ind. Acc. Com., 181 Cal. 550, 185 P. 953. The rule thus announced is applicable to the facts in the present proceeding. While the occupation in which Bojens was engaged at the time of his injury may not have been expressed in the "classification of operations" contained in the "declarations" of the policy, other provisions of the policy were sufficiently broad and comprehensive to include him within the protection of the policy. One particular provision of the policy to which we refer is as follows: "This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations which for the purpose of this insurance shall include all operations necessary, incident or appurtenant thereto or connected therewith whether such operations are conducted at the work places defined and described in said declarations or elsewhere in connection with or in relation to such work places."

Under this provision of the policy we are clearly of the view that the Fidelity & Casualty Company is liable as the insurer of the bank for the injury sustained by Bojens, while in the service of the bank as executor of the will of said decedent.

The argument is advanced by the Fidelity & Casualty Company that in the instant case it is in the same position as if it had insured a private individual carrying on a business who, while the insurance was in force, had been appointed executor of the will of a decedent. In such a case it is claimed, and rightly so, that the insurance carrier of the private business of the individual would not be liable for any injury sustained by an employee of this same individual while acting as executor. The cases are not analogous. In the case of a private individual appointed to administer an estate, the settlement of the estate is distinct from and cannot in any sense be held to be a part of his private business. In the case of a bank, with the powers of a trust company, the administration of estates under appointment of the court is just as much a part of its corporate business as the receiving of deposits over its bank counter or the loaning of funds entrusted to it. A private individual, acting as executor, carries on the business of the estate entirely separate and distinct from his private business, while a trust company in performing like services is simply carrying out the objects and purposes of its creation. The argument, we think, is not sound.

We are appending hereto the opinion of the District Court of Appeal written by Presiding Justice Barnard annulling the order of the commission dismissing from liability the Occidental Indemnity Company as adopted by us. It correctly expresses our views upon the questions considered and is as follows:

This is a petition for a writ of review, seeking to annul an award made by the Industrial Accident Commission.

Charles Hascall and S. W. Powell, as copartners, were conducting a wholesale and retail cigar store in the city of San Diego. On December 28, 1928, the respondent Occidental Indemnity Company issued to them a standard form workmen's compensation policy, covering the employees of said business from that date until December 28, 1929. About May 1, 1929, Hascall purchased the partnership interest of Powell in said business, and thereafter, until his death, continued to conduct the business under the same name of Hascall & Powell, with no change in the manner of conducting the business, or in the nature of the employment of one Rinehard Bojens, who had been an employee of the partnership. On September 27, 1929, the said Hascall died, and the First National Trust & Savings Bank of San Diego, a corporation, was appointed executor of his estate. The executor continued to operate the cigar store to the end that it might be sold as a going concern. One of the employees of the cigar store was made manager thereof by the executor, at an increased salary, and the other employees, including Bojens, were continued at the same work and at the same salary as before. On November 15, 1929, the said Rinehard Bojens, in the regular course of his employment in said cigar business, received injuries which resulted in blood poisoning and caused his death on January 18, 1930. Shortly after November 15, 1929, one Robert E. Holmes, through whom the Occidental policy was procured, was notified of the injury. After making some investigation, Holmes referred the matter to the respondent Occidental Indemnity Company, which company on December 30, 1929, wrote to an adjuster in San Diego, requesting him to make further investigation, which he did. It is admitted that Holmes knew that Hascall had purchased the partnership interest of Powell shortly after that transaction occurred and also knew that he was continuing the business as sole owner thereof. Also, that Holmes knew of the death of Hascall within a few days after it occurred, and prior to the date Bojens was injured. On December 27, 1929, respondent Occidental Indemnity Company issued a statement addressed to Holmes, calling for an additional premium, based upon the wages actually paid by the business during the entire policy year, including the period during which the business was operated by Hascall alone and also the period during which the business was operated by the executor. The amount of this additional premium was paid by the executor to Holmes on January 6, 1930. It also appears that upon the expiration of the policy year on December 28, 1929, the policy was renewed for another year. The First National Trust & Savings Bank of San Diego carried a workmen's compensation policy with the respondent the Fidelity & Casualty Company of New York, which policy was written for the benefit of all of the employees of the bank, as set forth in said policy. After a hearing, with various continuances, the respondent Industrial Accident Commission made an award in the amount of $5,000 in favor of the dependent wife and children of Bojens, and found that the First National Trust & Savings Bank of San Diego, executor of the estate of Charles Williams Hascall, deceased, was the employer of the said Bojens at the time of his injury, and that said employer was not insured. An order was also made dismissing the proceedings as to the First National Trust & Savings Bank individually, as to the Fidelity & Casualty Company of New York, a corporation, and as to Occidental Indemnity Company, a corporation. A petition for a rehearing was later denied by the Industrial Accident Commission.

It is conceded by all parties that the dependent wife and children of Bojens are entitled to the award made, the only question raised being as to who should pay the same. It is also conceded that the insurance policy issued by the Occidental Indemnity Company was in full force and effect at the time of the injury, unless the same had been avoided either by the transfer of the interest of S.W. Powell to Charles Hascall, or by his subsequent death and the continuance of the business by his executor. In behalf of the respondents, it is urged that in the policy referred to the Occidental Indemnity Company insured a particular entity, namely, the partnership of Hascall & Powell, and that at the time of his fatal injuries Bojens was not the employee of this entity, but was the employee of the trust company in its capacity as executor; it being urged that the employer, within the meaning of the policy, was twice changed after the policy was issued.

[4, 5] Item 1 of the declarations in this policy reads as follows:

"Name of this Employer Charles Hascall and S. W. Powell, d. b. a. Hascall & Powell
"P. O. Address
1072-4th Street, San Diego, California.
Street City or Town

"For the purpose of serving notice, as in the policy provided, this Employer agrees that this address may be considered as both the residence and business address of this Employer or any representative upon whom notice may be served.

"Individual, co-partnership, corporation or estate? Co-partnership."

It will be noted that under "Name of this Employer," there are set forth two names, who are described as "doing business as Hascall & Powell." In paragraph 1 (a) of the policy the company agrees with this employer to pay to any person entitled thereto under the Workmen's Compensation Law the entire amount of any sum due. It will be noted that the policy, in naming the employer, names two individuals who are not even described as a copartnership. It does not specify that the partnership, as an entity, is named as the employer. While a little further down there appears a description as a copartnership, this is not included under the name of the employer. Not only does the policy fail to specify that the employer insured is a copartnership, as an entity, but in this state a partnership is not usually considered a legal entity. 20 Cal. Jur. 680; People v. Maljan, 34 Cal. App. 384, 167 P. 547; Woodward v. McAdam, 101 Cal. 439, 35 P. 1016. The point relied upon by respondents as freeing the Occidental Indemnity Company from liability under this policy is a most technical one. If we are to be extremely technical in interpreting this policy, it would seem that, strictly speaking, in naming the employer, this policy has insured two individuals, Charles Hascall and S. W. Powell, while they are doing business as Hascall & Powell. In other words, they are each insured while doing business under that firm name. While one of them dropped out of the business, the other continued to run the same business in the same manner and in the same name, so that not even such an increase of risk could be claimed, as might have occurred if a new personality had been brought into the business. Strictly interpreted, the policy insured either Charles Hascall or S. W. Powell while doing business as Hascall & Powell. If an ambiguity exists, an insurance policy should be strictly construed against the insurer who prepared it. Welch v. British American, etc., Co., 148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396. Had this insurance company desired to insure only this copartnership as an entity, it could have been easily so designated in naming the employer.

[6-9] In any event, we feel that section 2557 of the Civil Code applies. This section reads as follows: "A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured."

That section applies to all kinds of insurance. Civ. Code, § 2534. Respondents insist that this section does not apply, but should be interpreted in connection with the entire Code, particularly in connection with the provisions with respect to dissolution of copartnerships. It is urged that by these latter provisions, a transfer from one of only two partners to the other, effects a dissolution of the partnership, and that section 2557 was meant to apply only when there are more than two partners, and where the partnership would not be dissolved by the transfer of the interest of one to the others remaining. If that were the case, section 2557 would have no meaning in respect to partnerships because, by the law of partnership, the transfer of the interest of any one partner dissolves the partnership, no matter how many partners remain. It is also urged that the word "several" in section 2557 means more than two. While that is one meaning of the word, there are also other meanings, such as, different and separate. The word is often used to designate a number greater than one. The section refers not only to partners, but to joint owners or owners in common. And in speaking of such owners, no reason appears why the beneficent provisions of the section should be limited to cases where more than two are involved. It seems to us that the object and purpose of the section is to provide for a perfectly natural and just situation, and that it was intended to apply to such a transfer by one of two or more such parties. The section is unquestionably remedial, and for the benefit of the insured, and as such, should be liberally construed. This section of the Civil Code was a part of this insurance contract. General Acc., etc., Corp. v. Indus. Acc. Comm., 196 Cal. 179, 237 P. 33. We are therefore of the opinion that the transfer of the interest of S. W. Powell in this business to Charles Hascall did not avoid this policy and that Charles Hascall continued as the employer named in the policy up to his death.

[10] Among the conditions of the policy in question, section D reads as follows: "The obligations of paragraph one (a) foregoing are hereby declared to be the direct obligations and promises of the Company to any injured employee covered hereby, or, in the event of his death, to his dependents; and to each such

employee or such dependent the Company is hereby made directly and primarily liable under said obligations and promises. This contract is made for the benefit of such employees or such dependents and is enforceable against the Company, by any such employee or such dependent in his name or on his behalf, at any time and in any manner permitted by law, whether claims or proceedings are brought against the Company alone or jointly with this Employer. If the law of any state in which the policy is applicable provides for the enforcement of the rights of such employees or such dependents by any commission, board or other state agency for the benefit of such employees or such dependents, then the provisions of such law are made a part hereof, as respects any matter subject thereto, as fully as if written herein. The obligations and promises of the Company as set forth in this paragraph shall not be affected by the failure of this Employer to do or refrain from doing any act required by the policy; nor by any default of this Employer after the accident in the payment of premiums or in the giving of any notice required by the policy or otherwise; nor by the death, insolvency, bankruptcy, legal incapacity or inability of this Employer, nor by any proceeding against him as a result of which the conduct of this Employer's business may be and continue to be in charge of an executor, administrator, receiver, trustee, assignee, or other person."

Charles Hascall being, up to the time of his death, the employer of Bojens, the section of the policy just quoted not only makes the insurance company directly and primarily liable to Bojens for the obligations of paragraph 1 (a) thereof, which was to pay the amount due to his dependents under the Workmen's Compensation Law, but the last sentence of the paragraph quoted provides that this obligation and promise of the company shall not be affected by the death of this employer, nor by any proceedings as a result of which this employer's business should continue in charge of an executor. It is argued by the respondent Occidental Indemnity Company that this provision only applies and refers to a death of an employer, and the administration of his estate, taking place after the injury to the employee. We think this position cannot be maintained. Such an interpretation would make the clause meaningless, as the liability of the insurance company would, in the absence of this provision in the policy, become fixed at the date of an injury occurring during the life of the employer, and would not be affected by his later death. Moreover, the policy specifically refers to "after the accident" in the second clause preceding this one, but makes no such reference in the clause in question. We conclude, therefore, that under the law and the provisions of this particular policy, it was still in force at the date of the injury to Bojens, and that respondent Occidental Indemnity Company was responsible for the payment of the award. It follows, therefore, that the finding of the commission that the employer was uninsured at the time of the injury is not supported by the evidence.

[11] An attempt is made by petitioner to establish that respondent Occidental Indemnity Company is estopped to deny its liability by reason of having sent out a bill for an additional premium, after the date of the injury to Bojens. While the record shows that Holmes, through whom the policy was originally secured, had knowledge of the transfer of Powell's interest in the business to Hascall, and later of the death of Hascall, the record fails to show that Holmes was an agent of the Occidental Indemnity Company and nothing appears in the record to definitely show knowledge upon the part of the insurance company itself, prior to December 30, 1929.

The equities are with the petitioner in this proceeding. While Holmes testified that he was a broker, and he was not clearly shown to have been the agent of this insurance company, the general situation was one that might easily mislead an employer. The insurance company received its premium, the risk was not increased, the executor paid the additional premium covering the entire year, and the policy was renewed at its expiration. Holmes having been informed of the changes, it was a natural thing to rely on the policy as continuing. While the knowledge of Holmes was not definitely fastened upon the company, the circumstances are such as to further justify the rule that a contract should be strictly interpreted against the party who drew it.

For the reasons set forth, the award of the Industrial Accident Commission is annulled and the matter is referred to said commission for a further order, consistent with the views herein expressed.

We concur: SEAWELL, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; LANGDON, J.

213 Cal. 208

R. BARCROFT & SONS CO. v. CULLEN et al.

Sac. 4510.

Supreme Court of California.

July 27, 1931.

Appeal and error ⚷113(5).

Where judgment foreclosing materialman's lien upon lots and building was modified to order building sold first, appeal from modified judgment timely brought as to modified, but not as to original, judgment, by defendant who furnished building, *held* not dismissible, since modified judgment departed materially from original judgment, to appellant's prejudice (Code Civ. Proc. § 662).

In Bank.

Action by R. Barcroft & Sons Company against Neil J. Cullen and others, including the Pacific Steel Building Company. From the judgment, the last-named defendant appeals. On motion to dismiss appeal.

Motion denied.

Sherman & Sherman, of Los Angeles, for appellant.

F. W. Henderson, of Merced (deceased), Julian H. Biddle and Duncan A. McLeod, both of San Francisco, for respondent (substitutes).

PRESTON, J.

The motion to dismiss the appeal herein is denied, being without merit for the following reasons:

Plaintiff sued to foreclose a materialman's lien and to have it impressed upon two city lots in Merced, together with the building erected thereon, praying also for the sale of the property to satisfy its claims. The building was a portable steel service station structure furnished by appellant for installation and use as a gas and oil service station. Pending trial of the action, appellant corporation removed the structure from the real property, and at the trial contended that it was a mere trade fixture, not subject to the lien of plaintiff. The trial court held otherwise, and ordered the whole of the property sold, without distinction or preference between the lots and the building.

The court entered its judgment on April 15, 1930. In due time appellant, as well as some of the other defendants, filed a notice of intention to move for a new trial. The court heard and denied said motion but modified the decree, apparently acting under the powers conferred by the recently enacted section 662 of the Code of Civil Procedure. The chief modification in the decree was to order that the building be exposed to sale first and, if sufficient funds were not created thereby to satisfy plaintiff's demand, then that the lots be sold to pay the deficit. In other words, the court modified its decree in a material respect as to appellant, and to put this modification into effect made new findings and a new decree, which said decree was entered on August 12, 1930. On September 5, 1930, appellant duly filed its notice of appeal.

The notice was clearly within the time allowed by law. Respondent's theory is that the new judgment was but a correction of clerical misprisions in the old one, and hence the appeal should have been taken in time from the original judgment.

Appellant proposes to have reviewed only the judgment entered on August 12th, and, if that judgment is a material departure from the original judgment to the prejudice of appellant, it has a plain right of appeal therefrom. It is our view that the new judgment does depart from the old in material respects to the injury of appellant. This is evident from the facts already recited; hence the order above made.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

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213 Cal. 296

BARBEE v. STATE BAR OF CALIFORNIA.

L. A. 12251.

Supreme Court of California.

July 31, 1931.

1. Attorney and client ⚷53(2), 58.

Although attorney's allegedly withholding clients' moneys or charging excessive fee was subject to disapproval, evidence *held* insufficient to establish fraudulent intent or moral turpitude; three months' suspension being adequate penalty.

2. Attorney and client ⚷44(1).

In workmen's compensation proceedings, attorney cannot lawfully charge fee exceeding that allowed by commission.

In Bank.

Petition by James W. Barbee to review a recommendation of the Board of Governors of the State Bar of California that petitioner be suspended for one year.

Modified to three months' suspension.

James W. Barbee, of Long Beach, for appellant, in propria persona.

Walter J. Little and Philbrick McCoy, both of Los Angeles, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PER CURIAM.

This is a petition to review a recommendation of the board of governors of the State Bar that petitioner be suspended from the practice of the law for a period of one year. The proceeding was commenced before local administrative committee No. 6, in Los Angeles county, and resulted in a recommendation of disbarment, which was reduced to suspension by order of the board of governors.

[1] Petitioner was tried on three accusations. In the Burns case, the complainant, Mrs. Michael Burns, made charges based upon an action against her husband brought by Walker Collection Service Company, in which petitioner acted as attorney for said husband. Burns later directed petitioner to settle the case, and agreed to pay him a fee of $15. Petitioner negotiated the settlement, and over a considerable period of time received remittances in small sums from his client to be paid over to the adverse party. The committee found that petitioner withheld the sum of $78.50 for some time before finally remitting to the collection company. The committee also found that "at the time respondent was handling said case of Walker's Collection Service Company against complainant, respondent was handling two other matters for complainant, in which he was making certain payments on behalf of complainant, for report on title for street assessments, and other items of minor importance. The evidence as to whether or not complainant furnished the money to respondent with which to make these last mentioned payments is conflicting, but the committee finds that the evidence preponderates in favor of complainant. * * *" We are not sure that we agree with this statement of the weight of the evidence, but irrespective of this, the complainant admitted, and the committee found, that petitioner was representing Mr. and Mrs. Burns in several matters, and handling their accounts with several creditors. His explanation of the delay in making payments is that he was acting in their interests in spreading the small payments received among the various claimants. The whole case appears to us to be a dispute over accounting methods, and perhaps the evidence establishes laxity on the part of petitioner in handling the money. But we find little in the record to justify the conclusion that he deliberately withheld the sum of $78.50, intending to appropriate it to his own use. Indeed, it plainly appears that he performed continuous services for the parties without adequate compensation and that he became a guarantor for Mr. Burns on a note for $100 evidencing a loan obtained from the Morris Plan Company. There is also in the record the testimony of John B. Stirk, manager of the collection company, that petitioner had personally guaranteed the payment of the balance of the account at a time when there was owing $150.25; that he had so informed Mr. and Mrs. Burns; and that in reliance upon the personal assurance of petitioner, he had released a garnishment which had been levied upon the wages of Mr. Burns. On the whole, we are inclined to the view that the evidence in this case is insufficient to justify the findings and order.

The McDaniels case grew out of a divorce action brought by Mrs. Pearl McDaniels against her husband, in which petitioner represented her. It appears that she paid him $50 in advance with the understanding that if he were able to collect the whole of an agreed fee of $150 from the defendant, he would return the $50 to her. Petitioner secured a settlement in which she was to receive certain property and $350, and he was to receive $250 for his fees and $15 additional for his costs. Thereafter she demanded that he return the $50, which he failed to do until after the commencement of this proceeding. Petitioner's explanation is that she had agreed to accept a settlement of $300 and the property; that he had negotiated such a settlement; that thereafter he had made further overtures to the attorney for the defendant to raise the additional sum of $50 to cover the part of his fee advanced to him; and that this was finally accomplished. On this point petitioner is corroborated by the testimony of the husband's attorney. Hence, he contends, the $50 was really returned to Mrs. McDaniels when he turned over to her the sum of $350 instead of $300 which she had agreed to take and which he had secured for her. With respect to the fee of $250, it appears from Mrs. McDaniels' testimony that she acquiesced in this charge, and petitioner states that the original figure of $150 was quoted for a simple action involving no alimony or property settlement. No such acquiescence is shown as to the item of $50, for when the matter was presented to Mrs. McDaniels she took the papers under consideration, and a few days later demanded the return of the money. In the meantime she had become reconciled to her husband. Again we may concede that petitioner's conduct is subject to criticism. Without doubt he should have obtained her consent prior to the agreement with counsel for the adverse party, and lacking that consent, should have remitted to her the entire amount apparently received in settlement of the action. But in this case also the record does not satisfactorily establish an intent to defraud. Petitioner was, we believe, stubbornly but honestly mistaken in his understanding of his rights in the matter. We are not prepared to hold that such a dispute over the fixing of a fee is grounds for the drastic punishment inflicted by the order herein.

[2] The third case was one in which petitioner was engaged by Mrs. Frances Slates to institute a proceeding before the Industrial Accident Commission to recover for herself and minor child an award for the death of her husband. The commission made an award of $3,410.40, out of which it directed that the sum of $100 be paid to petitioner and another as attorney's fees. Payments on account of the award were made to petitioner from time to time, from which he deducted the specified fee and the additional sum of $150 for additional services. The committee found that this additional sum was wrongfully deducted and that he also withheld sums at various times and for various periods. Ultimately all the money claimed was paid over to complainant. Petitioner presents an explanation for each of the acts criticised. The additional fee was charged, he claims, for additional services in attempting to collect the award from a somewhat recalcitrant debtor. Some of the delays in payments are accounted for by the fact that checks paid to petitioner by the other party to the proceeding were dishonored, and were collected only after considerable effort. Petitioner also testified that Mrs. Slates was desirous of keeping the money away from her husband and that he withheld money with her consent. In this he is corroborated by Mrs. Henigan, Mrs. Slates' aunt, who testified that Mrs. Slates was having trouble with her husband, and intended to secure a divorce; that Mrs. Slates asked petitioner to prepare the papers for such an action; and that she told petitioner not to tell her husband how much money was available, and not to pay the bulk of the sum collected until after the parties were separated. Petitioner testified further that Mrs. Slates expressed herself as being satisfied with his charge of $150 for special services, and in this he is also corroborated by Mrs. Henigan. Mrs. Slates herself stated in response to a question of petitioner that she had made no complaint about this sum as long as he had continued to work on the matter of collections. On the essential issues, the evidence in this case is conflicting. We should not hesitate to condemn the exaction of a fee in excess of that allowed by the commission, which act would be in violation of the law; but there is testimony in the record to support petitioner's contention that it was a separate charge for the separate services involved in collection, in which Mrs. Slates had acquiesced. With respect to the claim of withholding the money to keep it from her husband, petitioner's testimony is fully corroborated by that of Mrs. Henigan.

It seems unfortunate that in these matters, assuming petitioner's testimony to be true, he failed to keep sufficient records and accounts, and relied upon oral agreements and understandings as a foundation for his various claims and his acts. As we have already stated, his conduct is subject to criticism and disapproval. Nevertheless, our reading of the whole record leaves us without the firm conviction that his moral turpitude is established. We think that the committee has in its findings magnified his errors somewhat, and that his conduct does not call for the severe penalty meted out to him. Moreover, petitioner presented numerous letters from judges, lawyers, and business men of the community in which he practiced, which testified to his good character and reputation. An additional fact of some significance is a long period of practice in the courts of this state without any complaints of this nature ever having been made. For the acts herein considered, however, some penalty is deserved, and we are of the opinion that suspension for a period of three months would be adequate.

It is therefore ordered that petitioner be suspended from the practice of law in all courts of this state for a period of three months, said suspension to become effective thirty days from the service of notice of the within order, said service to be made upon him by the clerk of this court by means of the United States registered mail.

DALTON v. KEERS et al.

S. F. 13478.

Supreme Court of California.
July 27, 1931.

Joint tenancy ⚷3.

Interest acquired by purchasers under contract of purchase naming purchasers disjunctively *held* not joint tenancy, where instrument itself did not so declare (Civ. Code, §§ 683, 686).

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Suit by Anna Dalton against Louis H. Keers, Jacob Huntzicker, as executor of the last will and testament of George W. Gould, deceased, and another, in which defendant last named filed a cross-complaint. Judgment for plaintiff, and defendant last named appeals.

Reversed.

Ernest K. Little, of San Francisco, for appellant.

Austin Lewis and M. M. Getz, both of San Francisco, for respondent.

SHENK, J.

This is an appeal from a judgment in specific performance.

In October, 1919, Anna Dalton, the plaintiff, and George W. Gould, since deceased, established a joint bank account in the Hibernia Savings & Loan Society in San Francisco. Thereafter from time to time and until August 24, 1926, deposits were made in that account aggregating some $15,000. It is an admitted fact that all of the money deposited in that account, prior to deposit, belonged to George W. Gould, and that all of the withdrawals therefrom were made by the plaintiff.

On May 10, 1926, the defendants Keers and McGain were the owners of the real property involved in this action, which is located in San Mateo county, and which is described by metes and bounds. On that day they were paid from the joint account the sum of $1,100, which was the full purchase price of said property. Instead of taking a deed to the property, and for reasons which do not appear from the record, an ordinary contract of conditional sale was executed, wherein Keers and McGain were named as the sellers and G. W. Gould *or* Anna Dalton were named as the purchasers. Receipt of the $1,100 was acknowledged therein as payment in full. On July 26, 1926, George W. Gould *and* Anna Dalton executed a written contract with a builder for the construction of a house on said property for the sum of $3,375.

George W. Gould died on October 28, 1926, in the city of San Francisco. On the day before his death, Anna Dalton withdrew from the bank account the sum of $2,000, and on the day of his death she withdrew the further sum of $270, thereby reducing the balance in the account to the sum of $5.53.

The decedent's will was filed for probate, and in February, 1927, the defendant executor was appointed. In April, 1928, this action was brought by Anna Dalton to compel the conveyance to her as sole owner of the title to said property. The complaint is grounded on said contract of purchase and sale. The defendants Keers and McGain interposed no defense and stand ready to convey the title in accordance with the order of the court. The executor answered and also filed a cross-complaint, in which it was alleged that George W. Gould, prior to 1914, was a resident of South Dakota; that about that time he came to California to regain his health; that shortly thereafter he took up his residence with Anna Dalton and her husband in San Francisco; that Mr. Gould paid the rent and upkeep of the house until the time of his death; that by reason of his poor health he could not conveniently attend to his banking and other business; that he reposed great trust and confidence in Anna Dalton and by reason thereof he established the bank account in the manner above described; that during the existence of said account the withdrawals from said fund were made by Anna Dalton for the use and benefit of George W. Gould; that in May, 1926, said real property was purchased on the advice of Anna Dalton; that said building contract was entered into for and on behalf of George W. Gould; and that the withdrawals were made from said bank account by Anna Dalton as the agent and trustee of George W. Gould. The prayer of the cross-complaint was that it be decreed that George W. Gould was the owner of said property during his lifetime; that a conveyance be ordered in favor of the executor and for an accounting of said fund on the part of the plaintiff.

The trial court refused to permit the defendant executor to introduce any evidence as to the confidential relationship existing between Anna Dalton and the decedent. On proof of the contract to convey and the payment of the $1,100 from said bank account, the court found the allegations of the complaint to be true and the foregoing allegations of the cross-complaint to be untrue, and ordered judgment accordingly. The defendant executor appeals on the ground that the evidence does not support the findings and judgment.

It is apparent that the only theory upon which the judgment may be supported is that the contract of purchase created a joint interest in the purchasers which inured to the benefit of the survivor. Section 683 of the Civil Code provides: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, * * * or when granted or devised to executors or trustees as joint tenants." Section 686 of the Civil Code provides: "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section 683, or unless acquired as community property."

The foregoing sections remained the same from the time of their enactment, in 1872, to the time of the commencement of the present action. Prior to their enactment it was declared in the early case of Bowen v. May, 12 Cal. 348, that in order to constitute a joint estate in lands in two or more persons, such estate must be expressly declared in the conveyance itself, otherwise the estate conveyed will be held by the grantees as tenants in common. In Estate of Hittell, 141 Cal. 432, 75 P. 53, it was held that an interest in real property in favor of several persons is an interest in common, unless a joint interest is created as provided in section 683 of the Civil Code.

It is clear that the contract now under consideration did not create a joint tenancy in Anna Dalton and George W. Gould. This is true, not because of the use of the disjunctive, but by reason of the fact that the instrument itself did not so declare. The question is, what interest, if any, did the instrument create? No question is raised as to the obligation of the sellers to convey to the party or parties entitled. The purchasers thereunder became the equitable owners of the property (Estate of Dwyer, 159 Cal. 664, 115 P. 235; 6 Cal. Jur. p. 527), and entitled to demand performance. If the purchasers had been named in the conjunctive, no doubt could arise, and they would take as tenants in common. There is a strong inference from the evidence that the purchasers intended to take as tenants in common arising from the execution by them jointly of the building contract. If such was the intention the instrument might have been reformed so as to effectuate that intention and the two would take as tenants in common.

In any event the interest, if any, which the purchasers acquired under the contract of purchase was not a joint tenancy, under the express language of sections 683 and 686 of the Civil Code, and the judgment based on such contract, vesting exclusive title in the plaintiff, cannot be sustained.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

213 Cal. 426

OCHOA et al. v. McCUSH et al.

STONE et al. v. SAME.

Sac. 4402, 4403.

Supreme Court of California.

Aug. 17, 1931.

1. Appeal and error 🔑907(3).

On appeal upon judgment roll alone, findings are conclusively presumed supported by evidence.

2. Appeal and error 🔑931(1).

On appeal findings must, if possible, be so construed as to sustain rather than to defeat judgment.

3. Trusts 🔑110.

Findings in suit for reconveyance *held* not to establish defendant was involuntary trustee through own fault (Civ. Code, §§ 2217, 2273, 2275).

Court found that plaintiffs and defendants became owners as tenants in common of undeveloped tract of land in remote portion of state; that defendant was son and brother respectively of plaintiffs, who reposed great and implicit confidence and trust in defendant; that they conveyed land to defendant, sole consideration for conveyance being defendant's agreement to sell land and to pay plaintiffs proportionate share of proceeds; that defendant made improvements in good faith and was entitled to reimbursement for them and for taxes paid; that no period was specified within which sale must be made; and that there were equities in favor of both parties.

4. Tenancy in common 🔑21.

Tenant in common has right to occupy whole of common lands, being presumed to hold for himself and cotenants.

5. Tenancy in common 🔑32.

Tenant in common *held* entitled to deduct from rents and profits received proportionate part of proper expenditures made in working and developing property and protecting common estate.

6. Equity 🔑66.

In suit for reconveyance against cotenant holding whole legal title for purpose of sale, plaintiffs, having permitted defendant to hold and improve lands for over eleven years without protest, *held* required to do equity by reimbursing defendant for improvements and taxes.

7. Judgment 🔑229.

In suit for reconveyance against cotenant holding legal title, "interlocutory order" decreeing reconveyance, provided plaintiffs reimburse defendant for taxes and improvements before certain date, *held* really "final decree" unduly prejudicing plaintiffs.

Under such decree, if plaintiffs had submitted to such requirement by discharging claims, they would have thereby waived and foregone right to complain of justice of such exaction. Hence, to make compliance with such judgment a condition precedent to granting defendants relief to which they were otherwise found to be entitled, unduly prejudiced them.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

8. Judgment 🔑217.

In suit for reconveyance against cotenant, *held*, decree should be framed so as to enable aggrieved party to prosecute, without hindrance, review of adverse provisions.

In Bank.

Appeals from Superior Court, Mendocino County; H. L. Preston, Judge.

Suits by Anna Ochoa and another, and by Mary F. Stone and another, against S. A. McCush and others. From judgments for defendants, plaintiffs appeal.

Reversed and remanded, with instructions.

M. H. Iversen and G. E. Redwine, both of Ukiah, for appellants.

Lilburn Gibson, of Ukiah, for respondents.

PRESTON, J.

Appeals from judgments for defendants in suits to compel the reconveyance of certain real property. The causes of action are identical, are submitted under one set of briefs, and will be considered together; the word "appeal" will refer to both appeals.

The real basis of the appeal is the contention that the findings do not support the judgment. The substance of these findings will therefore be set forth:

In 1916 plaintiffs and defendant S. A. McCush became owners, as tenants in common, of an undeveloped tract of land in northern Mendocino county of the reasonable value of $5,000, which they incumbered soon thereafter with a $1,700 mortgage. Said defendant was the son of one plaintiff and the brother of the other plaintiffs, and they all reposed great and implicit confidence and trust in him. In October, 1917, they executed a deed, intended to convey their respective interests in said property to him. However, by mutual mistake, a portion of the land was omitted from the description in the deed and the court found that it should be corrected to conform to the true intent of the parties.

The deed was delivered to defendant with the understanding and agreement on his part to sell the property, apply the proceeds first to payment of said mortgage and cost of sale, and then to payment to each plaintiff of his proportionate share of the residue. The court found that plaintiffs would not have made the deed but for their confidence and trust in said defendant and that the sole and only consideration therefor was his said agreement to sell the property and distribute the proceeds as aforesaid.

Defendant went into possession and did not or could not sell the land. But out of his own funds he paid taxes from the date of the deed to him, aggregating some $900. In addition, he had improvements erected on the land, a house, garage, fences, chicken house, and a woodshed, at a total cost of $2,775. These improvements greatly enhanced the value of the property. The court found that plaintiffs first discovered in 1925 that said defendant did not intend to keep his agreement to sell and they then and there demanded that he sell the land and carry out his agreement with them. Also in 1925 said defendant borrowed money from defendant Cobb to discharge the renewal of the mortgage of 1917, with accumulations of interest thereunder, and he executed to her a new mortgage in the sum of $2,176, which became and the court found to now be a first lien against the whole of said property.

The court further found that in this cause there were equities in favor of both parties; that while plaintiffs' cause was not barred by statutory limitation, equity, or laches, yet said defendant had made the above improvements in good faith and was entitled to be reimbursed therefor. The proceeds of the land received by defendant since October 31, 1917, were found sufficient to cover the cost of all other improvements made by him, such as clearing the ground, etc.

On March 8, 1929, the court made an interlocutory order requiring said defendant to reconvey said property, in proportionate shares, to each of the plaintiffs, provided each of said plaintiffs repay to defendant his proportionate share of the sums so expended by said defendant for taxes and improvements, but that in the event of plaintiffs' failure to repay said sums before May 7, 1929, said defendant would not be required to reconvey and plaintiffs would take nothing by their action. On June 14, 1929, no repayment having been made by plaintiffs, the court made another order extending their time to July 20, 1929. No payment having been made by that date, the court thereupon prepared and on July 29, 1929, filed its findings, in substance as above set forth, and concluded as a matter of law that said deed should be reformed to contain a complete description of said land; that said Cobb mortgage is a valid first lien against the property; and that plaintiffs take nothing by their action. Judgment was entered accordingly, and plaintiffs have appealed.

As above stated, the court found that the sole consideration for execution of said deed was said respondent's agreement to sell the land and distribute the proceeds as aforesaid, which agreement he refused and failed to perform. Appellants claim that these findings establish the status of respondent as an involuntary trustee "through his own fault" of the legal title to the land, thus precluding him from the assertion of any right to reimbursement for the sums expended by him (sections 2217, 2273, 2275, Civ. Code); hence they claim that in denying them relief because of their failure to reimburse, the judgment is unsupported by the findings and is contrary to law. These same facts, they contend, show the lack of any equity in respondent sufficient to justify the reformation of said deed. Lastly they claim that, from the facts found, the trial court should have entered a decree establishing a trust in their favor, directing conveyance of the property to them, and denying reformation of the deed.

[1, 2] In disposing of these several contentions we may first make the observation that as this is an appeal upon the judgment roll alone, the findings are conclusively presumed to be supported by the evidence; furthermore, it is also elementary that they are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon; they are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining the judgment.

[3-6] We cannot say that these findings establish the status of respondent as an involuntary trustee through his own fault. With the finding that the agreement to sell the land was the sole consideration for appellants' deed to respondent is to be considered the finding that there was a relationship of trust and confidence between the parties; that respondent made said improvements in good faith and was entitled to reimbursement for them and for taxes paid. It is also to be considered that the court specifically found that there were equities in favor of both parties. The land appears to have been an undeveloped tract in a remote portion of the state. The evidence is not before us. It is significant that no period was specified within which the sale must be made. Had respondent made every effort to sell over a long period of time and to fulfill the terms of his agreement but had he been unable to find a buyer, it would not be said that he acted in bad faith in entering upon the land to hold and protect it, securing renewals of the mortgage and paying taxes, interest, etc., out of his own funds, meanwhile improving the property to enhance its value.

Even though respondent held legal title to the tract merely for purposes of sale thereof, the equitable title to undivided shares remaining at all times in appellants, yet he and appellants were tenants in common and he held in his own right both the legal and equitable title to his undivided share of said property. He therefore had the right to enter upon and occupy the whole and every part of the common lands, being presumed, so long as he remained in possession, to hold for himself and for his cotenants. Wood v. Henley, 88 Cal. App. 441, 452, 453, 263 P. 870, and cases cited. He was entitled to deduct from the rents or profits received the cost of all proper expenditures made in working the property and developing it and protecting the common estate. Higgins v. Eva, 204 Cal. 231, 238, 267 P. 1081.

Thus the circumstances of this case show plainly that there were equities in favor of both parties, as found by the court. From the fact that appellants permitted respondent to hold the property without protest from 1917 to 1925, the presumption on his part would not be unwarranted that they were satisfied to be relieved of the burden of the mortgage and taxes and he may have believed in all sincerity that his right had ripened into legal title. At any rate, in allowing said respondent to hold, improve, and increase the value of their property over a period of eleven years, without so much as raising a voice in protest or entering a court of equity to demand a reconveyance, appellants obviously induced a situation demanding the application of equitable principles and requiring that they do equity by reimbursing respondent, before seeking equity by demanding a reconveyance from him. Pomeroy's Equity Juris. (4th Ed.) vol. 3, § 1241, and cases cited.

[7, 8] Notwithstanding our approval in the main of the action of the court below, we are unable to follow it as to the form of its judgment in these causes. The interlocutory order made was in reality a final decree disposing of a part of the main issue in the cause. Pista v. Resetar, 205 Cal. 198, 200, 270 P. 453. To make compliance with this judgment a condition precedent to granting appellants the relief to which they are otherwise found to be entitled unduly prejudiced them. Such a decree only should be framed as will enable an aggrieved party to prosecute, without hindrance, a review of all adverse provisions thereof. Under the present decree appellants must first submit to the judgment respecting compensation for taxes and improvements before they may have the title restored to them. If they had submitted to such a requirement by discharging the claims, they would have thereby waived and foregone the right to complain of the justice of such an exaction. The decree, of course, could have provided that said respondent was under no obligation to reconvey until the claims were paid, but the time of payment could only have followed the point of time when the decree should become final.

It is also worthy of mention that the regularity of the record title to said property would be best preserved by the decreeing of a lien upon the respective interests in favor of said respondent for the several amounts due and the directing of reconveyances subject thereto.

At any rate, a retrial of these causes seems unnecessary.

The judgments are therefore reversed, and the causes are remanded to the court below with instructions to enter final judgments therein not inconsistent with these views.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

213 Cal. 384

HERNANDEZ v. SOUTHERN CALIFORNIA GAS CO.

L. A. 10918.

Supreme Court of California.
Aug. 14, 1931.

1. Gas 🔑20(2).

Workman, burned by explosion while working in sewer, was required to introduce evidence, showing not only that defendant's gas was allowed to escape, but also that it entered and accumulated in sewer pipe (Code Civ. Proc. § 1960).

2. Gas 🔑20(2).

Inference that defendant gas company's gas was in sewer where explosion injuring workman occurred must be founded on fact legally proved and on such deduction from that fact as consideration of course of nature warrants (Code Civ. Proc. § 1960).

3. Gas 🔑20(2).

In suit against gas company for injuries from explosion, until it was shown that defendant's gas caused injury, res ipsa loquitur did not apply.

4. Gas 🔑20(2).

In action against gas company for injuries from explosion in sewer, evidence failed to show defendant was responsible for explosion.

There was some evidence that there were leaks in the pipes of the gas company, but no evidence was introduced showing that any of those leaks led to the sewer in which employee was working when the explosion occurred, and there was uncontradicted evidence that escaping gas would rise and not fall, and that it could not fall below the water level down into the sewer which was lower than the top of the water.

5. Gas 🔑20(4).

In action for injuries received in sewer explosion, evidence of defendant's negligence *held* for jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Joe Hernandez against Southern California Gas Company. Judgment for plaintiff, and defendant appeals.

Reversed.

For opinion of District Court of Appeal herewith adopted, see 296 P. 665.

Thos. J. Reynolds, of Los Angeles, and Allen L. Cleveland, of Santa Monica, for appellant.

George L. Greer, of Los Angeles, for respondent.

PER CURIAM.

Upon a re-examination of the record on this appeal after decision by the District Court of Appeal, First District, Division 2, we are satisfied with the statement of the facts, reasoning, and conclusions of that court, and hereby adopt the opinion there rendered, prepared by Mr. Justice Sturtevant, as the opinion of this court. It is as follows:

Action for personal injuries. The verdict was in favor of the plaintiff, and, from the judgment entered thereon, the defendant has appealed. For some months prior to the happening of the accident the Los Angeles county sanitation district had been engaged in laying a sewer along the west side of Atlantic boulevard in the city of Los Angeles. In the immediate neighborhood of where the work was being done the ground is marshy. The water level is within six or seven feet of the surface of the ground. The sewer trench was dug, and at the same time the water was pumped out and the pipe was so laid that the bottom of it was about ten feet below the surface of the ground. The pipe was about three feet in diameter and was made in joints of reinforced concrete. North of Tweedy boulevard the sewer had been laid. Manholes had been installed, and some of them had been covered, but the joints of the pipe had not been caulked. The dirt and rock had been thrown back into the trench and the ground had been leveled up. The evidence does not show that any apertures, channels, or pipes of any kind led to, or into, the sewer from any direction except as they may have been created by or arisen out of the conditions we have noted. On the afternoon of the 22d day of February, 1927, the plaintiff took a coal oil lantern, tools, and materials, and entered the sewer to caulk the joints. He had worked about two hours and was inside of the sewer at a point approximately one hundred and fifty feet from the manhole he entered when an explosion occurred and he was seriously burned. He commenced this action to recover damages for his injuries. In his complaint he alleged that the defendant maintained gas pipes in Atlantic boulevard near the intersection of the two streets named above; that the pipes were negligently and carelessly maintained, and that gas escaped therefrom in large quantities and exploded and injured him. In its answer the defendant denied specifically the allegations of the complaint. In presenting his case the plaintiff introduced evidence showing that he entered the sewer as above stated; that an explosion occurred; that he was injured; and the nature and extent of the injuries. He also introduced evidence to the effect that one or two days after the explosion the defendant sent its employees into the neighborhood of the explosion and there made excavations and examinations and alterations. Some of the witnesses saw certain leaks. No one of those leaks was described as being closer than one hundred feet from where the plaintiff was at the time of the explosion. After the explosion had occurred no gas pipe was shown to be so broken as to allow gas to escape in large quantities. When the explosion occurred some of the witnesses stated that the flame was blue. At least one of the witnesses testified that the explosion was of such force as to shake the buildings and windows. The defendant's gas pipes contain natural gas and extend along the east side of Atlantic boulevard, and, from the main pipes, service pipes are led at right angles to the west over the sewer, or to the east to the properties of the defendant's customers. The pipes were so laid that they were from two to three feet under the surface of the ground. At the end of the plaintiff's case the defendant moved for a nonsuit. The court denied the motion, and thereupon the defendant proceeded to introduce its case. It called to the stand the employees who did the work and the employees who directed the work of making the above-mentioned excavations, alterations, and examinations of the gas pipes. Each one of those witnesses was examined and cross-examined as to what leaks, if any, were located. One leak, located about one hundred feet from where the plaintiff was working, was on the east side of the defendant's pipes and in a service pipe serving one of the customers residing on the east side of Atlantic boulevard. The witness testified that, when he located it and applied the soapsuds test, there were small bubbles, and the extent of the leak would be one or two cubic feet in ten or twelve hours. It was twenty feet east of the sewer and one hundred feet south of the manhole. One witness testified that there were two other small leaks at a distance of a few hundred feet from the place where the explosion occurred. The defendant's witnesses testified that, applying their pressure tests, they found no major leaks in any of the pipes at any place. They further testified that gas will not sink through water at all; that it is only about seven-tenths as heavy as air, and that it will rise from, but not sink into, trenches or pits. Neither party introduced any evidence showing that defendant's escaping gas flowed to, or into, the sewer.

[1-4] At all times the defendant claimed that there was no evidence that the gas which exploded was defendant's gas. It also claimed that the explosion was caused by the explosion of the plaintiff's coal oil lantern. It also contended that the explosion might have occurred from gasoline which those who were constructing the sewer had spilled from time to time. Furthermore, they claimed that the explosion might have been marsh gas instead of the defendant's gas. It cites and relies on Union, etc., Co. v. S. F. Gas, etc., Co., 168 Cal. 58, 141 P. 807. In reply, the plaintiff quotes evidence showing the explosion lifted the lids on the manholes. He argues that the explosion could not have been merely the explosion of a single lantern. He then contends that the surface soil of the street may have been packed and hardened, and that the defendant's gas leaked out of the pipes, approached the surface of the street, and was forced to pass under the surface of the street and across to, down to, and into the sewer. The answer is not sufficient. The plaintiff was bound to introduce some evidence, direct, or indirect, showing, not only that defendant's gas was allowed to escape, but also that it entered and accumulated in the sewer pipe. Of course it is not contended that there is any direct evidence in the record that defendant's gas was in the sewer. Furthermore, an inference to that effect must be founded on a fact legally proved and on such a deduction from that fact as is warranted by a consideration of the course of nature. Code Civ. Proc. § 1960. But the direct positive proof in this record is that from "a consideration of the course of nature" natural gas will rise and not sink, and that it will not pass down into water. The plaintiff also makes the contention that the doctrine of res ipsa loquitur applied, and he cites Smith v. Southern Counties Gas Co., 89 Cal. App. 81, 264 P. 532. But in that case the injured person at the time of the injury was standing in a pit in which the gas company had its pipes located. Both the plaintiff and the defendant in the case at bar concede that Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 1021, 29 L. R. A. 718, 48 Am. St. Rep. 146, states the rule correctly when the court quotes from Shearman and Redfield on Negligence as follows: "*When a thing which causes injury* is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." The italicized words present the very question before us, to wit, What caused the injury, defendant's gas or some other explosive? Not until it is shown that the defendant's gas caused the injury can the doctrine of res ipsa loquitur be relied on. 19 Cal. Jur. 708, § 125. Assuming that the defendant was negligent in having some leaks in its pipes, no evidence was introduced showing that any of those leaks led to the sewer, and the uncontradicted evidence is that the escaping gas would rise and not fall, and that it could not fall below the water level down into the sewer which was lower than the top of the water. It thus appears that there was no evidence showing that "*the thing which caused the injury*" was

under the management of the defendant or that it belonged to the defendant, or that the defendant was in any way responsible for injuries caused by it.

[5] The defendant claims that it was not negligent. Hereinabove we have shown to what extent there were any leaks. Evidence was introduced by the defendant showing that it had a large corps of inspectors and repairers who diligently examined. All of these facts were for the consideration of the jury. They were properly submitted, and this court may not say as a matter of law that no negligence was shown. However, it is clear that the defendant's negligence was not shown to have been the cause of the injury.

In view of what we have said above, we need not discuss other points made by the defendant.

Judgment reversed.

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213 Cal. 377

KARLSLYST v. FRAZIER.

Sac. 4393.

Supreme Court of California.

Aug. 14, 1931.

1. **Divorce** 🔑303.

Where final divorce decree did not purport to modify order contained in interlocutory decree regarding child's support, order remained effective, although not carried into final decree.

2. **Judgment** 🔑443(1).

Before relief may be obtained from judgment affected with extrinsic fraud, it must appear that judgment is unjust and different judgment would have been entered but for fraud.

3. **Bastards** 🔑6.

Evidence of plaintiff seeking relief from interlocutory divorce decree provision ordering plaintiff to contribute to child's support *held* insufficient to establish that plaintiff was not child's father.

4. **Bastards** 🔑3.

As regards divorced husband's liability for support of child, legitimacy is favored.

5. **Divorce** 🔑297.

Contract of parties, to divorce suit, regarding child's support, *held* not binding on court.

6. **Divorce** 🔑297.

In divorce suit, evidence of agreement between parties as to support of child is relevant in placing burden of support.

7. **Divorce** 🔑308.

Divorce decree awarding wife support for child until further order of court *held* valid, although wife prayed for support only during pendency of action (Code Civ. Proc. § 580).

8. **Divorce** 🔑308.

In absence of showing that amount awarded for child's support was not necessary therefor, nor beyond defendant's ability to pay, equity will not afford relief.

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by Oscar Karlslyst against Elsie Frazier. Judgment for defendant, and plaintiff appeals.

Affirmed.

George E. McCutchen, of Sacramento, for appellant.

Otis D. Babcock, of Sacramento, for respondent.

SEAWELL, J.

Appellant, Oscar Karlslyst, brought this action to obtain equitable relief from a provision in an interlocutory decree of divorce entered in an action brought against him by respondent herein, who is now Elsie Frazier, ordering him to contribute $25 a month to the support of Marian Elaine Karlslyst, found by the court to be the child of the parties, until further order of court.

As grounds for relief, appellant alleged that said Marian Elaine Karlslyst, born four months after his marriage to respondent, was not his child; that at the time of their separation, which was about a year after marriage, he had agreed to pay respondent $400 in installments in full satisfaction of all claims against him, and in consideration thereof she had agreed to care for and provide for said child, and he had faithfully paid said sum; that when it appeared that respondent prayed for support for said child in her action for divorce, an agreement had been entered into between her attorney and appellant's attorney, on behalf of their respective clients, that if appellant did not appear and contest said action she would not apply for any relief other than temporary alimony and no other relief would be asked for or taken; and that respondent applied for an interlocutory decree without further notice to appellant or his attorney, and, in violation of said agreement, and without advising the court thereof, applied for and was awarded relief in excess of that provided for in the agreement. Respondent denied the making of said agreements, and also the appellant's contention that the child was not his, and the court found in her favor on both questions.

[1] The action was brought in 1929, more than five years after the entry of the interlocutory decree, appellant claiming that he had no notice of the provision for support contained therein until 1927. Said provision was not carried into the final decree, but in view of the fact that the final decree did not purport to modify the order of support, said order remained effective.

Conceding that extrinsic fraud was practiced upon appellant by respondent concealing from the court her agreement to assume full support of said child and to take no award for its support, which agreement induced appellant to absent himself from the hearing, appellant is not entitled to equitable relief on the facts shown.

[2] Before relief may be obtained in equity from a judgment affected with extrinsic fraud, it must appear that said judgment is unjust and that a different judgment would have been entered but for the fraud practiced. Lee v. Colquhoun, 175 Cal. 16, 164 P. 894; Matson v. John Batto & Sons, 173 Cal. 800, 161 P. 1144; Bell v. Thompson, 147 Cal. 689, 82 P. 327; Burbridge v. Rauer, 146 Cal. 21, 79 P. 526; 15 Cal. Jur. 29; 3 Freeman on Judgments, §§ 1189, 1190. Appellant has not met the burden which the law placed upon him as the party attacking the judgment.

[3, 4] The evidence offered by appellant to establish that the child was not his falls far short of meeting the requirements of the law. It is admitted that he did not at any time deny paternity of the child born four months after his marriage with respondent until he filed the complaint in the present action, some seven years after the birth of said child. In a justice court action brought to compel him to comply with the terms of the decree which provided that he should contribute to the support of said child he made no question of its paternity. Said parties were residents of Wisconsin before they came to California, and had been intimate in that state. Upon coming separately to reside in this state, they resumed their former relationship. Appellant knew that respondent was pregnant when he married her in 1921.

In the present action appellant introduced the testimony of a physician, who stated that he was then sterile by reason of having been afflicted at some time in the past with a venereal disease. Appellant himself testified that he had suffered from such a disease in 1919, which was more than a year before the conception of the child. The physician's testimony related to a time more than eight years after the conception of the child, and he was unable in the nature of the case to determine at what time the condition of sterility had developed. Furthermore, the testimony of said physician would not seem to establish absolute sterility. Respondent testified that appellant was the father of her child, and all reasonable inferences to be drawn from the circumstances support her testimony. For the court to have found in favor of appellant upon evidence so inconclusive as that relied upon to establish illegitimacy as to the child and promiscuity on the part of her mother, would certainly have been a finding in derogation of rather than in favor of legitimacy, contrary to the rule favoring legitimacy in cases such as this, wherein the facts are sufficient to sustain legitimacy.

[5, 6] Appellant has also failed to show that if the agreement of respondent to assume the full support of the child had been disclosed and he had been present in court he would not have been required to contribute to the support of said child. It was beyond the power of the parties to deprive the court by their private contract of its right to make such suitable provision for the support of their minor child as her welfare required. Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Black v. Black, 149 Cal. 224, 86 P. 505; Parkhurst v. Parkhurst, 118 Cal. 18, 50 P. 9; Merritt v. Merritt, 106 Cal. App. 238, 289 P. 240; Fernandez v. Aburrea, 42 Cal. App. 131, 183 P. 366. Evidence of an agreement is relevant in placing the burden of support, but the court is not bound thereby. Appellant offered no evidence to show that if the agreement had been given effect the child would have been adequately cared for by her mother, or that he was unable to contribute $25 a month to her support.

[7, 8] For the same reason the decree cannot be set aside on the ground that the relief granted exceeded that prayed for (section 580, Code Civ. Proc.), in that it was to continue in effect until further order of the court, whereas plaintiff prayed for support only during the pendency of the action. Such a decree is not void. Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520; Parker v. Parker, 203 Cal. 787, 266 P. 283. In view of the fact that the interests of the child are a factor of prime importance, the court is not bound by the contract of the parties or the prayer for relief. In the absence of a showing that the amount awarded is not necessary for the support of the child nor beyond the ability of the plaintiff to pay, equity will not afford relief from the decree.

Nothing said herein bars appellant from applying for a modification of the original order. Sections 138, 139, Civ. Code. As to the merits of such an application we express no opinion.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

213 Cal. 190

CATE v. FRESNO TRACTION CO. et al.

S. F. 14240.

Supreme Court of California.
July 25, 1931.

Rehearing Denied Aug. 24, 1931.

1. Railroads 🔑327(1).

Driving automobile upon street car tracks at rural crossing without looking or listening for approaching trolley car would constitute negligence.

2. Railroads 🔑333(2).

Driving automobile upon street car tracks at rural crossing with car in plain view, and approaching crossing at speed rendering collision reasonably probable, would constitute negligence.

3. Negligence 🔑122(1).

Law presumes that person possessing normal sight and hearing must have seen and heard that which was within range of sight and hearing.

4. Automobiles 🔑244(20).

Evidence *held* to support verdict finding driver of automobile, struck by trolley car at open rural crossing, guilty of negligence, and therefore liable for death of guest.

> Action for wrongful death of guest, riding in automobile which collided with trolley car at rural highway crossing, was brought against the trolley company, its motorman, and the driver of the automobile. Decedent at time of accident was employed by the defendant automobile driver at his ranch, and he was returning her from a visit to her mother.

5. Railroads 🔑348(1).

Evidence *held* to support verdict finding motorman of trolley car, which struck automobile at open rural crossing, guilty of negligence, rendering trolley company liable for death of guest in automobile.

6. Railroads 🔑320.

Motorman of electric trolley on approaching rural highway crossing may presume that automobile driver will stop or turn aside until latter's conduct leads motorman to apprehend contrary.

7. Evidence 🔑588.

Jury may accept any one of conflicting statements in evidence as true, in passing upon issue of negligence.

8. Negligence 🔑93(1).

Negligence of automobile driver cannot be imputed to passenger.

9. Negligence 🔑136(26).

Contributory negligence **is question for** jury.

10. Automobiles 🔑224(4).
Railroads 🔑327(12).

Guest having absolutely **no control** over operation of automobile merely had duty to notify driver, if observing anything which endangered her safety.

11. Automobiles 🔑244(56).
Railroads 🔑348(8).

In action for death of guest, riding in automobile struck by trolley car at open rural crossing, against trolley company, motorman, and automobile driver, evidence *held* to support verdict finding decedent was not contributorily negligent in failing to give warning of approaching trolley car.

12. Trial 🔑350(3).

In action for wrongful death, submitting special findings permitting jury to find specially amount each heir was entitled to receive *held* not reversible error.

> Decedent left as her heirs at law a husband and four minor children who were dependent upon their mother for support. Trial court instructed jury to fix amount of damages in one lump sum in accordance with instructions if they found for the plaintiff. Court further instructed jury that in event they found a verdict for the plaintiff, and after they had fixed damages in one lump sum, they should find specially the amount each particular heir was entitled to receive from the total damage found.

13. Trial 🔑260(1).

Refusing instructions fully covered by other instructions given *held* not error.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Clyde E. Cate, as administrator of the estate of Genevieve Brennan, deceased, against the Fresno Traction Company and others, wherein the defendant William H. Bruce filed a cross-complaint against the other two defendants. From a judgment for the plaintiff and against the cross-complainant, the defendants appeal.

Affirmed.

Superseding opinion of the District Court of Appeal, 295 P. 98, which superseded 291 P. 215.

Conley, Conley & Conley, of Fresno, for appellant William H. Bruce.

Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for appellants Fresno Traction Co. and W. E. Gash.

George R. Lovejoy and Ray W. Hays, both of Fresno, for respondent.

CURTIS, J.

The facts in this case are correctly stated by the District Court of Appeal (295 P. 98), and are as follows:

"This is an action brought by Clyde E. Cate, as administrator of the estate of Genevieve Brennan, deceased, against the Fresno Traction Company and its motorman, W. E. Gash, and also against William H. Bruce, the driver of the automobile in which Genevieve Brennan, deceased, and her minor son were riding at the time of the collision, which occurred at a railroad crossing on September 20, 1928. The case was tried before a jury, and resulted in a verdict against all of the defendants for $20,001; also a verdict in favor of the Fresno Traction Company and W. E. Gash as against the cross-complainant on the cross-complaint of William H. Bruce. All of the defendants have appealed.

"The Fresno Traction Company operates its electric trolley line on regular schedule between the city of Fresno and the town of Pinedale, which is situated some 9 miles north of Fresno, and has been operating such line for a number of years. The line runs approximately north and south between Fresno and Pinedale, and is a single track line where it crosses Shaw avenue, which is a paved highway and runs approximately east and west. The paved portion of the highway is 24 feet in width, and crosses the tracks of the Fresno Traction Company at a right angle. This intersection is about 5 miles from the city of Fresno in a level and sparsely settled country.

"The deceased, Genevieve Brennan, a woman of thirty-five years of age at the time of the accident, was employed by defendant William H. Bruce, a man of thirty-seven years of age, to do general housework on a ranch upon which he was living and was leasing, which is located about 11 miles north of Madera. Some two weeks prior to the accident Bruce had taken Mrs. Brennan and her small boy to visit her mother, and on the date of the accident had gone for them and was returning them to his ranch. Bruce drove his automobile in a westerly direction along Shaw avenue. The trolley car involved in the collision approached Shaw avenue from Bruce's right, and was traveling in a southerly direction towards Fresno. For 637 feet along Shaw avenue before reaching the car tracks, and on Bruce's right as he approached the crossing and in the direction from which the electric car was approaching, there was nothing to obscure Bruce's nor Mrs. Brennan's vision of the electric car; the ground was level, no foliage, house, or other obstructions of any kind were in the open country on their right as they proceeded towards the rails of the Fresno Traction Company; 307 feet from the tracks facing east and in the direction from which Bruce and the deceased approached the tracks was a standard California State Automobile Association railroad sign. The property lines extend 18 feet both north and south of the paved portion of Shaw avenue; 12 feet 6 inches from the rail, and facing the direction from which the automobile was approaching, and 13 feet north of the paved portion of the highway, stood a standard railroad crossing sign. The automobile in which Bruce, Mrs. Brennan, and the child were riding was an open Ford. Mrs. Brennan sat next to Bruce in the front seat, and the boy was sitting at the right of his mother. From defendant Bruce's testimony, it appears that he and Mrs. Brennan were discussing what he had done while she had been away and a dance he attended. As they approached the tracks, and at a distance of about 60 or 80 feet therefrom, they both looked to the right and then he looked to the left. He further testified that he saw nothing; that Mrs. Brennan said nothing until just before the crash, when she said: 'Lord! There is a car'; that he did not slow the speed of his automobile at any time during his approach to or while he was upon the tracks. As to the motorman giving a warning signal, there is some conflict. Both the motorman and Robert Morris Hogan —the only passenger on the electric car at the time of the accident—testified that the motorman sounded a warning gong, the motorman stating: 'Somewhere within about sixty feet of the edge of the paved portion of the highway, and I rang my gong * * * and he didn't check his speed any, and they were looking right at me, and I thought he was going on through, or he might have been aiming to stop; I can't say but he didn't check his speed * * * I went over and got a little air. Taken just enough air through my air valve to pull the car down so it would give him plenty of time for clearance on through. * * * Well, he didn't check his speed. I got up within—something about ten or twelve feet of the edge of the paved portion of the highway and he was anywhere from about seven to nine feet east of the street car rail and all of a sudden he slammed on his brakes and swayed just a little to the left, and I had taken all the air I had, then at that time, and I realized there was going to be an accident.' The passenger, Hogan, stated that the motorman rang his gong 'ten or fifteen feet before we hit the crossing. I couldn't say just exactly how far.' Defendant Bruce testified that he heard no such gong sounded, and Floyd Lawden, a youth of thirteen years of age, who was walking along Shaw avenue and when about 100 feet west of the car tracks his attention was attracted by the crash of the collision, testified that he did not hear a gong or bell ring. When the motorman first observed the automobile, the electric car was traveling at 18 or 19 miles an hour, and when it approached the crossing it had been slowed down to 17 miles per hour. The speed of the automobile, according to defendant Bruce, was from 18 to 22 miles an hour. The automobile was struck about the center of the highway, shoved along and across the same and up to a telephone pole which stood 18 feet south of the southerly edge of the paved portion of the highway and a few feet west of the electric car tracks. Mrs. Brennan and her son sustained injuries from which they both died the next day."

[1-4] We will first dispose of the appeal of the defendant Bruce, the driver of the automobile in which plaintiff's intestate was riding at the time of her injury. He contends that the evidence is insufficient to support the verdict of the jury finding him guilty of negligence in the operation of his car at the time of, and just previous to, its collision with the street car of his codefendant, the Fresno Traction Company. We are unable to see upon what theory this appellant can make such a contention with any reasonable hope or assurance that it will be sustained. The appellant Bruce drove upon the street car tracks either without looking to see whether a car was approaching thereon, or, if he did look, with the car in plain view and approaching the highway at a rate of speed which would cause it in all reasonable probability to collide with his automobile as soon as the two reached the crossing. In either event, he would be guilty of gross negligence. If he approached the railway tracks without either looking or listening for an approaching car he was, under the circumstances appearing in the evidence, guilty of negligence. There was a standard California State Automobile Association rail sign on Shaw avenue 370 feet from the crossing, which Bruce could have seen before he reached the crossing, had he used reasonable care. The railway tracks were themselves in plain view of motorists using the highway at this point, and there is evidence that Bruce was familiar with the highway and knew of the presence of the traction company's line of railway at this crossing. It is manifest that Bruce was guilty of negligence if he drove his machine upon the track of the defendant corporation without first looking to see whether he could cross said track with safety. If Bruce looked for an approaching train, and his testimony is that he did, he must have seen it, as it could not have been more than one hundred feet from the crossing at the time, and there was nothing to obscure his vision for a quarter of a mile up the track from the crossing. "The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing." Young v. Southern Pacific Co., 189 Cal. 746, 754, 210 P. 259, 262. Therefore, if he looked for a car he must have seen it, and, in deliberately driving his machine upon the car track with the car approaching, Bruce was guilty of negligence of the most extreme character. We, of course, do not know just which one of these two views of the evidence the jury accepted. As we read the evidence, it seems plain to us that Bruce was so much engrossed in his conversation with the deceased that he did not look to see whether the crossing was clear before attempting to pass over it, and that, without taking any of the reasonable precautions which the law enjoins upon one approaching a railroad crossing, he deliberately drove his machine almost upon the tracks before he observed the street car approaching the crossing. It was then too late for Bruce to stop his machine, and, although he set his brakes and turned to the left, he was unable to avoid a collision with the street car. Under no construction of the evidence can it be held to be insufficient to support the verdict of the jury against the appellant Bruce.

[5] We will now turn to the consideration of the appeal by the Fresno Traction Company and its motorman, W. E. Gash. These appellants first make the contention that the evidence fails to show that Gash, the motorman, was negligent in the operation of the car which collided with Bruce's machine, resulting in the death of the deceased and her minor child. The testimony of the motorman as to his actions immediately prior to the collision is at best somewhat equivocal. He testified that he saw the machine in which Bruce and the deceased were riding when the car of the traction company was from 175 to 200 feet from the crossing, and that at that time the automobile was possibly a little further from the crossing than was the street car. The train was traveling about 18 to 19 miles per hour, and the automobile a little faster, possibly 25 miles per hour. Gash testified that at this time he did not pay "much attention to him until I come on up. I was somewhere about 135 to 140 feet, and I threw off my power and was coasting up to the highway."

"Q. Where was he; what was he doing? A. He was still coming on up, all the time.

"Q. Did he change his speed any? A. Not any at all. * * *

"Q. You threw off your power —? A. And coasted up.

"Q. Did you put on any air at that time? A. Not at that time, I didn't.

"Q. What next took place? A. Well, I got up within about—somewhere within about 60 feet of the edge of the paved portion of the highway, and I rang my gong—I always rang there, it is a crossing—and he didn't check his speed any, and they were looking right at me, and I thought that he was going on through, or he might have been aiming to stop; I can't say, but he didn't check his speed. * * *

"Q. Then when [what] did you do? A. I went over and got a little air.

"Q. Please explain what you mean by that? A. Taken just enough air through my air valve to pull the car down so it would give him plenty of time for clearance going on through.

"Q. That was about 60 feet away from the roadway? A. From the north edge of the paved portion of the highway.

"Q. Then what happened? A. Well, he didn't check his speed. I got up within something about ten or twelve feet of the edge of the paved portion of the highway and he was anywhere from about seven to nine feet east of the street car rail and all of a sudden he slammed on his brakes and swayed just a little to the left, and I taken all the air I had, then, at that time, and I realized there was going to be an accident.

"Q. Did you give it all the air you had? A. I gave it all the air I had. * * *

"Q. Then you came into collision. Describe the collision; how it happened. A. Well, he passed out in front of me and I caught him just behind the fender of the car and drug him just across the edge of the highway against this line post. * * * One of the poles of the street car line. * * *"

From this testimony of the motorman, it is clear that he saw Bruce and the deceased in an automobile approaching the track of the car line, and that he thought the driver in the automobile intended to pass over the crossing in front of the street car. He accordingly slackened the speed of the car, intending to give time for the automobile to pass in front of the street car. When at a point sixty feet from the edge of the paved highway he rang his gong, at the same time he noticed that the speed of the automobile was unchecked. It might be well here to note the contradiction in the evidence of the motorman regarding the ringing of the gong at this point. Bruce testified that he heard no gong, and the passenger in the street car, Hogan, testified that the motorman rang his gong "ten or fifteen feet before we hit the crossing." The jury may well have accepted the testimony of Hogan and believed that the gong was not sounded by the motorman until the street car was from ten to fifteen feet from the highway. Hogan's testimony finds some corroboration in the evidence given by the motorman when he testified that "at the time I gave all the air I had, I was about 10 or 12 feet from the edge of the highway," and that when the street car was about ten or twelve feet from the edge of the highway Bruce slammed on his brakes and turned his machine to the left. It would be a natural thing for the motorman to do when he gave his car "all the air he had," in an endeavor to stop his car, that he would also sound his gong to warn Bruce of the presence of the street car. Evidently it was at this point when the street car was somewhere from ten to twelve to fifteen feet from the north edge of the highway that the motorman first realized that there was liable to be a collision between his car and the automobile. It was at this time that Bruce apparently first had knowledge of the street car. Whether we are correct or not in this conclusion, there is ample evidence in the record to support the conclusion that when the motorman saw the automobile approaching the street car track he was of the opinion that the driver of the automobile intended to cross in front of the street car. He accordingly lessened the speed of his car in order to permit the automobile to pass. In doing so, however, he did not attempt to stop his car or to reduce its speed to a rate which would permit the automobile to make the crossing in safety, but, on the other hand, he allowed his car to travel at such a rate of speed that it collided with the automobile at the crossing. He discovered his mistake when he was only a few feet from the highway, and then, to use his language, "gave it all the air I had" in an endeavor to avert the collision. It was then impossible for him to stop his car before it collided with the automobile. We think this evidence establishes a clear case of negligence against the motorman in the operation of his car, which negligence, being that of an employee, is imputed to his employer, the Fresno Traction Company.

[6] These appellants contend, however, that the motorman had the right to assume that Bruce would stop his automobile or turn to one side before crossing the track, and thus avoid a collision with the street car. The law on this subject seems to be correctly stated in the cases of Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 P. 798, 800, and Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992, 995. In the first of these cases, we find the statement that, "He [the motorman] had the right to presume that Arnold [the driver of the automobile] would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary." In the second case cited, the court stated the rule as follows: "The operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing regard."

Undoubtedly in the present case the motorman had the right to presume that Bruce would perform his duty and would either stop or turn aside until the conduct of Bruce led him to apprehend the contrary. From the motorman's own testimony, it clearly appears that the conduct of Bruce, when the street car was 135 to 140 feet north of the crossing, was such as to lead the motorman to believe that Bruce was intending to cross in front of the train. He did not assume that Bruce would stop, but, on the other hand, he assumed that Bruce did not intend to stop, and he, the motorman, attempted to regulate the speed of his car in order to permit the automobile to pass over the crossing ahead of the car. The two cases above cited cannot be held applicable to the facts of this case. On the other hand, the facts of this case bring it more nearly within the rule enunciated in Stein v. United Railroads, 159 Cal. 368, 378, 113 P. 663, 667. In that case, the court said: "The evidence then being sufficient to show that the motorman had reason to believe that the plaintiff was likely to be injured, the law imposed upon him the duty of exercising at least ordinary care to avoid the injury. It is clear that within the contemplation of ordinary care and prudence and in consonance with a just regard for the safety and welfare of others the act required of him was to endeavor to stop his car before a collision occurred. At least, the case was such as to make it a proper question to be determined by the jury whether he acted promptly in his effort to stop the car when he was apprised of plaintiff's danger. If he made an honest effort to do so, no one, of course, could contend that he was at fault. But, on the other hand, if he failed to use the means at hand and made no effort to prevent the accident until he saw that it was impossible to avert it, the jury would be justified in finding for the plaintiff."

[7] Here the evidence shows that the motorman when sixty feet from the crossing was firmly of the opinion that Bruce did not intend to stop before crossing over the street car track. He had it in his power to resort to his air brakes to stop his car and thus prevent the collision. Instead of doing so, he waited until he was between ten or fifteen feet from the crossing when, for the first time, he made a real attempt to stop his car. It was then too late. Notwithstanding the brakes, the car proceeded across the highway and collided with the automobile just as it reached the car track. The act of the motorman in failing to stop his car cannot under this evidence be justified or excused by resort to the rule that he had the right to assume that Bruce would stop his machine before crossing the street car track, as by his own testimony he admits that the conduct of Bruce clearly indicated to him that Bruce did not intend to stop or turn aside before reaching the street car track. We have referred to the testimony of the motorman as equivocal, due to the fact that, while he testified as above set forth that he thought Bruce intended to pass in front of the approaching street car and that he, the motorman, attempted to regulate the speed of his car so as to permit him to do so, in other parts of his testimony he states, in one place that he did not know whether Bruce intended to stop or not before reaching the street car track, and in still another place he says he thought Bruce intended to stop before passing over the crossing. The jury had the right to accept any one of these conflicting statements as true in passing upon the conduct of the motorman. Evidently they believed that portion of his testimony in which he stated that he thought from Bruce's actions that Bruce intended to pass in front of the street car.

[8-11] It is next contended that the deceased, Genevieve Brennan, was herself guilty of contributory negligence which was the proximate cause of her injury, and therefore the plaintiff, as her administrator, cannot recover. It is not claimed that the deceased was guilty of any overt act which contributed to her injury, but, on the other hand, the contention is that she failed to exercise due care for her own safety in not observing the street car before she did, and warning Bruce that it was approaching the crossing. It is conceded that the negligence of a driver of a vehicle cannot be imputed to a passenger. It is also, we think, conceded that contributory negligence is a question for the jury. If there is any question as to the correctness of either of these two statements, we would cite in support of them the following cases: Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319; and Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529. We must construe the evidence, therefore, bearing upon the issue of contributory negligence of the deceased in the light most favorable to the plaintiff. The evidence shows, we think, without any question that Mrs. Brennan, the deceased, had absolutely no control of the machine in which she was riding, and that she occupied the position of a guest therein, pure and simple. She was an employee of Bruce, and was being taken by him from the home of her mother to the home of Bruce, where she acted as the latter's housekeeper. The deceased assumed no responsibility in the operation of the machine, and, under the facts in this case, the law cast upon her no responsibility. There was no evidence that Bruce up to the time of the collision was not properly and carefully operating his machine. Deceased, therefore, had no reason to be apprehensive of her safety while riding with him, or to take any unusual precaution against their running into danger. The most that can be said as to her responsibility in this regard is that, if she ob-

served anything which might tend to endanger her safety, it was her duty to notify the driver of this danger in order that he might avoid it. Ordinary prudence for her own safety would require this. If she saw the street car approaching the crossing in front of them, it was undoubtedly her duty to notify Bruce, if she had reason to believe that he did not also see the car and might collide with it at the crossing at the rate of speed at which they were traveling. The evidence as to whether she saw the street car before it entered the crossing may be said to be conflicting. The motorman said that she and Bruce were looking straight at the street car long before it reached the crossing. As we have said regarding the claim that Bruce saw the street car when it was some distance from the crossing, we think on the whole it favors the view that he did not see it or know of its being on the track until just before the collision. The evidence, we think, is much stronger in favor of the conclusion that Mrs. Brennan was not aware of the presence of the street car until just before their machine collided with it. Her exclamation, evidently spontaneously uttered just before the crash, "Lord! There is a car," indicates her complete surprise on seeing the street car in front of them. Had she seen it a few minutes or seconds previously, as might be inferred from the testimony of the motorman, we would not expect such an exclamation from her. The jury, we think, could well have believed from the testimony in the case that Mrs. Brennan was wholly oblivious to the fact that the street car was approaching the crossing until the moment she uttered the above exclamation. They were, therefore, justified in finding that she was not guilty of contributory negligence in failing to warn Bruce of its presence. For a discussion of the responsibility of a person while riding as a guest in a vehicle driven by another, we would refer to the following cases decided by this court: Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622; Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529; Martinelli v. Poley (Cal. Sup.) 292 P. 451.

Appellants rely with considerable strenuousness upon the case of Barnett v. Atchison, etc., Ry. Co., 99 Cal. App. 310, 278 P. 443, in support of their contention that the evidence in the present action establishes beyond conflict that the deceased, although riding in the automobile as a guest, was guilty of contributory negligence. We had reason to refer to that case in our decision in Smellie v. Southern Pacific Co., 299 P. 529, 539. We there held that it had no application to the facts in the Smellie Case, in which case damages were asked for the death of plaintiff's husband, who was riding as a guest at the time of his injury. We referred to the fact that in the Barnett Case, "No mention of the rule applicable to guests is to be found in that entire case." No point was made in the Barnett Case that any of the parties riding in the ill-fated machine were the guests of the driver, or of any other person. It cannot therefore in any sense be regarded as an authority upon the question before us. The contention that there is no evidence to support the implied finding of the jury that the deceased was not guilty of contributory negligence is accordingly not sustained.

[12] A third contention made by appellants is that the court erred in submitting to the jury special findings. The deceased, Genevieve Brennan, left as her heirs at law a husband, from whom she had been separated for some time immediately preceding her death, and four minor children. The children were dependent upon their mother for support. The court, after instructing the jury as to the law applicable to the general facts of the case, gave the following instruction: "In the event you find for the plaintiff, you will fix the amount of damages in one lump sum in accordance with the instructions I have given you and that, of course, would be inserted in the verdict which you brought in. Now, in addition to that, after that is done, in the event you should find a verdict for the plaintiff, and after you have fixed the damages in one lump sum, then at the request of the plaintiff I am asking you to bring some special findings on special issues which have been requested by the plaintiff." It then submitted to the jury five special findings by which it permitted the jury to find specially the amount each particular heir was entitled to receive from the total damage found. In response to those special findings submitted, the jury found that the husband, by the death of the deceased, had sustained a pecuniary loss of one dollar, and that each of her four minor children had sustained a pecuniary loss of $5,000. A verdict in this form, while criticized, was upheld by this court in the case of Robinson v. Western States Gas, etc., Co., 184 Cal. 401, 194 P. 39, 43. The court there said: "The defendant has no interest in the division which the plaintiffs may make among themselves, or which may be made for them, of the damages recovered. The statute contemplates a single recovery for the benefit of the family of the deceased, or those of his heirs who are dependent upon him for support. Whether it is divided among them after recovery or not, or how it is divided, are matters of no concern to the defendant." In view of this prior holding of the court, the action of the trial court in submitting these special findings to the jury cannot be held to be reversible error.

[13] Finally the appellant Fresno Traction Company assigns as error the action of the court in refusing to give certain instructions requested by it, and designated instructions Nos. 1, 2, 3, and 4. As to instructions Nos. 1, 2, and 3, it is apparent that they

are directed to the question of Bruce's negligence in failing to exercise proper care in the operation of his automobile just prior to and at the time of the collision. We fail to see how the refusal of the court to give these instructions could affect the case of the plaintiff, inasmuch as the negligence of Bruce was not imputable to the deceased. Instruction No. 4, while directed to the question of negligence on the part of the deceased, was fully covered by other instructions. It was not error, therefore, to refuse to give it.

We are satisfied after a consideration of the entire evidence in this case that it is ample to justify the verdict of the jury finding that the death of the deceased was proximately caused by the concurrent negligence of the driver of the automobile and the motorman.

The judgment is therefore affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENCK, J.; SEAWELL, J.

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213 Cal. 359

GARDNER et al. v. COOKSON.

Sac. 4399.

Supreme Court of California.
Aug. 8, 1931.

1. Landlord and tenant ⚷49(2), 222.

Defrauded lessee could set up lessor's fraud as defense, when sued for rent and violation of covenants of lease, without having sought to rescind lease.

2. Landlord and tenant ⚷49(2).

That lessee alone executed second lease about year after execution of first lease by lessee and another *held* insufficient to overcome inference that lessee relied on lessors' misrepresentations in executing first lease.

> This was so, since other evidence supported the conclusion that the second lease was a continuing transaction resulting from and based upon the repeated false representations and deceit of the lessors.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by M. F. Gardner and another against Maurice E. Cookson. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Eugene S. Selvage and Henry L. Ford, both of Eureka, for appellants.

J. Logan Beamer, of Eureka, for respondent.

PER CURIAM.

This is an appeal from a judgment rendered for the defendant for costs.

The plaintiffs' complaint alleged the execution of a lease dated December 26, 1924, whereby the plaintiffs let to the defendant a 331-acre ranch and an additional 160-acre tract for a period of three years at a monthly rental of $100 per month payable $400 on the first of June of each year and $800 on the first of November of each year; that the defendant took possession of the leased premises and remained thereon until October 15, 1926, when without the plaintiffs' consent he abandoned possession; that the plaintiffs reentered the premises on April 15, 1927; that the defendant has not paid the installment of rent due November 1, 1926, in the sum of $800, nor any rent for the period from January 1 to April 15, 1927, amounting to $350. The complaint contained statements of further causes of action wherein it was alleged that the defendant caused damage to the leased premises and violated the covenants and terms of the lease, all to the plaintiffs' loss and damage in the total sum of $7,657.87. The defendant filed his answer containing certain admissions, averments, and denials, and his cross-complaint in several counts wherein he set up fraud and deceit on the part of the plaintiffs in the making of certain false representations as an inducement to the execution of certain leases on the part of the defendant and which, if supported by the evidence, it may be conceded constitute actionable fraud. The defendant alleged injury and damage aggregating $9,000. After a trial on the issues the jury brought in its verdict for the defendant without specifying any amount of damages, and judgment for the defendant for costs was entered thereon.

[1] On this appeal the plaintiffs contend that the court erred in overruling their demurrer to the defendant's second amended cross-complaint for the reason that the defendant should have elected either to rescind the lease or to stand on the lease and sue for damages. But the court instructed the jury that the "defendant in addition to his answer to plaintiff's complaint has filed a plea by way of recoupment. * * * And in this the court instructs you that this is a 'defensive relief' whereby the alleged fraud is set up by way of defense to defeat the action brought to enforce an apparent obligation or liability. The alleged fraud is given in evidence as a defense and an answer to the whole demand or in abatement of the damages according to the circumstances of the

case. This defense, however, the defendant must prove to your satisfaction by a preponderance of evidence under the following rules:" (And the court then proceeded properly to advise the jury thereon.) That the court and the jury both so understood the purpose of the defendant's cross-complaint is apparent from these instructions and from the jury's verdict and is in accordance with the principles enunciated in Paolini v. Salprizio, 201 Cal. 683, 258 P. 380, relied upon by the plaintiffs. The contention in that respect is therefore not meritorious. Neither is there any merit in the claim that the defendant's cross-complaint is predicated upon a different lease from that alleged in the plaintiffs' complaint. An examination of the pleadings discloses that both parties alleged the lease dated in December, 1924.

No serious contention is made by the plaintiffs that the evidence does not support the jury's inferential finding that the allegations of the defendant's cross-complaint on the issues of fraud and deceit are true. The only contention made under the heading "Evidence Insufficient to Justify Verdict of Jury," appearing in the appellants' opening brief, is that the plaintiffs should have recovered rent at least for the period during which the defendant actually occupied the premises. That the jury, however, found that the amount of any claim made by the plaintiffs was offset by the damages sustained by the defendant must have become apparent from what has hereinbefore been said.

[2] The plaintiffs also contend that the court erred in refusing to grant their motion for a nonsuit of the defendant's cross-action for the reason, so it is claimed, that there was no evidence that the defendant relied upon the misrepresentations. It was in evidence that the defendant executed a second lease about a year after the execution of the first lease, identical in its terms with the exception that it ran to the defendant alone as the lessee, the first lease having named both the defendant and his brother as lessees. The plaintiffs ground their contention on the fact of the execution of the second lease. But this alone is insufficient to overcome the inferences which may be drawn from other sufficient evidence in the record that the defendant did rely upon the representations made by the plaintiffs, and that the defendant was in fact misled and deceived by the plaintiffs to his injury and damage. In this connection the plaintiffs urge that the defendant's execution of the second lease was an express affirmation of the contract between the parties, which operated as a waiver of any rights which may have accrued to the defendant by reason of any fraud practiced upon him by the plaintiffs. But the record does not uphold this contention. On the contrary, the evidence supports the conclusion which the jury must have drawn that the execution of the second lease was a continuing transaction resulting from and based upon the repeated false representations and deceit of the plaintiffs. The jury under the evidence was justified in finding that the execution of the second lease by the defendant was not an entry into a new arrangement or engagement by which he may be deemed to have waived any right to pursue a claim for damages on account of fraud.

The plaintiffs contend that several of the court's instructions were erroneous. We have examined each of such instructions and all of the instructions given to the jury, and on the whole record we cannot say that any error appearing therein operated to the prejudice of the plaintiffs.

We conclude that the verdict is supported by the evidence, and we find no error in the record.

The judgment is affirmed.

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213 Cal. 400

SHAW v. LEE.

S. F. 13473.

Supreme Court of California.

Aug. 15, 1931.

Rehearing Denied Sept. 14, 1931.

Appeal and error 🔑**687.**

Record did not show defendant was deprived of opportunity to present his side in action for accounting, notwithstanding court adopted referee's findings (Code Civ. Proc. §§ 644, 645).

Record disclosed that after each party introduced his evidence and rested the court appointed a referee to expert the books involved in the action and make a report to the court; the findings of the referee to be deemed and considered the findings of the court. After the filing of the report and in the presence of both parties, an extended hearing was held, and another referee was appointed to make a further examination of the books, and, after receiving two of this referee's reports, as well as additional testimony of the parties, the trial court approved the first report and made formal findings in which it incorporated the findings of this report.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by J. D. Shaw against H. Irving Lee. From the judgment, defendant appeals.

Affirmed.

Owen D. Richardson, Fry & Jenkins, and D. T. Jenkins, all of San Jose, for appellant.

S. G. Tompkins, of San Jose, for respondent.

Fred A. Wool, of San Jose, for G. Helburn, judgment creditor of J. D. Shaw.

CURTIS, J.

This action was brought for an accounting after dissolution of a partnership consisting of the plaintiff and defendant. The action came on for trial. Each party introduced his evidence and rested. Thereupon the court, by order entered upon its minutes, appointed Louis M. Simonsen referee to expert the books of the copartnership and make a report to the court in accordance with said accounting. It was further provided in said order "that the said findings of said referee be deemed and considered the findings of the court." Thereafter the referee made an examination of the copartnership books, and reported to the court "that the plaintiff J. D. Shaw is entitled to receive from H. I. Lee, defendant, the sum of $1,523.90, to equalize their respective transactions."

The court, after certain proceedings had subsequent to the filing of said report with the court, made findings of fact in which it adopted the report of the referee, and also made separate conclusions of law in which it found that the plaintiff was entitled to judgment against the defendant in the sum of $1,523.90. A proper judgment in accordance with these findings of fact and conclusions of law was thereupon entered against defendant. From this judgment the defendant has appealed.

The position of the appellant may best be shown from the following statement contained in his brief: "* * * If it shall be contended by counsel that the Simonsen report is to be construed simply as a report showing the balance reflected by the books, leaving for additional evidence the explanation of the items contained in the books, the correctness and propriety of the charges, and such other matters as can be explained only by extrinsic evidence, it at once becomes obvious that the court below did not try the whole case and that the defendant has been deprived of his opportunity to present his side of the controversy." In view of the record in the case, we think there is no merit in appellant's position. The minutes of the court showing the proceedings taken at the trial, after stating that each party introduced witnesses in support of his contentions, further recited: "Thereupon both parties rest and the matter is submitted to the court. Whereupon the court makes its order appointing Louis M. Simonsen referee to expert the books of said copartnership and make a report to the court in accordance with said accounting; and it is further ordered that the said findings of said referee be deemed and considered the findings of the court." No attack is made upon these minutes of the court as not containing a true statement of the proceedings in court at the time of the trial. It appears therefrom that each party had rested his case and submitted the same to the court for decision. If either party desired to dispute the correctness of the partnership books or had any extrinsic evidence to offer in explanation of any matters contained therein, it was his duty at that time to make his wishes or purposes known to the court. This was especially true, in view of the order of the court, to which the appellant made no objection, that the findings of the referee would be deemed and considered the findings of the court.

As we have seen, there was but one issue before the court, and that was the amount due as shown by the accounting. This issue the court referred to the referee to try and determine. "The finding of the referee * * * upon the whole issue must stand as the finding of the court. * * *" Section 644, Code Civ. Proc. The next section of the Code provides how such a finding may be reviewed, that is, "in like manner as if made by the court."

Had no other proceedings been taken than those recited above, the judgment of the court against the defendant would have to stand. But the record before us shows that, upon the filing of the report of the referee, the court set a day for a hearing of said report. Both parties were present, and an extended hearing was held. Another referee, a Mr. Rosenthal, was appointed to make a further examination of the partnership books. Rosenthal made two reports, in one of which he found that the plaintiff was indebted to the defendant in the sum of $2,311.83. He later filed a second report finding that plaintiff was indebted to defendant in the sum of $1,352.92. These reports of Rosenthal, as well as additional testimony of the parties, were before the trial court at the time it finally approved the Simonsen report "as the Finding of the Court, and the conclusions found therefrom are also the conclusions of the court." Thereafter, as already stated, the court made formal findings in which it incorporated the findings of the referee.

It is apparent that appellant's claim that the court did not try the whole case, or that he was deprived of his opportunity to present his side of the controversy, finds no support whatever in the record of the case before us and which has been referred to above.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

213 Cal. 414

ANDERSON v. TROTTER.

ANDERSON et al. v. SAME.

BAYLIS ESTATE CO. v. TROTTER.

Sac. 4472.

Supreme Court of California.
Aug. 17, 1931.

Rehearing Denied Sept. 14, 1931.

Boundaries 🔑13.

Patents referring to plat showing lake shore as boundary *held* to convey title to 83 acres between meander line and water line (Civ. Code, § 830).

Since meander line of plat in question purported to coincide with water line of lake, but did not actually do so, there being a tract of about 83 acres lying between meander line and actual water line, it was contended that size of tract was sufficient to require finding that survey was fraudulent, and that no title was conveyed to such tract, but evidence showed that land in controversy at time of survey was worth only about $100, that it was not suitable for cultivation, and that it was used only for pasturage and as a source of supply for small quantities of firewood.

In Bank.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Three actions by Iantha C. Anderson, by John Russel Anderson and others, and by the Baylis Estate Company, against Mary S. Trotter, were tried together. Judgments for the respective plaintiffs, and defendant appeals.

Affirmed.

William Sea, Jr., of San Francisco, for appellant.

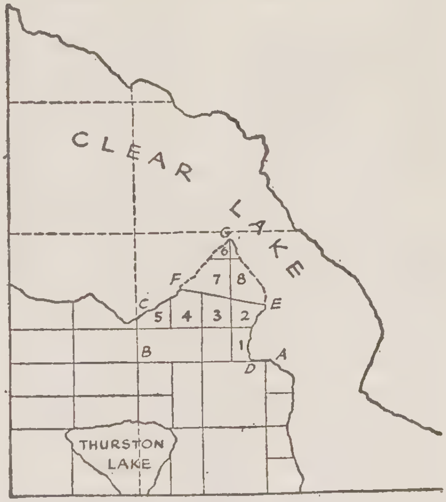
Herbert V. Keeling, of Lakeport, and Lovett K. Fraser, of San Francisco, for respondents.

PLUMMER, Justice pro tem.

The three actions above named were tried together, and involve only one question, to wit, the ownership of a tract of land lying between the meander line and the waters of Clear Lake. The respective plaintiffs had judgment, and the defendant appeals.

The actions were brought to quiet the title to lots 1, 2, 3, 4, and 5 of section 29, township 15 north, range 7 west, M. D. B. & M., abutting on Clear Lake, the plaintiffs alleging ownership to the actual water line of the lake, irrespective of the meander line, as shown by the original survey of the property in dispute. The tract in dispute involves approximately 83 acres, of which the plaintiff Iantha C. Anderson claims to be the owner of 39.50 acres. The plaintiff John Russel Anderson alleges ownership to 43 acres of the tract, and the plaintiff Baylis Estate Company, a corporation, alleges ownership to approximately 2.25 acres. The record shows ownership in the plaintiff John Russel Anderson of lots 1 and 2; ownership in Iantha C. Anderson of lots 3 and 4, save and except a certain portion thereof owned by the Baylis Estate Company, lot 5 being owned also by the Baylis Estate Company.

Section 29 was originally surveyed in December, 1875, by George Tucker, a regularly licensed United States surveyor, and the plat thereof was subsequently filed in the office of the surveyor general at San Francisco, Cal., and approved by the surveyor general on the 18th day of December, 1876. In 1925 a resurvey of the premises involved was made by William H. Thorne, which survey was approved by the United States supervisor of surveys, on the 26th day of January, 1926, and by the acting commissioner United States general land office on March 16, 1926. The following plat shows the difference in the respective surveys:



The Tucker survey began at point "A" and ran a line westerly to a point marked "B"; thence northerly to a point marked "C," returning to the point of beginning. What is known as the meander line of Clear Lake was run as follows: "A" to "D"; thence to point marked "E"; thence to point marked "F"; thence to point marked "C." This latter line was described on the plat as the meander line of Clear Lake, and the plat filed with the United States surveyor general and in the office of the Interior Department shows the water line of Clear Lake coincident with the meander line of the survey made by Tuck-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

er in 1875. It being discovered later that the meander line of the lake, as run and platted by Tucker, did not actually coincide with the water line of the lake, a resurvey was made in 1925, which resurvey gives the meander line indicated on the plat as running from "E" to "G" and from "G" to "F," and, by running a line from "F" to "E," incloses a tract comprising a trifle over 83 acres, the respective plaintiffs alleging ownership to portions of the 83 acres as heretofore described, by reason of their ownership of lands described in the Tucker survey to which we have referred. A duly certified copy of the plat of the original survey made by Tucker in 1875 was admitted in evidence, and the meander line of the survey and the plat coincide as to the water line of Clear Lake; that is, the original plat does not show the existence of any land between the meander line of the survey and the actual water line of the lake.

The patents issued by the United States government, under which the respective plaintiffs claim, describe the land conveyed by lots numbered as we have indicated on the plat, containing so many acres according to the official plat of the survey of the lands returned to the general land office of the surveyor general, etc. In other words, the lands were conveyed according to the plat of the survey thereof made by Tucker, which describe the lands as extending to, and abutting upon, the waters of Clear Lake.

The court found that a patent was issued to Algernon Sidney Jones for 126.1 acres, and that there were approximately 41 acres between the meander line of said land and Clear Lake, which said 41 acres were included in said patent to Algernon Sidney Jones from the United States of America, and that 38.78 acres of the same lies between the meander line of the plaintiff Iantha C. Anderson and Clear Lake, and is a part of the land conveyed by said patent.

As to the property claimed by the plaintiff John Russel Anderson, the court found that the United States government issued a patent to Harvey W. Grigsby for 155.79 acres, and that there was approximately 42.72 acres between the meander line of said land and Clear Lake, and which said 42.72 acres was included and conveyed by the patent to Harvey W. Grigsby.

The court further found that as to the Baylis Estate Company the 2.25 acres claimed by said estate was covered by the patent issued to Algernon Sidney Jones, as above stated.

The plaintiffs in this action claim the property through mesne conveyances from the patentees named. Following the Thorne survey a patent was issued by the United States government to the defendant, which includes the land indicated on the plat to which we have referred, as follows: Beginning at point "E"; thence to point marked "G"; thence to point marked "F"; thence to point of beginning.

The meander line of the Tucker survey, according to which the plat was made, filed, and approved, as heretofore stated, is as follows:

"Beginning at meander post on south boundary of township 17.70 chains east of corner to sections 32 and 33.

"In Section 33

N. 57 deg. W.	15.50 chains	to corner to sections 28, 29, 32, 33.
West	14.00 chains	Thence In Section 29
N. 1 deg. W.	8.00 chains	
N. 13 deg. E.	10.00 chains	
N. 20 deg. E.	11.00 chains	
N. 57 deg. E.	6.00 chains	
North	4.00 chains	
N. 80 deg. W.	53.00 chains	S. Jones cabin S. 3 deg. chains.
S. 60¼ deg. W.	28.50 chains	to fractional corner to sections 29 and 30."

Approximately fifty years later a different plat was filed after the Thorne survey, indicating a different meander line, as we have shown by the lines running from points "E" to "G," "G" to "F," and "F" to "E." The testimony shows that the land included within the Thorne survey and lying between the meander line of the Tucker survey and the waters of Clear Lake was rocky, covered by live oak, chamisal, and manzanita trees, and was of little value; the testimony being to the effect that the land at the time of the Tucker survey was not worth over $1.25 an acre, or an aggregate sum of $100, was not suitable to cultivation, and during all the years intervening between the Tucker and the Thorne surveys was used only for pasturage purposes. Some of the trees thereon were cut for use as firewood. Following the Thorne survey, the defendant and her husband built a cabin on one corner of the disputed tract. Taxes were paid upon the disputed premises by the plaintiffs in this action for a number of years. The trial court, however, did not make any finding as to adverse possession by any of the parties hereto, and we have found nothing in the testimony which would justify such finding.

The claim of the plaintiffs, as we have stated, is based upon the survey made in 1875, and carried with it all the lands lying between the lots mentioned in the patents and the actual water line of the lake. The claim of the defendant is based upon the theory that the 83 acres of land is sufficient in size to warrant and demand a finding that the Tucker survey was fraudulent, and that no title or claim of ownership to the disputed premises can be based thereon. The trial court found against the claim of the defendant, holding that there was no basis for setting aside the Tucker survey, or holding that it was the result of either mistake or fraudulent act, and that under the law the water line, and not the meander line, constituted the true boundary of the patented lands, and that the subsequent patent based upon a survey made fifty years later conveyed no title.

The patents issued following the Tucker survey purported to convey the land according to the plat on file in the general land office, which plat gave the waters of Clear Lake as the boundary line. In 9 C. J. p. 180, § 50, the rule with reference to such conveyances is thus stated: "When maps, plats or field notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land." It will be noticed that the rule here stated reads, "maps, plats *or* field notes," not "maps, plats *and* field notes." In the instant case the deed refers to the "official plat," and does not mention the field notes. The plat gives Clear Lake as the boundary. Hence the application of the rule set forth in section 830 of the Civil Code, as follows: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." In 9 C. J. p. 181, § 51, the rule is stated as follows: "Grants by the United States of its public lands bounded on streams or other waters, navigable or nonnavigable, made without reservation or restriction, are to be construed according to their effect and according to the law of the state in which the land lies." "The general rule adopted by both state and federal courts is that meander lines are not run as boundaries of the tract surveyed, but for the purpose of defining the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey. The stream, or other body of water, and not the meander line as actually run on the ground, is the boundary, the purpose of meander lines being merely for the benefit of the government in ascertaining the quantity of land in the survey for which it requires payment; and the rules adopted in the various states as to the extent of the title of the owner of land bounded on rivers and other bodies of water apply in the case of land bounded on meandered waters." 9 C. J. p. 189, § 69. The exceptions to this rule include references to bodies of water which do not exist, and to tracts of land so large as to palpably indicate fraud or such a mistake in the survey that a court will, for equitable reasons, treat the meander line as the boundary. As we have stated, the testimony in this case shows land of little value, land suitable only for pasturage purposes, and land that has never been cultivated or used other than for pasturage purposes and the cutting of small quantities of wood for use as fuel.

In Craig v. White, 187 Cal. 489, 202 P. 648. 649, this court had before it a somewhat similar question. There the meander line was sufficiently distant from the shore line of Clear Lake as to omit from the survey about 350 acres of land. This tract of land was about 13 miles in length. The principle there stated, however, is applicable here, to wit: "These conveyances were made on the theory that the meander line as marked by the United States survey constituted the actual boundary between the uplands belonging to the government and the state lands included within the borders of the lake. Prior to the issuance of state patents to the defendant, United States patents had been duly issued to settlers on the government uplands bordering on this part of the lake, which patents, under the established rule governing such transfers, conveyed title to the patentees to the actual margin of the lake"—citing Civ. Code, § 830; Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428. Some claim was made in that case that the waters of the lake had receded, but the evidence shows that such was not the case.

In Foss v. Johnstone, 158 Cal. 119, 110 P. 294, 298, this court, in answering like questions involved in the instant case, used the following language: "The patents expressly declare that they grant the lots mentioned, and that they contain a stated number of acres, being the same number of acres mentioned in the plat of the corresponding lots. It is claimed that this shows an intent to grant no more than the stated number of acres, and to make the meander line the boundary, and not the shore line of the pond. This claim is disposed of by the following passage from Hardin v. Jordan, 140 U. S. 384, 11 S. Ct. 808, 35 L. Ed. 428: 'It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the federal and state courts, that such meander lines are [not] intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary.'" The court then cites a number of cases where the lands granted corresponded with the plat but did not include acreage between the meander line and the shore line, holding that such acreage was conveyed, as the shore line constituted the boundary. The opinion in the Foss Case, supra, quoting from Mitchell v. Smale, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. Ed. 442, thus sets forth the rule as to the binding effect of the official plat: "The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary in the matter of riparian rights and title to land under water regularly follow." To the same effect is the case of Kirby v. Potter, 138 Cal. 686, 72 P. 338.

In Maginnis v. Hurlbutt, 49 Cal. App. 460, 193 P. 606, the District Court of Appeal for the First District had before it the question of ownership of lands lying between the meander line and the actual shore line of Clear Lake. It was there held that the grant of land by the government carried the boundary to the shore line of the lake, and was not limited to the meander line. The briefs of counsel state that 38 acres were included in the tract lying between the meander line and the shore line of the lake. The opinion of the court, however, does not indicate the number of acres. The Maginnis Case differs from the case at bar in that the title asserted as against the original patent was based upon an act of the state of California commonly known as the "Swamp Land Act." The character of the land, however, and the character of the title claimed does not affect the principle which we have heretofore stated that a patent purporting to convey land according to a plat which describes the land as bounded by a body of water conveys the land to the shore line unlimited by the meander line, unless there enters into the case a question of fraud or palpable mistake justifying a court of equity to intervene, and the question therefore arises: Should the court in this case have held that the tract of land between the meander line of the Tucker survey and the shore line of Clear Lake was such as to limit the boundary of the lands claimed by the plaintiff to the meander line shown by the Tucker survey, or was the court correct in fixing the boundary of the plaintiff's land according to the plat on file?

Appellant bases her claim for reversal upon the cases of Jeems Bayou Fishing & Hunting Club et al. v. United States, 260 U. S. 561, 43 S. Ct. 205, 67 L. Ed. 402; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 24 S. Ct. 425, 48 L. Ed. 662; Id., 87 Minn. 97, 91 N. W. 304, 63 L. R. A. 157, 94 Am. St. Rep. 684; Lee Wilson & Co. v. United States, 245 U. S. 24, 38 S. Ct. 21, 62 L. Ed. 128; Producers' Oil Co. v. Hanzen, 238 U. S. 325, 35 S. Ct. 755, 59 L. Ed. 1330; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 22 S. Ct. 563, 46 L. Ed. 800; Scott v. Lattig, 227 U. S. 229, 33 S. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107. A review of these cases, however, we think shows that they are readily distinguishable from the facts found by the court in this case. In the Jeems Bayou Fishing & Hunting Club Case, supra, a compact body of land of 500 acres was omitted from the original survey. The court there held that the omission of such a large tract of land indicated a deliberate purpose on the part of the surveyor and rendered his actions fraudulent. In the case of Security Land & Exploration Co., supra, the patent called for 140 acres. The omitted land comprised 570 acres, which, according to the language of the court, indicated that the surveyor never saw the grant and never saw the lake he pretended to have measured. In the case of Lee Wilson & Co., supra, the controversy involved 853 acres of unsurveyed swamp land. In the French-Glenn Live Stock Co. Case, supra, a large tract of land was involved, and it was found that there was no body of water to meander. The case of United States v. Lane, 260 U. S. 662, 43 S. Ct. 236, 67 L. Ed. 448, where the facts are more similar to those involved here, held, quoting from the syllabus: "A patent to land under a survey along the margin of a lake, which purports to follow such margin, will carry title to the water's edge, where the land is wild and remote and of little value, and numerous ravines run into the land from the water, so that the running of the line on the water's edge would have been difficult, while the survey follows with fair accuracy the contour of the lake, although in a length of 4,000 feet, with an indicated area of 271 acres, about 98 acres are outside of the meander line." The opinions in the Jeems Case, supra, and the Lane Case, supra, were written by the same justice. In the former case the size of the tract of land omitted was held to indicate fraud, while in the Lane Case 98 acres omitted were not held to constitute a sufficiently large body of land to indicate fraud or deliberate mistake, etc.

In deciding the Lane Case the court used the following language, which is pertinent here: "The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the physical effect of a declaration that they extend to and are bounded by the lake or stream." This language is quoted from the case of Mitchell v. Smale, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. Ed. 442. The court then proceeds: "While the facts are somewhat different and the extent of the omission somewhat greater, we think the general rule should, likewise, be applied in the remaining two cases. The Warren survey and plat here indicate an area of about 271 acres in the fractional subdivisions conveyed. The lands added by the new survey constitute a compact body of 97.64 acres—65.77 acres of which are involved in the Greene Case and 14.13 acres in the Loucks Case—having the outline of a long and rather irregular crescent, with the outer curve next to the water," etc.

In the case of Barringer v. Davis, 120 N. W. 65, a case referred to in the citations which we have given, it is held that the meander line is not the limit of the land conveyed when the lands border upon a body of water, but that the shore line constitutes the true boundary. On pages 66 and 67 of the volume cited are two maps or plats showing the lands in controversy. The original survey made in 1875 called for 154 acres. A resurvey made in 1901 added 104 acres. The court held that the original patents conveyed the lands in controversy. This case is also reported in 141 Iowa, 419, 433. It would appear from the opinion and the plats in the Barringer Case that the acreage involved was considerably larger than that with which we are dealing.

In the case of Rue v. Oregon & Washington Railroad Co., 109 Wash. 436, 186 P. 1074, the Supreme Court of Washington held that 43 acres of land lying between the meander line and the shore line was insufficient upon which to hold that the survey was fraudulent or so palpably erroneous as to justify the interference of a court of equity. Other questions were involved in that case, but the principles there stated are applicable here.

In the case of Mitchell v. Smale, supra, the patent covered 4.53 acres. As platted it was held to carry title to 25 acres. In Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046, the title to the riparian owner of 143.93 acres of land between the meander line and the lake in a different section was sustained where his patent called for but 68.06 acres. As reported in 106 N. W. 1046, this case exhibits plats illustrating the questions involved and the lands in dispute.

In Schlosser v. Cruickshank et al., 96 Iowa, 414, 65 N. W. 344, the opinion discloses that there were 100 acres between the meander line and the shore of the lake. It was there held that the patent under the cases which we have cited carried the boundary line to the shore of the lake.

In Schmitz v. Klee, 173 P. 1026, 1027, the meander line left between it and the shore line 30.71 acres of high land. It was held that the patent conveyed the intervening tract. A plat showing the unsurveyed land appears on page 1027 of the volume cited.

In Greene et al. v. United States (C. C. A.) 274 F. 145, 149, and Loucks et al. v. United States (U. S. v. Lane) 260 U. S. 662, 43 S. Ct. 236, 67 L. Ed. 448, are quoted practically all the cases which we have cited, and, where a larger tract of land was omitted than lies between the Tucker meander line and the shore of Clear Lake, the court said: "The case is well within the rule that a meander line is not to be considered as a line of boundary, where the plat of survey shows a body of water as the boundary," etc.

Some minor questions were presented as to errors in the admission of testimony, but they are not such as to affect the application of the legal principles enunciated by the foregoing cases, and, in view of what we have heretofore stated, we think that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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213 Cal. 432

READ v. JOHNSON et al.

Sac. 4427.

Supreme Court of California.

Aug. 18, 1931.

Rehearing Denied Sept. 17, 1931.

1. Corporations 🔑269(3).

Proof of dates of notes executed by corporation and of items of indebtedness represented thereby and of items making up open book account authorized enforcement of stockholder's liability.

> This was so, since the dates as proved removed the case from any question of the statute of limitations (Code Civ. Proc. § 337).

2. Corporations 🔑245.

Action to enforce stockholder's liability could be maintained against stockholder's administrator (Code Civ. Proc. §§ 385, 1582; Civ. Code, §§ 313, 322).

3. Corporations 🔑269(2).

In action to enforce stockholder's liability, notes executed by corporation *held* admissible as evidence of original indebtedness.

4. Corporations 🔑237.

Where notes evidencing indebtedness of corporation provided for payment of attorney

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fees and other charges, stockholder's liability attached to corporation's liability therefor; consideration being extension of time.

5. Corporations 🔑245.

Sale of stock by stockholder's administrator did not affect cause of action against administrator to enforce stockholder's liability.

6. Corporations 🔑263(1).

That stockholder's administrator was discharged pending suit to enforce stockholder's liability did not affect Superior Court's jurisdiction over subject-matter, though judgment was rendered for $146.46 against each of nine heirs substituted as defendants.

7. Corporations 🔑268(4).

Where stockholder's administrator was discharged pending suit to enforce stockholder's liability, permitting plaintiff to file supplemental complaint to obtain relief from distributees *held* proper.

8. Depositions 🔑98.

Deposition taken before substitution of deceased stockholder's heirs as defendants in administrator's stead *held* properly received in evidence in action to enforce stockholder's liability.

In Bank.

Appeal from Superior Court, Sacramento County; **W. A. Anderson**, Judge.

Action by H. J. Read against Carl Johnson, administrator of the estate of Andrew Johnson, deceased. After the discharge of Carl Johnson, as administrator, Regnhild Johnson and others, heirs at law of the deceased, were substituted as parties defendant. From an adverse judgment, defendants appeal.

Affirmed.

H. W. Zagoren, of Sacramento, for appellants.

Matthew A. McCullough, of San Francisco, for respondent.

SHENK, J.

This is an appeal from a judgment in favor of the plaintiff in an action to enforce a stockholder's liability.

Andrew Johnson died intestate on July 22, 1921, in the county of Sacramento. Carl Johnson was appointed administrator of his estate, consisting of separate and community property. A final decree distributing the estate to the heirs at law and the assigns of certain of them was filed on April 7, 1924. The administrator was discharged on April 13, 1925.

At the time of his death the decedent was the owner of 330 shares of the capital stock of the Yuba Vineyards Company, a corporation, and this stock came into the possession of the administrator. The rights, privileges, and powers of said corporation were suspended on March 1, 1924, by reason of the nonpayment of its license tax. After the appointment of the administrator, and during the years 1923 and 1924, said corporation contracted certain indebtedness by reason of the purchase of farm machinery, materials, and supplies from Booth and Herboth, merchants at Marysville. Much of this original indebtedness, after it was incurred, was merged in promissory notes executed by the corporation to the creditor firm. Some of the notes were paid, but four of them remained unpaid. The unpaid notes and the open book account were transferred to the plaintiff for purposes of collection. On June 30, 1924, this action was commenced against the administrator to recover the proportionate share of said indebtedness chargeable to the decedent as a stockholder of said corporation.

The complaint is in five counts, four of which are on the indebtedness evidenced by the promissory notes and for interest and attorney's fees provided for therein. The first note is dated January 2, 1924, for $950; the second is dated November 21, 1923, for $261.20; the third, December 3, 1923, for $940; and the fourth, February 1, 1924, for $1,371.95. The fifth count alleged the indebtedness of the corporation to the plaintiff's assignor in the sum of $998.16 on an open book account extending from July 25, 1923, to February 18, 1924. After the discharge of the administrator and on December 22, 1925, the plaintiff, by leave of court, filed an amended and supplemental complaint, substituting as parties defendant the heirs at law of the decedent who were the distributees of the estate and the California National Bank as assignee of the defendant widow, in the place and stead of the administrator. The demurrer of the defendant bank was sustained, and the action as to it was dismissed. On issue joined by the remaining defendants the case was tried, and the court ordered findings in favor of the plaintiff, and appointed a referee to take the account and determine the amounts properly chargeable to each defendant. The referee found the defendant widow chargeable with the sum of $1,194.33 and each of the nine remaining defendants with the sum of $146.46. Judgment was entered accordingly.

The first point made on the appeal is that the defendant stockholders are not liable on account of the promissory notes alleged in the first four counts of the complaint, for the reason that their liability, if any, can be predicated only on the original indebtedness and not on the promissory notes. As to the fifth count it is contended that a stockholder is not liable on an open book account, but is liable only upon each individual purchase for a period of three years next ensuing.

The defendants cite as controlling the case of Winona Wagon Company v. Bull, 108 Cal. 1, 40 P. 1077, 1078. In that case a stockholder was sought to be held on an indebtedness evidenced by the promissory note sued on, executed as a renewal of prior promissory notes. It was held that neither the date of the note sued on nor the date of the notes of which it was a renewal were conclusive as to the time when the liability arose, in the absence of a showing as to when the indebtedness was created. It was stated as well settled "that the liability of the stockholder is an original liability created by the statute; that his liability is dependent upon the fact that he is a stockholder at the time the debt is created, and the extent of his liability is measured by the proportion between the stock then held by him and the total number of shares issued," and that an allegation "that the defendant was a stockholder at the time the note was given, is not an allegation that the debt was incurred at that date, nor that the defendant was a stockholder at any prior date when the indebtedness was in fact contracted." For aught that appeared in the complaint, the defendant in that case may not have been a stockholder when the debt was created. It was accordingly held that the complaint did not state a cause of action.

[1, 2] In the case at bar the times when the several indebtednesses were contracted were alleged in the complaint. The dates of the notes and of the items of the indebtedness represented thereby were proved. The dates of the items making up the open book account were also proved. This, we think, was sufficient. The dates thus shown remove the case from any question of the statute of limitations (Code Civ. Proc. § 337), and the estate in the person of the administrator was the stockholder during all of said times. The action to enforce the stockholder's liability could have been maintained against the decedent had he been living. Upon his ownership of the stock at the time of his death, the action was maintainable against his administrator. Sections 385, 1582, Code Civ. Proc.; sections 313, 322, Civ. Code; Miller & Lux, Inc. v. Katz, 10 Cal. App. 576, 102 P. 946.

[3, 4] Although both the original and the amended and supplemental complaints alleged the execution of the four notes by the Yuba Vineyards Company, the original indebtedness was proved and the notes were admissible as evidence of the original indebtedness. It is true that the notes provide for interest on the indebtedness, and for attorney fees in the event of suit, and include certain so-called "carrying charges." These items can be viewed in no other light than as additional obligations which the corporation had the right to assume, and, since they were incurred within the period of the statute, and while the stock was owned by the estate, the stockholder's liability would attach thereto, and the consideration therefor was the extension of the time of payment. We find nothing in Santa Rosa National Bank v. Barnett, 125 Cal. 407, 58 P. 85, or Cordes v. Paulson, 78 Cal. App. 90, 248 P. 546, which would justify a contrary conclusion. Those cases are clearly distinguishable on the facts, and do not support the defendants' position. They do not involve the point presented.

[5, 6] The second contention in support of the appeal is that the Superior Court had no jurisdiction of the subject-matter of the action, especially as to the nine defendants against whom judgment was rendered in the sum of $146.46. There is no merit in the point. The court had jurisdiction of the action originally filed against the administrator. During the course of administration, the stock of the defendant was sold with the approval of the court. It does not appear that the sale was necessary to the settlement of all claims of the estate, but it does appear that the sale was advantageous to the estate. However this may be, the sale did not affect the plaintiff's cause of action against the administrator.

[7] After distribution was ordered to the defendants, and after the discharge of the administrator in April, 1925, the plaintiff filed his amended and supplemental complaint, in which the new matter was appropriately alleged, and in which it was sought to follow the funds, which should have been held to discharge the plaintiff's claim during administration, into the hands of the distributees and to impress a trust thereon for the protection of said claim. We find no error in allowing the amended and supplemental complaint to be filed. In its essential characteristics, the purpose of the action remained the same, and it was necessary, by reason of the discharge of the administrator pending the action, to set up the new matter alleged in the amended and supplemental complaint in order that the relief sought might be granted. This new matter was within the equitable cognizance of the court, and jurisdiction was thus retained. Gardiner v. Royer, 167 Cal. 238, 139 P. 75.

[8] The defendants make what are called minor points. The only one requiring notice is that the court erred in admitting in evidence the deposition of one Albrecht, secretary of the Yuba Vineyards Company, taken before the substitution of the parties defendant. The substituted parties were in reality the real parties in interest. When they were brought in, they took the case as they found it, and were bound by the prior proceedings in the case to the same extent as

if the administrator had not been discharged and had continued to be the party defendant. Briggs v. Briggs, 80 Cal. 253, 22 P. 334; Fredericks v. Judah, 73 Cal. 604, 15 P. 305. The case of Lange v. Braynard, 104 Cal. 156, 37 P. 868, cited by the defendants, is not in point on the facts. On the contrary, the discussion therein supports the plaintiff's position.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

213 Cal. 452

SMART v. PEEK et al.

Sac. 4451.

Supreme Court of California.

Aug. 25, 1931.

Rehearing Denied Sept. 24, 1931.

1. Taxation 🔑809(3).

In suit to quiet title, defendant need not plead tax title specially; answer denying plaintiff's title and right to possession being sufficient.

An answer denying plaintiff's title and right to possession is always sufficient, since under such an answer defendant may prove whatever right he may have, including a tax title.

2. Pleading 🔑35.

Where defendant in suit to quiet title, after denying plaintiff's ownership and right to possession, pleads tax title specially, special allegations may be deemed surplusage if defective.

3. Pleading 🔑411.

Defects, if any, in cross-complaints *held* cured by plaintiff's failure to demur, nature of answers, and definite issues.

4. Taxation 🔑653.

Assessor *held* not sole official authorized to make tax sale of possessory interest in government land; sale by collector being valid (Pol. Code, §§ 3617, 3758, 3790, 3805a, 3820–3822).

Assessor is not sole official authorized to sell mining property comprising possessory interest in government land for delinquent taxes, in view of Pol. Code, § 3821, under which assessor's powers of seizure and sale terminate in August, whereas tax collector does not initiate proceedings for collection of delinquent taxes until December, in view of sections 3758, 3790, and there is therefore no conflict between duties of the two officials.

5. Taxation 🔑764(1).

Tax sale of mining equipment wherein deed described property as realty *held* not invalid as including equipment not shown to be realty (Pol. Code, §§ 3617, 3898; Civ. Code, § 661).

Under Pol. Code, § 3617, all improvements affixed to land are excluded from definition of personal property, and under Civ. Code, § 661, machinery or tools together with other enumerated equipment used in developing mine are to be deemed affixed to mine, and Pol. Code, § 3898, declares that tax deed is prima facie evidence of truth of all recitals therein.

6. Taxation 🔑788(5).

Tax deed reciting legal offer for sale *held* prima facie evidence that notice was given (Pol. Code, §§ 3897, 3898).

7. Taxation 🔑764(2).

Tax deed to mill site describing property by name *held* not ineffective for uncertainty (Civ. Code, § 1092).

8. Taxation 🔑754, 757.

That tax deed founded on valid sale is formally defective or misrecites facts does not avoid sale, and purchaser may compel proper conveyance (Pol. Code, § 3898).

9. Taxation 🔑788(5).

Misrecital of amount of bid did not invalidate tax deed or destroy its effect as prima facie evidence of other facts recited (Pol. Code, §§ 3897, 3898).

10. Taxation 🔑679(6), 762.

Charges for advertising tax sale notice and serving copies must be included in bid and statement of sale price in deed (Pol. Code, §§ 3897, 3898).

11. Taxation 🔑810(3).

Receipts included in tax collector's records *held* prima facie evidence of payment for advertising notice of tax sale and serving copies (Pol. Code, §§ 3897, 3898).

12. Taxation 🔑679(7).

Where charges for advertising tax sale notice and serving copies were paid in advance of sale, and, together with amount paid at sale, constituted lowest price at which property could lawfully be sold, statutes *held* substantially complied with (Pol. Code, §§ 3897, 3898).

In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by W. G. Smart against Percy Peek and others, with cross-complaints by defendants. Judgment for defendants, and plaintiff appeals.

Affirmed.

Barker & Keithly and Donald Barker, all of Los Angeles, for appellant.

Virgil M. Airola, of San Andreas, for respondent Robert Irvine.

Edward R. Solinsky, of San Francisco, for respondents Percy Peek and others.

SEAWELL, J.

Plaintiff appeals from a judgment for defendants in an action brought by him to quiet his title to four parcels of mining property and a mill site situate in the county of Calaveras. Defendants assert that plaintiff's title has been divested by proceedings taken against said property for nonpayment of county taxes for the fiscal year 1913-14 which resulted in the sale of the property to them by the state of California under the provisions of section 3897, Political Code. Plaintiff attacks the validity of said proceedings, and further contends that as the pleadings stand defendants are not entitled to rely on a tax title.

[1-3] The attack upon the pleadings is based upon defendants' failure to set forth with particularity all the several steps required to be taken in a tax proceeding to vest title in the purchaser from the state. This has been held to be a requirement where a party undertakes to plead a tax title specially. Russell v. Mann, 22 Cal. 132; Metteer v. Smith, 156 Cal. 572, 105 P. 735. But in a suit to quiet title the party relying on a tax title need not plead it specially. An answer denying the plaintiff's title and right to possession is always sufficient. Warden v. Stoll (Cal. Sup.) 291 P. 835; Hinds v. Clark, 173 Cal. 49, 159 P. 153; Tilton v. Russek, 171 Cal. 731, 154 P. 860; United Land Ass'n v. Pacific Improvement Co., 139 Cal. 370, 69 P. 1064, 72 P. 988. Under such an answer the defendant may prove whatever right he may have, including a tax title. Hinds v. Clark, supra; Tilton v. Russek, supra. Where the answer contains denials of the plaintiff's ownership and right to possession, as in this case, and further attempts to plead the tax title specially, the special allegations may be treated as surplusage if insufficient or defective. Cole v. Segraves, 88 Cal. 103, 25 P. 1109. The cited case involved a complaint in a suit in ejectment; but what is there said is equally applicable to the answer to a complaint in an action to quiet title which is in the usual form. Furthermore, any defects appearing in the cross-complaints were cured by appellant's failure to demur, the nature of the allegations and denials of the answers, and the definite and clear-cut issues which the parties addressed themselves to upon the trial of the cause.

[4] As to the merits of the case, plaintiff contends that the proceedings taken by the tax collector are invalid for the reason that one of the four mining properties included is a possessory interest in land of the United States government, and that under sections 3820 and 3821, Political Code, the assessor, rather than the tax collector, is the sole official authorized to take proceedings to subject such possessory interest to sale for delinquent taxes, which proceedings must be in the manner prescribed by section 3822, Political Code. Plaintiff cannot succeed in this contention. Said sections as they stood at the time of the proceedings herein provided as follows:

"3820. The assessor must collect the taxes on all property when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes. The taxes on all assessments of possession of, claim to, or right to the possession of land * * * shall be immediately due and payable upon assessment and shall be collected by the assessor as provided in this chapter.

"3821. In the case provided for in the preceding section, at the time of making the assessment, or at any time before the first Monday of August following the assessment, the assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed, or if no personal property can be found, then the assessor may collect the taxes by seizure and sale of the right to the possession of, claim to or right to the possession of land.

"3822. The provisions of sections 3791, 3792, 3793, 3794, 3795 and 3796 apply to such seizure and sale."

The validity of said sections and their applicability to possessory mining rights and possessory oil leases has been fully sustained. Ventura County v. Barry, 207 Cal. 189, 277 P. 333; Mohawk Oil Co. v. Hopkins, 196 Cal. 148, 236 P. 133; Bakersfield, etc., Co. v. Kern County, 144 Cal. 148, 77 P. 892; Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211. But none of said cases goes to the extent of holding that said sections prescribe the exclusive method by which possessory interests or personal property may be subjected to the claim of the county for taxes.

As to taxes upon personal property not a lien on real property, section 3790, Political Code, provides for seizure and sale of any personal property owned by the delinquent by the tax collector, whose powers do not, however, commence until the auditor shall have delivered the assessment books to him. This must be done on or before the fourth Monday in September. The assessor's powers of seizure and sale in such cases terminate on the first Monday in August. Section 3821, Pol. Code. Possessory interests are defined by the revenue act as real estate (section 3617, Pol. Code), and the tax thereon is a lien on the interest assessed. The revenue act provides a complete method for the collection of delinquent taxes which are a lien on real property, and makes no exception of possessory interests defined by the act as real estate. The prescribed procedure was followed in the instant case. The tax collector does not initiate proceedings for the collection of delinquent taxes until the third Monday in December (section 3758, Pol. Code), which is several months after the assessor's powers of sale have terminated. There is no conflict between the duties of the two officials. If the taxes are not collected by the assessor within the time allowed, they are not lost to the people, but the duty of collection devolves upon the tax collector.

Section 3805a, Political Code, makes express reference to the sale of a possessory interest in land to the state, thereby showing the intended application of the provisions providing for sale by the tax collector to such interests, since the power of acting in the matter of a sale to the state is not conferred upon the assessor.

[5] The contention that the proceedings are invalid because they embrace mining equipment not shown to be real property is without merit. By the terms of section 3617, Political Code, "all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, except telephone and telegraph lines," are excluded from the definition of personal property. Section 661, Civil Code, provides that "sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith-shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine." The deed issued to the defendants as purchasers under section 3898, Political Code, characterized the property as real property, and said deed is declared by the section to be prima facie evidence of the truth of all recitals contained therein.

[6] Plaintiff also objects to the sale on the ground that it was not shown that the notice of sale required by the terms of section 3897, Political Code, had been given to him as the party to whom the land was last assessed. By the provisions of section 3898, supra, the deed from the state must recite that the tax collector offered the property for sale "in conformity with law." The deed is, by the further terms of said section, prima facie evidence of all facts recited therein. Since a sale in conformity with law could not be had except upon notice duly given, the deed is prima facie evidence thereof. Hayes v. Ducasse, 119 Cal. 682, 52 P. 121. At the time of the decision in Johnson v. Canty, 162 Cal. 391, 123 P. 263, a case especially relied on by appellant, it was necessary that the deed state that notice was given.

[7] The deed is not ineffective for uncertainty in the description of one of the parcels included in the proceedings, which is described as "fracl. of lot 2 and fracl. of SW¼ of SW¼ of Section 26, Township 6 North, Range 12 East (containing 4.95 acres), known as the 'Occident Mill Site.'" Section 1092, Civil Code, furnishes express authorization for a description by name. Murray v. Tulare Irrigation Co., 120 Cal. 311, 49 P. 563, 52 P. 586; Haley v. Amestoy, 44 Cal. 132; Bates v. Howard, 105 Cal. 173, 38 P. 715; Carter v. Bacigalupi, 83 Cal. 187, 23 P. 361. Hence the designation of the property as "Occident Mill Site" removes any uncertainty.

[8, 9] Appellant contends that the sale made by the state to defendants is void for the reason that defendants bid less for the property than $2,272.99, which sum was the total of all taxes levied and all costs and penalties, and was the lowest price at which the property lawfully could be sold. Pol. Code, § 3897. And, further appellant contends that even if the sale was for the proper amount, a deed which misrecites a sale for a smaller amount is void. The deed in the instant case recited a sale for $2,219.87. When a tax deed founded upon a valid sale is defective in form or misrecites the true facts, the sale is not rendered void, but the purchaser may compel the issuance to him of a conveyance in due form. Morton v. Sloan, 96 Cal. App. 747, 275 P. 223, and cases there cited. In Morton v. Sloan, supra, in which a hearing was denied by this court, the District Court of Appeal considered the validity of a tax deed issued under section 3785b, Political Code, which recited that all taxes levied and assessed prior to 1919 had been paid, instead of reciting that all taxes prior to sale had been paid. Although a corrected deed had been filed in the Appellate Court under section 956a, Code of Civil Procedure, the court held that the original deed was not void, but sufficient to pass title, and merely irregular. A similar decision was made in Schainman v. All Persons, 96 Cal. App. 753, 275 P. 225, 276 P. 113, decided the same day. We regard the rule of said decisions as equally applicable to a deed issued under section 3898, Political Code, and to an error in stating the amount bid for the property. The misrecital does not destroy the effect of the deed as prima facie evidence of the other facts recited therein.

[10] Appellant contends, however, that there is not a mere misrecital of the amount bid, but that in fact defendants bid less for the property than the lowest sum for which it lawfully could be sold. It was advertised for sale at $2,272.99. The deed from the state to defendants recites a sale for $2,219.87, which is $53.12 less than the sum required. The charge for advertising the notice of sale and serving copies thereof, as stated in the notice of sale, was $53.12. Respondents argue that since the charges for advertising are no long-

er charges against the county, but charges against the property which must be deposited *in advance* of the sale with the tax collector, said items are not to be included in the bid or statement of sale price in the deed. We think they are in error in this contention.

[11, 12] The record, however, contains evidence in the form of receipts covering both charges, it being stipulated that said receipts were a part of the records of the tax collector's office. These receipts, connected with the transaction in such fashion as to compel the inference of payment on account of the publication of said notice and service, must be held to be prima facie evidence of payment. No attempt was made by appellant to minimize their effect in this respect. Beyond question the sum of $53.12 paid in advance of the sale was paid in addition to the sum of $2,219.87 paid at the time of sale, and with said sum constituted the minimum amount named in the notice of sale as the lowest price at which the property could lawfully be sold and in fact was sold. This was a substantial compliance with the law, and we cannot see that appellant was prejudiced or misled in any respect by the proceedings.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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213 Cal. 438

BATES v. CAMPBELL.

L. A. 10585.

Supreme Court of California.

Aug. 19, 1931.

1. Libel and slander 🔑19.

Whether publication is libelous is determinable from expressions used, whole scope and apparent object of writer, and from viewpoint of probable effect upon average reader (Civ. Code, § 45).

2. Libel and slander 🔑89(1).

Publications coming within statutory definition of libel are "libelous per se," obviating necessity for averring special damage (Civ. Code, § 45).

[Ed. Note.—For other definitions of "Libel," see Words and Phrases.]

3. Libel and slander 🔑86(2).

Where alleged libelous publication is susceptible of harmless as well as injurious meaning, plaintiff must plead by innuendo facts showing injurious meaning.

4. Libel and slander 🔑86(1).

Office of "innuendo" is to merely explain or interpret, without enlarging, alleged libelous publication.

[Ed. Note.—For other definitions of "Innuendo," see Words and Phrases.]

5. Libel and slander 🔑86(2).

Statement in alleged libelous letter that it would probably serve no useful purpose to recite circumstances leading to request for plaintiff's resignation could not be enlarged by innuendo to mean that plaintiff was discharged for unfitness.

6. Libel and slander 🔑86(2).

Where published statements were actionable regardless of innuendo, allegations by way of innuendo could be disregarded as surplusage.

7. Principal and agent 🔑48.

Publicity agent stands in fiduciary relation to principal.

8. Libel and slander 🔑9(9).

Statement that bar association's publicity agent, after being discharged, unauthorizedly continued to use association's stationery, resulting in misleading people, *held* libelous per se as tending to injure agent in her occupation and as "exposing her to obloquy" (Civ. Code, § 45).

> The statement was injurious to the publicity agent in her occupation, since men of business prudence would not employ one who subsequent to the termination of such employment, and without permission or consent, and to the confusion and possible deception of third persons, would continue to use for her personal ends letterheads or other property of her principal intrusted to her solely for the purpose of effecting the satisfactory discharge of her duties as publicity agent, and the statement was calculated to and undoubtedly exposed the agent to obloquy as one untrue to a trust reposed in her by a former employer. "To expose one to obloquy," within Civ. Code, § 45, is to expose him to censure, reproach, blame, or reprehension.
>
> [Ed. Note.—For other definitions of "Obloquy," see Words and Phrases.]

9. Appeal and error 🔑843(4).

On appeal from judgment sustaining demurrer to libel complaint, truth or privileged character of allegedly libelous charges required no consideration, being purely matters of defense.

10. Libel and slander 🔑80.

Complaint did not show on face that allegedly libelous letter of bar association's president regarding former publicity agent of association was privileged.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Rosalind Bates against Kemper Campbell. Judgment for defendant, and plaintiff appeals.

Reversed, with direction.

Superseding opinion of District Court of Appeal in 295 P. 355.

Rosalind Goodrich Bates, in pro per.

W. Joseph Ford, Meserve, Mumper, Hughes & Robertson and Anderson & Anderson, all of Los Angeles, for respondent.

PER CURIAM.

Plaintiff brought this action to recover damages from the defendant for an alleged libel. A demurrer to the first amended complaint was sustained without leave to amend. Judgment for costs was thereupon entered for the defendant, from which judgment this appeal was taken.

It is alleged in the complaint that the plaintiff was, and is, what is generally known and termed a "publicity agent"; that by her perseverance, endeavors, and ability she had created and built up a lucrative business as such publicity agent; that on or about October 31, 1927, the defendant, an attorney at law, and then president of the Los Angeles Bar Association, and a man of great wealth and influence, wrote, published, and caused to be published by others, a certain letter or article of and concerning the plaintiff, which said letter or article reads as follows:

"Referring to certain letter appearing in a morning paper of this date. Without taking the time to comment upon the entire letter of Mr. McNitt, I desire to correct one or two misstatements therein contained. These misstatements were perhaps due to the stress under which Mr. McNitt is apparently laboring in his campaign for election to the Board of Governors of The State Bar. I did not as stated by Mr. McNitt, nor did my office send 'to the metropolitan dailies publicity containing statements which were erroneous.' No publicity whatever was sent out from my office or by me concerning the election, which fact Mr. McNitt could have ascertained by the slightest inquiry.

"I did not ask Mr. McNitt to withdraw although I did consider it my duty as a long time acquaintance and as a member of the State Bar Commission to ask him whether he had considered the fact that as a member of the Board, if elected, it would be his duty to establish standards for admission which might conflict with the policy of the law school with which he is connected, this being a duty which cannot be delegated to a committee. In the course of the conversation, he stated he did not like to be in the position of running against leaders of the Bar, such as Mr. Hunsaker and Mr. James and he thought he would withdraw. Later on he informed me that he had been importuned by his friends to stay in the race.

"As to the principal subject of controversy to which the letters of Judge Hollzer, Miss Bates, Mr. McNitt, and Mr. Hunter, are directed, I think this could have been avoided, had there not been confusion with respect to the fact and date of termination of employment of Miss Bates by the Los Angeles Bar Association. This confusion is apparently cleared up by the publication of those letters. It would probably serve no useful purpose to recite the circumstances leading to the request for Miss Bates' resignation which in pursuance to such request, was received and accepted by the Board of Trustees on or about July 7, 1927. The confusion, however, is easily understood in view of the fact that Miss Bates without permission or consent continued to use Bar Association stationery and failed to notify the metropolitan papers of her change of status and in using her articles it was assumed that she still represented the bar association. In fact, not only Judge Hollzer, but a number of other judges and lawyers who signed certain petitions and letters at the request of Miss Bates have stated that they would not have done so had they known she was not employed by the Bar Association and had they known that certain other candidates were in the field.

"October 13, 1927. Kemper Campbell."

That by said letter or article the defendant intended it to be understood, and it was so understood by the readers thereof, to mean that plaintiff had been discharged by the board of trustees of the Los Angeles Bar Association for the reason that she was not a fit person to occupy such position; that she had appropriated to her own use, and had used, property of said bar association by reason of which conduct and the employment of false pretenses she had induced divers persons to sign certain petitions and letters which they would not otherwise have signed; that to the defendant's knowledge all of said statements were false, defamatory, and untrue; that said letter or article is false, libelous, defamatory, untrue, and unprivileged, and was written and published maliciously and with the evil intent to injure and defame plaintiff and to destroy her business and to prevent plaintiff from earning a livelihood for herself and minor children; that said false and defamatory letter or article has greatly injured the reputation of plaintiff in the city of Los Angeles and the county of Los Angeles, and has exposed her to public hatred, contempt, ridicule, and obloquy, and has injured her in her profession, all to her damage in the sum of $50,000. The complaint also prays for an award of exemplary or punitive damages in a like amount.

[1] Section 45 of the Civil Code defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." The Code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation. Schomberg v. Walker, 132 Cal. 224, 64 P. 290; Stevens v. Snow, 191 Cal. 58, 62, 214 P. 968; Tonini v. Cevasco, 114 Cal. 266, 272, 46 P. 103. In the determination of this question, the alleged libelous publication is to be construed "as well from the expressions used as from the whole scope and apparent object of the writer." Stevens v. Storke, 191 Cal. 329, 334, 216 P. 371, 373; Bettner v. Holt, 70 Cal. 270, 11 P. 713, 715. The case last above cited states that: "Not only is the language employed to be regarded with reference to the actual words used, but according to the sense and meaning, under all the circumstances attending the publication, which such language may fairly be presumed to have conveyed to those to whom it was published; so that in such cases the language is uniformly to be regarded with what has been its effect, actual or presumed, and its sense is to be arrived at with the help of the cause and occasion of its publication. And in passing upon the sufficiency of such language as stating a cause of action, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of a complaint for libelous publication according to its natural and popular construction." That is to say, the publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader. A defendant is liable for what is insinuated, as well as for what is stated explicitly. Schomberg v. Walker, supra, page 227 of 132 Cal., 64 P. 290.

[2-4] Publications falling within the statutory definition above set out are libelous per se, thus obviating the necessity for an averment of special damage. Layne v. Kirby, 208 Cal. 694, 696, 284 P. 441. Should the alleged libelous publication be ambiguous and susceptible of two meanings, one of them harmless and the other injurious, it is necessary for the plaintiff to plead by innuendo the facts upon which he relies to point out the injurious meaning of the writing. Mellen v. Times-Mirror Co., 167 Cal. 587, 593, 140 P. 277, Ann. Cas. 1915C, 766; Ousdal v. Sansum, 86 Cal. App. 119, 122, 260 P. 322; Vedovi v. Watson & Taylor, 104 Cal. App. 80, 84, 285 P. 418. However, it is not the purpose of an innuendo to "beget an action," and the meaning of the language complained of may not be enlarged or extended thereby. Chavez v. Times-Mirror Co., 185 Cal. 20, 25, 195 P. 666; Grand v. Dreyfus, 122 Cal. 58, 61, 54 P. 389; Hearne v. De Young, 119 Cal. 670, 52 P. 150, 499; Des Granges v. Crall, 27 Cal. App. 313, 315, 149 P. 777. In other words, it is the office of the innuendo to merely explain or interpret, without enlarging, the alleged libelous publication.

[5] Viewing the alleged libelous communication in the light of these well-established principles of law, we are of opinion that there is merit in respondent's contention that the innuendo contained in the complaint attempts, in some particulars at least, to enlarge and extend beyond its fair and reasonable import the meaning of certain of the statements published of and concerning the appellant. To illustrate: The statement in the letter that "It would probably serve no useful purpose to recite the circumstances leading to the request for Miss Bates' resignation which in pursuance to such request, was received and accepted by the Board of Trustees on or about July 7, 1927," may not be construed, as in the complaint here, to mean that "plaintiff was discharged by the Board of Trustees of the Los Angeles Bar Association for the reason that she was not a fit person to occupy such position." The statement quoted from the letter makes no reference whatever, either expressly or impliedly, to appellant's fitness or unfitness to occupy such position, and is not therefore reasonably open to the construction attempted to be placed on it. Maynard v. Firemen's Fund Ins. Co., 47 Cal. 207, 208; Id., 34 Cal. 48, 91 Am. Dec. 672. This sufficiently illustrates the point as to the office of an innuendo. In view of our conclusion to be presently announced, we deem it unnecessary to determine whether other allegations of the complaint also attempt to improperly extend and enlarge the alleged libelous publication.

[6-8] Considering the publication herein as well from the expressions used as from the whole scope and apparent object of the writer, we are of the view that certain of respondent's written statements of and concerning the appellant are actionable entirely regardless of the innuendoes by which it is sought to explain or enlarge their sense. This being so, the allegations by way of innuendo may be disregarded as surplusage. The publication here complained of charges, among other things, that "Miss Bates without permission or consent continued to use Bar Association station-

ery and failed to notify the metropolitan papers of her change of status and in using her articles it was assumed that she still represented the Bar Association. In fact, not only Judge Hollzer, but a number of other judges and lawyers who signed certain petitions and letters at the request of Miss Bates have stated that they would not have done so had they known she was not employed by the Bar Association and had they known that certain other candidates were in the field." It is this portion of respondent's letter that contains the sting of the libel. In this connection, it must be borne in mind that the complaint alleges and for present purposes it must be taken to be true, that appellant for some time prior to the publication of the alleged libel had been engaged as a publicity agent, and by means of her ability as such had created and built up a lucrative business. There can be but little doubt that a publicity agent, like any other agent, stands in a fiduciary relation to his principal, and because of the trust and confidence reposed in him by his principal he must exercise the utmost good faith, must acquire no interest adverse to that of his principal, and must not unite his personal and representative capacities. As an incident to his employment, a publicity agent is necessarily intrusted with certain intimate information, files, letterheads, and other property of his principal essential and expedient to the proper and satisfactory discharge of his duties. To state of such a fiduciary that, without having first obtained the "permission or consent" of his principal, he had "continued to use" these instrumentalities subsequent to the termination of his employment, is to injure him in his occupation within the meaning of section 45, supra. It is only reasonable to conclude therefrom that other persons contemplating the employment of such a faithless servant, upon hearing of this charge, would hesitate, and in all probability would decline, to contract for his services because of the possible consequences. Surely no one can read the respondent's letter without understanding it to mean that plaintiff had been guilty of reprehensible conduct that would deter people from trusting her in her occupation.

While, as contended by respondent, it may not be libelous to state that appellant had failed to notify the newspapers of her change of status (it not being incumbent upon her to do so), and likewise, while it may not be libelous to state that the newspapers, being ignorant of appellant's change of status, had assumed that her articles were still being written for and on behalf of the Los Angeles Bar Association (appellant not being answerable for the construction placed on such articles by the newspapers), the fact still remains that respondent wrote and published of the appellant that subsequent to the severance of her confidential connection with the Los Angeles Bar Association, and without its permission or consent, she had continued to use bar association stationery, with the result that certain persons, thinking appellant still in the employ of the bar association, were so deceived or misled as to have performed certain acts and done certain things which they would not have performed or done had they been accurately advised as to appellant's status. That respondent's letter charges, both expressly and by necessary implication, that appellant had been guilty of a flagrant violation of the confidence and trust reposed in her by the bar association when it employed her, and that such charge of unethical conduct would have a "tendency to injure" appellant in her occupation goes without saying.

In Swan v. Thompson, 124 Cal. 193, 198, 56 P. 878, 880, a slander case, a charge that a "master mariner is in the habit of getting drunk" is said to be sufficiently broad to cover his conduct upon his voyages, as well as between his voyages, upon the sea as well as upon the land. The opinion declares: "We can imagine no language better calculated to ruin a master mariner than the language here used. * * * No man of the slightest business prudence would employ such a master mariner to navigate his ship." This language, paraphrased to fit the present case, would read: "No man of the slightest business prudence would employ as his publicity agent one who subsequent to the termination of such employment, and 'without permission or consent,' and to the confusion and possible deception of third persons, would continue to use for his own private and personal ends, letterheads or other property of his principal entrusted to him solely for the purpose of effecting the satisfactory discharge of his duties as such publicity agent."

Moreover, and aside from any "tendency" of the charge to injure appellant in her occupation, respondent's letter charges appellant with having been guilty of conduct which is calculated to and undoubtedly did expose her to obloquy, as one untrue to a trust reposed in her by a former employer, and, if the charge is false, it is libelous under section 45, supra. To expose one to obloquy is to expose him to censure, reproach, blame, or reprehension, for the terms are synonymous. Stevens v. Snow, supra, page 62 of 191 Cal., 214 P. 968; Tonini v. Cevasco, supra, page 273 of 114 Cal., 46 P. 103; Bettner v. Holt, supra, page 275 of 70 Cal., 11 P. 713.

[9, 10] The complaint is therefore immune from general demurrer on either of the foregoing theories. As the truth or privileged character of the charges directed at appellant are purely matters of defense, we need not consider them upon this appeal from a judgment entered upon the sustaining of a demurrer to the first amended complaint. We cannot agree that the complaint, on its face, shows the publication to have been a privi-

leged one. While the parties in their briefs concern themselves solely with the general demurrer, we have also considered the several grounds of special demurrer, and likewise find them not to be well taken.

The judgment is reversed, with direction to the court below to overrule the demurrer and permit the defendant to answer, should he be so advised.

MODESTO INV. CO. v. MODESTO CITY SCHOOL DIST. et al.

Sac. 4390.

Supreme Court of California.
Aug. 17, 1931.
Rehearing Denied Sept. 14, 1931.

1. Schools and school districts 🔑90.

Board of education's agreement regarding land purchase, funds for which were unavailable, *held* unenforceable (Const. art. 11, § 18).

> Agreement provided that parties recognized that no funds were available at the time for the purchase of the property, but that funds should be created, either by a tax levy or by a bond issue, or by an election within one year. The bond issue was defeated, and because of political changes in the membership of the board, a budget item, designed to absorb the contract, was recalled and eliminated, so that there were no funds available to carry out the contract.

2. Schools and school districts 🔑79.

Board of education's agreement regarding land purchase, upon creation of available funds, if construed as effort to bind board to particular line of official action, *held* void as against public policy.

3. Schools and school districts 🔑84.

Relation of trust did not arise between parties to board of education's agreement regarding purchasing land when funds became available.

4. Schools and school districts 🔑62.

Board of education's members were not personally liable for board's failure to comply with board's unenforceable contract regarding land purchase.

In Bank.

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge.

Action by the Modesto Investment Company against the Modesto City School District and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Dennett & Zion and T. B. Scott, all of Modesto, for appellant.

R. R. Fowler, Dist. Atty., Griffin & Boone, Brown & Chamberlain, L. J. Maddux, F. O. Hoover, A. J. Carlson, and T. C. Boone, all of Modesto, for respondents.

PRESTON, J.

Action for specific performance of written contract with prayer for damages as alternative relief.

A trial was had; findings and judgment were made in favor of defendants; plaintiff appealed. The several individual defendants constituted the board of education of the city of Modesto as of July 16, 1926. This board is made by law the governing body of a series of school districts of various kinds, centering about the city of Modesto. "Modesto City School District" is also made a party defendant and the existence of such an entity is questioned, but it is not necessary to pass an opinion upon this contention.

It is a fact that in the fall of 1925 the then board of education of said city favored the idea of purchasing as a school site some thirty-eight acres of land, known as the Dry creek site, near Modesto, and to that end, at a special meeting held October 7, 1925, all being present, they resolved to purchase this site at the price of $600 per acre and appointed two of their number as a committee to arrange the purchase. Admittedly there was then no fund available from which the purchase price might be taken. However, certain public spirited citizens, acting with said committee, decided to make the site available when funds for the purchase should be in existence and to that end they found it advisable to take over at once the title to said property. To do this, it was necessary that these citizens subscribe $10,000, which they did, taking a deed in the name of plaintiff corporation, which in turn gave a trust deed on the property to the original owner for $12,800, representing the balance due on the purchase price.

Seeking to give the board power to acquire said property at cost, plus carriage charges, plaintiff and said board executed a written agreement, which, in substance, provided that each recognized that no funds were available at the time for the purchase of said property, but that funds should be created, either by a tax levy or by a bond issue or by an election within one year; therefore, plaintiff agreed to hold the property for the use of said board and to protect the title by payment of taxes and other costs and the board agreed on its part to raise the necessary funds within said period of one year to pay for it. It was further planned from such funds so raised to reimburse the citizens who had advanced or who might thereafter advance money in order to hold said property available. This contract was executed on or about November 2, 1925, and a deed from plaintiff to the "Modesto City School District" was drafted and placed in escrow.

The board of education of said city as then constituted took possession of said property as its own and exercised dominion over it by leasing it at the rate of $750 per year and received a portion of said rents. Likewise, out of a fund known as the "Book Fund," it refunded to one of said citizens the sum of $2,000 advanced by him. Said board also undertook faithfully to carry out its covenants. It first caused a bond election to be held in June of 1926, which would have produced sufficient funds to buy and improve said site as high school property. This proposition was defeated. Later, and on June 30, 1926, pursuant to section 1612a of the Political Code, it prepared its annual budget for the year 1926–1927 and among other things included therein an item of $25,000 designed to absorb this contract and secure unencumbered title to this school site.

During this period the political winds began to blow fiercely, bringing a recall election against three of the principal members of said board. On July 14, 1926, the election was held and the said three members were decisively recalled. The vacancies caused by their recall were filled on or about July 16, 1926, by the three first-named individual defendants in this action. Said board, as newly constituted, and within the period allowed by said section of the Political Code, acting with the co-operation of the county superintendent of schools, recalled the budget of its predecessors filed on June 30th and caused an amended budget to be filed on July 31, 1926, which last-mentioned budget specifically eliminated the $25,000 item above referred to and failed to include any substitute item whatsoever for the purchase of school sites.

As a result of this situation not only were there no funds available to carry out said contract for the fiscal year 1925–1926, but, likewise, the same condition existed for the year 1926–1927. Following the said action of the new board, plaintiff and the citizens represented by it immediately became concerned as to the validity and enforceability of their said contract and in 1927 this action was instituted.

[1] The discussion in the briefs covers a wide range. Although the equities are strongly with the plaintiff and those who advanced moneys on the faith of the action of the board, we can see no legal ground upon which the court would be authorized to give them relief. The contract over and over acknowledges and the facts show without dispute in accord with the findings of the court that no funds were available during either of said fiscal years for the making of this purchase.

If the agreement be deemed a binding obligation to purchase, whether it was to be completed in the year 1925–1926 or in the year 1926–1927, the absence of available funds for the purpose renders it unenforceable because it is forbidden by the express terms of the constitutional provision. Article 11, § 18; Mahoney v. San Francisco, 201 Cal. 248, 257 P. 49; City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698. There is no feature of the contract which removes it from the operation of said provision. For a discussion of such cases, see Cal. Pac., etc., Co. v. Boyle, 209 Cal. 398, 287 P. 968; Mahoney v. San Francisco, supra; and Chester v. Carmichael, 187 Cal. 287, 294, 201 P. 925.

[2] If the agreement be construed as an effort to bind the board of education to a particular line of official action toward a predetermined result, it is obviously void as being against public policy.

Freedom of action when transacting public business presupposes that such officers may counsel with each other to reach a proper conclusion without being hampered or fettered by any previous contract which one or all may have entered into. McGinn v. Willey, 6 Cal. App. 111, 112, 91 P. 423.

[3, 4] The latter observation disposes of the claim that a relation of trust arose between the parties by reason of said contract, and likewise disposes of the contention that by failing to act in accord with such contract a personal liability arose in favor of plaintiff and against such individual officers.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.

KERSHAW v. TILBURY et al.*

Civ. 705.

District Court of Appeal, Fourth District, California.

Aug. 17, 1931.

Rehearing Denied Sept. 11, 1931. Hearing Granted by Supreme Court Oct. 15, 1931.

1. Pleading 🔑49.

Gravamen of action is to be determined by complaint.

2. Physicians and surgeons 🔑18(4).

Complaint against physician for negligence and unskillful treatment of patient *held* to state action in tort, allegations regarding engagement of defendant as physician and regarding his representations as to probable effect of treatment being matters of inducement.

3. Trial 🔑131(1).

Failure to object to alleged prejudicial remarks of counsel and to request court to instruct jury to disregard them constitutes waiver of any complaint by reason thereof.

4. Trial 🔑31.

Failure of defendant to call court's attention to alleged fact that juror fell asleep during trial constituted waiver of objection.

5. Appeal and error 🔑901.

Appellant contending that verdict is result of passion and prejudice must show wherein verdict was influenced by passion or prejudice, unless it is flagrantly excessive.

6. Physicians and surgeons 🔑18(11).

$30,000 for unskillful treatment of osteomyelitis of leg of nine year old girl, necessitating three operations and removal of piece of tibia, *held* not excessive.

> Evidence further disclosed that it would be necessary to perform one and perhaps two more operations to effect a cure; that the leg would always bear a scar; that the patient would suffer pain on change of weather; that the patient suffered pain as severe as any one could have; and that when new physician was called in the osteomyelitis was of such long standing that the patient was practically demented.

7. Physicians and surgeons 🔑18(8).

Evidence supported verdict against physician for unskillful treatment of osteomyelitis of leg.

8. Evidence 🔑552.

~~Better rule is~~ that hypothetical question should conform to testimony.

9. Evidence 🔑553(2).

Where witness answers hypothetical question not founded on all facts of case, answer goes to weight of witness' evidence rather than to its competency.

10. Evidence 🔑538.

That medical experts knew nothing of "radio method" used by defendant in treating disease went to weight, rather than competency, of their testimony.

11. Evidence 🔑570.

Weight of testimony of expert witness is for jury.

12. Evidence 🔑512.

Testimony of expert that "radio method" used by defendant, a licensed osteopath, in treating diseases, was unknown to osteopathy and that physician using such methods did not use ordinary care and diligence went to weight rather than competency of evidence.

13. Evidence 🔑571(3).

Expert's opinion that treatment must have been improper, based on result of recovery, is evidence on which jury may find negligence.

14. Physicians and surgeons 🔑14(1).

When one, with his own inventions, holds himself out as healer of diseases and accepts employment as such, he must use reasonable skill in practice of profession.

15. Physicians and surgeons 🔑16.

When one, with his own inventions, holds himself out as healer of diseases and seeks fields of experimentation, he is accountable for damages proximately caused by unskillful treatment.

16. Physicians and surgeons 🔑14(1).

One who, with own inventions, holds himself out as healer of diseases, is responsible if he does work unskillfully, although he does best he can.

17. Physicians and surgeons 🔑14(1).

One who, with own inventions, unknown to all schools of medicine, holds himself out as healer of diseases, assumes risk of quality and accuracy of inventions.

18. Evidence 🔑538.

Medical experts *held* competent from education and experience to testify whether treatment of patient was proper, although experts did not know anything about practice of "radio method" used.

19. Physicians and surgeons 🔑16.

Physician's wife acting as nurse *held* not liable for his malpractice.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 8 P.2d 109.

This was so notwithstanding the wife was part owner in the business and hospital operated by both the physician and his wife.

20. Physicians and surgeons 🔑16.

One holding himself out as physician, whether one or not, is liable for his tortious acts.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Jo Dell Kershaw, a minor, by Della Kershaw, her guardian ad litem, against Lloyd E. Tilbury and another. Judgment for plaintiff, and defendants appeal.

Affirmed in part, and reversed in part.

V. E. Shaw, G. C. O'Connell, and D. A. Knapp, all of Los Angeles, and Hahn & Hahn, of Pasadena, for appellants.

Hewitt, McCormick & Crump, of Los Angeles, for respondent.

ALLEN, Justice pro tem.

This is an action for damages brought by Jo Dell Kershaw, by her guardian ad litem, against the defendants Lloyd E. Tilbury and Helen L. Tilbury, as physicians, for alleged malpractice. The salient facts of the case are about as follows:

On July 7, 1927, the plaintiff being about nine years of age, suffered pain in her left leg just above her ankle. The mother, who is her guardian ad litem herein, called a physician, who advised her that pus was forming on the bone similar to a bone felon. He advised her to make arrangements to take her to a hospital and have an X-ray made and an operation performed and that the child was suffering from an infection known as osteomyelitis. The child had, for her age, become proficient in toe dancing. The mother, fearing an operation would leave an ugly scar on the child's leg and that an operation might result in permanently disabling her daughter from future dancing, sought the services of a drugless physician. Disclosing these facts to a neighbor, she was told by her friend that Dr. Lloyd E. Tilbury was treating his wife with some success. The neighbor, at the request of the child's mother, got in touch with the defendant Lloyd E. Tilbury by phone and asked him whether he could cure a case of infection of the bone of a girl about nine years of age. This neighbor was advised by the doctor to have the child write her name on a piece of paper and bring the specimen of her handwriting to him and that he would advise him if he could cure the plaintiff.

Dr. Tilbury had for some time prior thereto been diagnosing and treating diseases by a method known as radio treatment. His diagnosis was made by what is called a diagnostic machine, which is briefly described as follows: The mechanism is contained in a box approximately 16 inches long, 12 inches wide, and from 4 to 5 inches deep; the top of the box being covered with bakelite. Two dials on the right were for measuring the wave length of the disease. Two dials on the left were for measuring the intensity of the disease. These dials measured from 1-10 and from 10-1000. One dial is set near the center and is used to measure greater intensity from 100-10,000. Another dial near the center is used for turning on the different kingdoms, such as animal, vegetable, mineral, electrical, and ether waves, measuring from 1-5. Appellant briefly sets out and describes the contents of the box which, so far as the decision of this case is concerned, need not be gone into.

With this machine Dr. Tilbury diagnoses diseases in the following manner: From the terminal on the left front of the machine extends a wire attached to an electrode which is placed over the solar plexus of the patient. The patient's emanation passes through this terminal through the aerial to the kingdom wire and from there to the plate condenser, from whence it passes to the coil condenser on the right of the machine where the wave length of the disease is ascertained. These emanations from the patient passing through the condenser are amplified 3,000 times. From the terminal in the front left of the machine extends a wire which is attached to an electrode which is placed over the solar plexus of a healthy individual. Thus emanations from the patient passing through the machine amplified 3,000 times are received by this healthy individual. By tuning in on the wave length there is a vibration set up through the sympathetic nervous system of a healthy individual to such a degree that a tenseness will appear over a definite area of the solar plexus of a healthy individual or reagent. In order to ascertain the degree of intensity of the disease, Dr. Tilbury used a plain circular rubber rod about eight inches in length and about five-eighths of an inch in diameter, charged with a woolen cloth, and picked up this reaction of the tenseness by passing this rubber rod, which is a negative field, over the tensed area, causing the rod to adhere. Then by turning on the dials to the left of the machine and if necessary the one in the center front, passing the rod over this area until the rod no longer adheres or until the tenseness disappears, and by reading the amount of intensity on the dials, Dr. Tilbury knows how severe the disease is. This method was used for all diseases, keeping in mind each disease as a definite wave length.

After ascertaining the nature of the disease that the patient is suffering from, Dr. Tilbury treats said disease with a machine known as "radio method." This treating machine is briefly described as follows: It consists of a box 5 inches wide, 8 inches long, and 6 inches deep, the top of which is covered with bakelite, to which one dial and four terminal posts are affixed. One post connects with the aerial, one post connects with the ground wire and one post to an electrode which is placed on the occiput of the patient and from the other post a wire extends with multiple electrodes which go to any part of the body which is affected. Inside of the box are multiple coils and other devices which need not for the purpose of this decision be described herein. The dial on this machine registers from 1-100 and is capable of giving off 550 different wave lengths.

This machine is used in the following manner: From the terminal to the right extends a wire on which is an electrode that is placed on the occiput or back of the head. From the terminal to the left extends a wire with many terminal branches to which are attached electrodes that are placed over various parts of the diseased areas of the patient's body.

Immediately after the telephone call by the neighbor of the plaintiff to the doctor, he obtained a specimen of the handwriting of Jo Dell Kershaw and brought it to Dr. Tilbury's office. Dr. Tilbury took it and between himself and his wife, Helen L. Tilbury, codefendant herein, operated certain dials on what Dr. Tilbury described as his diagnostic machine by placing a metal plate on the paper containing the handwriting of the plaintiff, which plate was connected up with the diagnostic machine. Thereupon the defendant Helen L. Tilbury exposed her bare abdomen while the defendant Lloyd E. Tilbury stroked it with his rubber rod and worked the dials on the radio. While the doctor was thus stroking her bare abdomen, Mrs. Tilbury exclaimed that she felt a pain in the left leg and hip. Dr. Tilbury then stated to the friend that he had found one condition that required immediate attention and requested him to bring the child in for treatment; that in his opinion an operation was not necessary. About 5 o'clock Mrs. Kershaw took the plaintiff in her arms, as she was unable to walk and in intense pain, and brought her to the office of the defendants, where she was placed upon a settee in the office. There the defendants diagnosed plaintiff's trouble by placing one of the electrodes on the back of plaintiff's neck and a similar electrode on her stomach and on the part of the leg which was affected, all of said electrodes or plates being connected to the little radio box. As Dr. Tilbury turned the dials on the radio box, Mrs. Tilbury bared her stomach and Dr. Tilbury rubbed a rubber rod directly over her bare abdomen. As Dr. Tilbury was rubbing the rod over the stomach, Mrs. Tilbury was heard to say: "Yes, that is the pain in the leg. It is a very bad pain."

After this examination Dr. Tilbury stated that plaintiff was very, very ill, but that he could cure her without an operation and that plaintiff would only have to be there a few days; that the child was suffering from meningitis and that instead of settling in her back the germs had settled in her left leg and that in the course of three or four days, or inside of a week, the child would be able to be up and around and would be well and could go home.

At the time of the examination defendants stated that they were going to use said radio to find out what kind of stupes would be best to apply to the affected parts of the bone, and thereupon Mrs. Tilbury went out and obtained a small bottle of vinegar, placing it on the radio with a metal plate thereon, which plate was connected with the radio, and the doctor again rubbed the rubber rod over Mrs. Tilbury's bare abdomen and operated the dials, stating that "vinegar is fine, we will use hot vinegar stupes for the affected part, for the pain in her leg."

At that time the child was placed in the care of defendants and remained there from July 13, 1927, to August 4, 1927, during which time she received the following treatment at the hands of the defendants and their employees: She was given the radio treatment, placed in a vit-o-net or magnetic blanket for approximately 45 minutes and until the patient freely perspired. A few days after this treatment began pus began to discharge from about two inches above the ankle, after which the child was not in such severe pain. In about four or five days after receiving such treatment the defendants prepared to and did leave on their vacation, leaving the patient in the care of one Dr. Peterson, who continued the same method of treating the patient, using the nurse as the subject for rubbing the rod on her bare stomach. Upon inquiry of Dr. Peterson what the child could eat, the doctor replied that he would test out food on the radio and find out. The attending nurse brought up some plums, pears, grapes, and oranges and placed the metal plate, which was connected with the radio, on each fruit, and Dr. Peterson worked the dials on said radio and rubbed the rod on the stomach of the nurse and stated that the child could eat any of the fruits except the oranges, but that the oranges would not agree with her. Thereafter the child was fed fruits except oranges, and given some broth. The child continued to have great and intense pain which would become more severe during the nights. After she was in the hospital and before the infection came to a head and broke, the mother remained with the child at night and followed out the treatments the defendants had instructed her to follow, she being instructed to keep up the radio treatments and to apply hot salt stupes on that part of the leg where the child felt the pain. In applying the radio treatments the nurse set the dial, and the plates were placed as hereinbefore described and remained on the child from three to four hours per day. Subsequently the swelling spread from the ankle to the knee, and the left leg appeared to be about twice as large as the other. Upon being informed by Dr. Peterson that the plaintiff's leg was soon going to be well and that it was practically all right, the mother decided to take the child home and attempted to follow the instructions of Dr. Peterson by continuing to apply the hot packs to the child's leg and to give her radio treatments as described by the defendants, but on the second day after the child was taken home she was in such an alarming condition that the mother decided to call in another physician who, after an examination, had X-rays taken and then advised that in his opinion the child's leg could not be saved, suggesting taking her to a bone specialist in order to save her life; that in his opinion the child was suffering from acute osteomyelitis and that she had been suffering from that disease for at least three or four weeks. The child was thereupon taken to the hospital and operated upon by the removal of a portion of the tibia from about three inches below the knee to about two inches above the ankle, which part of the bone was about one-half inch in width and one-eighth inch thick. This operation further consisted of cleaning out as much of the infection as possible by scraping the bone, laying the skin open so that adequate drainage was provided and leaving the opening in such a condition as not to interfere with the drainage. Two other operations were necessary for the purpose of opening up collections of pus and providing for adequate drainage for localized infection at the lower end of the wound, and it was found necessary that the child have at lease one and perhaps two other operations to thoroughly remove all diseased bones and to clear up all infections.

Let it be understood that the defendant Lloyd E. Tilbury had a license to practice as an osteopathic physician.

Appellants first contend that the trial court erred in overruling the general demurrer to the amended complaint. Those portions of the complaint seriously objected to by them are paragraphs 4, 5, and 7, which are as follows:

"IV. That on or about the said 11th day of July, 1927, the said defendants Lloyd E. Tilbury and Helen Tilbury, representing themselves as licensed physicians, did represent to the plaintiffs herein that by a certain process known as a radio treatment, that they could and would cure the minor child of the plaintiff herein from an infection that had set in the bone about two or three inches above her left ankle. That at the said time, the said defendants, Lloyd E. Tilbury and Helen Tilbury did represent to the plaintiff herein and the said minor child, that by reason of said radio treatments, that they could and would within a period of about one week remove the said infection and completely cure the said JoDell Kershaw, on account of said infection.

"V. That the plaintiff herein relying and believing the said representation of the defendants to be true, did place the minor child, JoDell Kershaw, under the care of the said defendants, and that the said minor was placed under the care and custody of the said defendants on or about July 11th, 1927, at a place known and designated as 245 South Oxford Avenue, in the city of Los Angeles, county of Los Angeles, state of California.

* * *

"VII. That during the time that the said minor, JoDell Kershaw, remained under the care and custody of the said defendant, Lloyd E. Tilbury and Helen Tilbury, their agents, servants and employees, that in truth and in fact these said defendants and each of them, and their agents, servants and employees were guilty of gross negligence and malpractice in that the said defendants did not follow or pursue the recognized universal system and standard method of curing the said minor from her said disease, and that they failed and neglected to use and exercise reasonable and ordinary care, diligence and skill in curing the said infection for the following reasons, to wit, that the universal recognized standard system of curing, universally recognized by medical authorities was and should have been the taking of an X-ray photograph of the said infected bone, and the subsequent scraping or removal of that portion of the bone which would have been revealed as infected and diseased. That had the said defendants followed the said course of treatment which is the universally recognized system and standard method practiced by the medical profession, that the said minor, JoDell Kershaw, could and would have fully recovered from her said injuries within about two months and could and would have the full use of her said leg that she enjoyed prior to said infection."

[1] It is of prime importance to get the gravamen of the action, which is to be determined by the allegations of the complaint. It can be conceded that the complaint is inartificially drawn, but aside from this, an ex-

amination will disclose that Della Kershaw, as the guardian ad litem of Jo Dell Kershaw, brought this action against Lloyd E. Tilbury and Helen L. Tilbury; that defendants represented themselves to be physicians and that they could and would cure the said child from an infection that had set in on the bone about two or three inches above the child's left ankle; that plaintiff, believing such representations to be true, placed said child under the care and treatment of the defendants, where she remained from July 13th to August 3d; that the defendants and their agents, servants, and employees were guilty of gross negligence and malpractice, in that they did not follow or pursue a recognized universal system and standard method of curing the minor of her disease; that they used other and different methods of treatment which caused the infection to spread to the entire front bone of the left leg; that they failed and neglected to use and exercise reasonable and ordinary care, diligence, and skill in curing said infection; that said child did not recover under such treatment, but the front bone of said left leg became infected so that on August 13, 1927, said child was operated upon; that as a direct and proximate result of their gross carelessness, recklessness, and negligence, and by reason of their failure to use ordinary care and diligence in the treatment of said minor child, she was continually confined in a hospital from August 13, 1927, to November 25, 1927, and has become and will remain an invalid, and has become a nervous wreck; that she will be a total invalid for two years and will never have the free and complete use of her left leg and will be permanently disabled for the rest of her natural life.

There are other matters charged and alleged in the complaint, but we have set out enough of the facts to pass on the demurrer. It will be noted that the complaint alleges the sickness of the daughter; that defendants are physicians; the placing of the child under their care; the treatment and negligence of the defendants; and the damages sustained.

[2] Appellants contend that because it is alleged in paragraph IV of the complaint that defendants "did represent to the plaintiffs herein that by a certain process known as 'radio treatment' they could and would cure," etc., they were limited to this treatment; that plaintiff's allegation that defendants were negligent in some manner in administering this treatment binds her to a contract and therefore no cause of action is stated. There are many allegations in the complaint which contain statements not pertinent to the issue, all of which were and are only to be treated as allegations of inducement. From the averments of the complaint it appears that the action is one sounding in tort, the gravamen of which is the alleged negligence and unskillful performance of the treatment of the child, and that whatever is alleged therein as to the engagement of the defendants as physicians to treat plaintiff, and as to representations made by defendants regarding the probable effect of said treatment, are to be considered as mere matters of inducement to the main cause of action and not as averments of the breach of a contractual relation forming the basis of the action. This is the holding in Hall v. Steele, 193 Cal. 602, 226 P. 854.

In the case of Basler v. Sacramento, etc., 166 Cal. 33, 134 P. 993, the court held that an action based upon the injury, and not upon the agreement of carriage, and allegations of the complaint setting up the contract of carriage must be construed as matters of inducement to show that the person injured was not a trespasser and that by reason of the relation of passenger and carrier a definite duty arose on the part of the latter. This case has been cited with approval many times. See Harding v. Liberty Hospital Corporation, 177 Cal. 520, 171 P. 98; Krebenios v. Lindauer, 175 Cal. 431, 433, 166 P. 17; Marty v. Somers, 35 Cal. App. 182, 169 P. 411.

Actions of this kind are not based upon the contract of employment. They sound in tort and are classed as actions ex delicto which grow out of the contract. In Wetzel v. Pius, 78 Cal. App. 104, 106, 248 P. 288, 289, a malpractice case, the court said: "Actions of this character are not based upon the contract of employment; they sound in tort, and are classed as actions ex delicto. In discussing a similar contention our Supreme Court [Denning v. State, 123 Cal. 316, 55 P. 1000] said: 'The contract of employment has nothing whatever to do with the liability except to create a duty on the part of the employer, a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz., that of employer and employee, and under the old system of pleading was always classed as an action ex delicto.'" See Singley v. Bigelow, Executrix, etc. (Cal. App.) 291 P. 899. Authorities of other jurisdictions are in accordance with this holding. The demurrer to the complaint was properly overruled.

[3, 4] The next point raised by appellants is that the attorney for respondent made certain remarks to the jury which tended to prejudice the jury as against appellants. While such remarks were not complimentary to the defendant and probably it would have been just as well if they had not been said,

yet the record fails to disclose any objection on the part of the defendant or any request by the defendant to the court to instruct the jury to disregard the same. When circumstances of like character occur during a trial it then becomes the duty of the complaining party to make his objections thereto and ask the court to instruct the jury to disregard the same and a failure to so do will be treated as a waiver of any complaint by reason thereof. See Olsen v. Standard Oil Co., 188 Cal. 20, 26, 204 P. 393, and cases there cited. On the motion for a new trial appellants filed two affidavits asserting that the conduct of the jury prevented them from having a fair trial. Such misconduct consisted in one of the jurors falling asleep and continuing to sleep for several minutes during the trial. If one of the jurors fell asleep during the trial and it was noticed by appellant, it then became his duty to so notify his attorney who should call the court's attention thereto, and his failure to do so must be deemed a waiver of the objection. It does not behoove a litigant to observe an error being committed and sit idly by and not mention it to his attorney or the court. Should he do this he puts himself in the position of saying: "If I win I will say nothing; if I lose I will raise the error." This is not fair to the court and the litigant should not be permitted to take advantage thereof. Carey v. Gunnison (Iowa) 17 N. W. 881. Such error, if any, has been waived and merits no further consideration.

[5-7] The fourth objection goes to excessive damages appearing to have been given under the influence of passion and prejudice. Appellant contends that the fact that the jury awarded respondent $30,000 is in itself evidence of passion and prejudice. In raising this point the burden is on the appellant to show wherein the verdict was influenced by passion or prejudice, unless it is so flagrantly excessive that the award can be sustained on no other grounds than that it was the result of passion or prejudice on the part of the jury. Price v. Northern Electric Ry., 168 Cal. 173, 142 P. 91; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Bearing these cases in mind, the testimony shows that when plaintiff was ill, she was examined by a physician before being taken to the office of the appellants. This physician diagnosed the trouble as acute osteomyelitis. He described the disease as an inflammatory condition which has a seat in the marrow of the bone, due to infection, and he recommended immediate hospitalization. She was then taken to the office of appellants. Lloyd E. Tilbury testified that his diagnosis showed the patient to be suffering from staphlococcic infection, accompanied by streptococcus hemolyticus, with some tubercular germs in the marrow of the bones and the spinal cord; that the streptococcus infection was a general infection all over the body; that he knew at the moment when he examined her that she was suffering with an infection of the marrow of the bone; that she suffered intense pain for some time; that she was irrational at times; and that she became weak and emaciated. Other testimony was to the effect that it became necessary to perform three operations, the major of which was the removal of a piece of the tibia half an inch wide and one-eighth inch thick from three inches below the knee to about two inches above the ankle joint; that two subsequent operations were necessary for the purpose of drainage and that it would be necessary to perform one and perhaps two more operations to effect a cure; that the leg would always bear a scar; that she would suffer some pain on the change of weather; and that she would always be weak in her leg so that she could not pursue her dancing. Dr. Patton testified that when he examined her at the Orthopaedic Hospital on August 14th he found her in such a condition that it was a question whether her life could be saved; that she then had osteomyelitis of such a long standing that she was practically demented. He described her pain as being as "severe as anybody can have."

All these facts were before the trial judge and jury and were again presented to the court on a motion for a new trial. The trial court did not deem the judgment excessive. We see nothing in the record which would lead this court to say that the jury acted under passion and prejudice and nothing to indicate that the judgment is so grossly disproportionate to any reasonable limit of compensation, as warranted by the facts, as to shock the sense of justice and raise a presumption that the judgment was based on passion and prejudice rather than sober judgment. The trial judge was at liberty to interpose his judgment against that of the jury. This he refused to do. As to the sufficiency of the evidence to support the judgment, we find ample testimony to justify the verdict.

[8, 9] It is next objected that the trial court erred in overruling appellants' objection to certain testimony consisting of hypothetical questions offered by plaintiff. In stating a hypothetical question the better rule is that it must conform to the testimony. Where the witness answers a question which is not founded on all of the facts of the case, the answer goes to the weight of the witness' evidence rather than to its competency and materiality. Reardon v. Richmond Land Co., 21 Cal. App. 357, 131 P. 894; McCollum v. Barr, 38 Cal. App. 411, 428, 176 P. 463; Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 P. 190.

[10, 11] The appellants contend that the witnesses, offered as experts, were not quali-

fied as such to answer the hypothetical questions as to the proper methods of treatment, not using these methods themselves, and knowing nothing concerning them. The appellant Lloyd E. Tilbury testified that he was an osteopathic physician and that he had perfected what he termed a diagnostic machine which he used for the purpose of diagnosing the patient's illness. After ascertaining the nature of the disease his patient was suffering from, he would treat the disease with another machine known to him as the "radio method." Such machines were only known to Dr. Tilbury and were his own invention not in general use, nor accepted by any of the schools of medical practice or drugless healing. The qualifying questions were sufficient to establish the competency of the several medical doctors offered as witnesses by the plaintiff by reason of the fact that their education and experience was such as to qualify them to testify as expert allopathic physicians and surgeons. The basis of the objection to their competency as witnesses concerning the method of treatment as administered by Dr. Tilbury goes to the treatment of respondent's ailment by appellants' radio methods, about which they testified they knew nothing, such methods not being recognized by the allopathic school of medicine.

These objections to the testimony went to the weight, rather than to the competency of the evidence. Simply because a person claims to have some new process or method of healing peculiar to himself is no reason why other persons who do not claim such process or method are not, from education and practice, competent to judge whether the treatment administered was negligently or carelessly done. If we should hold otherwise, it would open the door to all sorts of nonprofessional persons who would undertake to treat all kinds of diseases and disorders, and no evidence could be brought to establish the negligence of such treatment. The practitioner knowing that no such person could be found to testify against him with regard to such negligence, the injured person would be without remedy, and this cannot be the law. This view is also expressed in Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 64 L. R. A. 969, 103 Am. St. Rep. 573. The value of an opinion of an expert witness depends on his intelligence, knowledge and experience ~~and~~ his testimony is a guidance for the jury. What weight, if any, they will give to such testimony is entirely with them.

[12, 13] Dr. Diebold, who qualified as an osteopathic physician, testified that the methods used by the defendant were unknown to the practice of osteopathy and that a physician who did use such methods did not use ordinary care and diligence. This, like the answers of the allopathic testimony, went to the weight of the evidence, rather than to its competency, and it was for the jury to decide whose testimony they would rely upon. We might go one step farther and say that the opinion of an expert that the treatment must have been improper, based on the result of recovery, is evidence on which the jury may find negligence. Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120; Reardon v. Richmond, etc., 21 Cal. App. 357, 359, 131 P. 894.

[14, 15] Much stress is laid to the fact that the form of the questions was such as to usurp the prerogative of the court and the jury as to negligence. In answering defendants' contention, it must be understood that the defendants were not treating the plaintiff by the methods of the osteopathic school of treatment, but by the "radio method," a method of Dr. Tilbury's invention, a method of an unknown quantity. When one, with his own inventions, holds himself out as a healer of diseases and accepts employment as such, he must be held to the duty of reasonable skill in the practice of his profession, and when he seeks fields of experimentation he will be held accountable for any damages proximately caused by the unskillful treatment of his patients.

[16, 17] This court passes no judgment on the theory of his profession, the source from whence it came, nor the appliances with which he works. With these we have no concern, but rather look to the results. The law holds him responsible if he does his work unskillfully, although he does the best he can. He assumes the risk of the quality and accuracy of his genius or inventions. On the same principle one who holds himself out as a medical expert and accepts employment as a healer of diseases, but who relies for diagnosis and remedies on some mechanical invention of his own, which invention is unknown to all schools of medical science, in like manner takes the risk of the quality and accuracy of such mechanical invention. If these move so imperfectly or inaccurately that he fails to treat the patients with reasonable skill, he is liable for the consequences. The law takes cognizance of the question: Did the practitioner render the services he undertook in a reasonable manner? That question as applied to the appellant Lloyd E. Tilbury, the jury, on sufficient proofs, we believe, have answered in the negative.

[18] While it is true that the physicians who testified on the part of the plaintiff did not claim or pretend to know anything about the practice of the "radio method," they were nevertheless competent, from education and experience, to testify as to whether the treatment which plaintiff underwent was proper. Simply because a person claims, or pretends to have invented a machine for diagnostic and curative purposes which is not known or recognized by any school of medical science, which machine possesses certain powers of healing peculiarly within the knowledge of the inventor, is no reason why other persons who know nothing of the workings of such machine but who have knowledge acquired from education, experience and practice, are not competent to judge whether the treatment administered is negligently or carelessly done. Otherwise as we have heretofore indicated, any nonprofessional person might undertake to treat certain disorders, and if appellants' position be correct in law, it matters not how carelessly or negligently his acts were performed, because no one could be obtained of the same pretensions to testify with respect to such treatment and the injured person would be without remedy. This contention we think untenable and has been so held by other jurisdictions.

[19, 20] It is claimed by defendant that the court erred in rendering judgment against the defendant Helen L. Tilbury, wife of defendant Lloyd E. Tilbury. The testimony discloses that she is not a physician; that she was not employed to care for the sick child and that she never prescribed or treated respondent's child. The evidence does disclose that her relations with the subject-matter were in the nature of assisting her husband in making the diagnosis and in the treatment. She acted more in the capacity of a nurse under her husband's instructions. Respondents claim that because the evidence discloses that she was a part owner in the business and hospital operated by both defendants, she is liable. There are no allegations in the complaint of any damages arising from the hospital services. The suit is one of malpractice and not based on hospitalization. The business itself could hold no license nor be permitted to practice the medical profession. We recognize the law to be that any one who holds himself out as a physician, whether one or not, is liable for his tortious acts, but in the instant case nothing of the kind was done by the appellant Helen L. Tilbury. In this case Helen L. Tilbury was nothing more than an assistant to the appellant Lloyd E. Tilbury in the practice of his profession, and we are of the opinion that she, not being made a party by reason of any allegations as to being his assistant or employee, and the case being for malpractice, the judgment should be reversed as to her. We fail to find any error in the record which would warrant a reversal of the judgment except as to Helen L. Tilbury.

The judgment of the trial court is affirmed as to Lloyd E. Tilbury, and reversed as to Helen L. Tilbury.

We concur: JENNINGS, Acting P. J.; MARKS, J.

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116 Cal.App. 78

CLAY v. MARTIN et al.

Civ. 6848.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1931.

1. Bills and notes ⚷523.

In action on note, finding that plaintiff was not owner or holder of note *held* supported.

2. Appeal and error ⚷1071(5).

Whether finding that plaintiff came into possession of note after maturity and without valuable consideration was supported *held* immaterial, where plaintiff admitted that he knew everything about note.

Appeal from Superior Court, Los Angeles County; Carl L. Stutsman, Judge.

Action by Thomas L. Clay against R. M. Martin and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

L. A. Trevor and Clay & Handy, all of Los Angeles, and Thomas L. Clay, of Los Angeles, in pro per., for appellant.

George M. Pierson and Milan E. Ryan, both of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Defendant Martin was the payee of a promissory note for $3,500 made by his codefendants, payment of which was thereafter guaranteed in writing by Martin and the same was deposited with the Peoples National Bank of Los Angeles as collateral security for a debt owing by him to the bank. Plaintiff brought suit on the note and guaranty. Defendant Martin alone was served and the action was apparently dismissed as to his codefendants. The case was tried before the court, a jury having been waived. From a judgment in favor of said defendants plaintiff has appealed.

The execution of the note and guaranty is admitted by the answer of defendant Martin, which denies, however, that plaintiff is the owner and holder of the note and sets out as separate defenses that the note was given as additional security for a loan then due said bank, which loan was paid in full, and other facts which tended to charge plaintiff with knowledge of any infirmities in the note.

It is appellant's contention that the third, eighth, and ninth findings of the court are not supported by the evidence. Such findings are as follows: "3rd. That it is not true that plaintiff was on the 10th day of June, 1928, the owner and holder of said note, or that he has been so at all times since said date, or that he was the owner or holder at the filing of this action, or at the date of the trial, or at all. * * * 8th. That plaintiff knew all of the facts and circumstances surrounding the giving and acceptance of the said note herein sued upon, and that plaintiff accepted the said note with full knowledge of the purpose for which it was given, and that said plaintiff was not an innocent purchaser for value, or in due course, or a bona fide holder at all. 9th. That said note came into the possession of plaintiff at a time long after the same became due and without any valuable consideration."

Plaintiff introduced in evidence what is denominated "General Pledge Agreement (collateral security not described)," proved to have been signed by Martin at the time he gave the bank a note representing his indebtedness to it and deposited some mining stock as collateral security therefor. A year or more thereafter the note sued on here was deposited as collateral security to a renewal note. Plaintiff testified that he could not remember the exact date he first saw such note, but that it was in his office in the possession of O. O. Moreland, apparently the cashier of the bank, who at that time asked plaintiff "to take for collection as attorney" the note of defendants to which the note sued on was collateral, and that it remained in his possession from about June 10, 1928. Apparently the assignment of the principal note was to plaintiff's secretary, F. M. MacDole, for the purpose of collection. Asked as to when such secretary's name was placed on the note in question here, plaintiff replied:

"Well, it was right at the time of the sale to Moreland. I have forgotten those dates.

"Q. That wasn't placed on there until there was an attempted sale made of this note? A. It wasn't placed on there until there was a sale made of the note.

"Q. You call it a sale, and I say an attempted sale. A. Well, I say a sale.

"Q. Then you don't know that date? A. Yes, I can get it. I have it in my file. * * *

"Q. When you say a sale, what do you mean, Mr. Clay? A. I mean that that note was advertised, together with other personal property, for sale; notice to the man who pledged it, Mr. Martin.

"Q. Where was it published, Mr. Clay; where was any notice of sale published? A. Well, I will have to look at the affidavit of the man that did it; I don't know.

"Q. You don't know? A. No, I don't know only his affidavit.

"Q. So when you say a sale was made it is a conclusion. You conclude everything was all correct.

"Mr. Trevor: Objected to as argument.

"The Court: Sustained.

"Mr. Pierson: Perhaps it is argument, but I wanted to show that this witness didn't know whether it was a sale or not, although he testified it was a sale.

"The Court: Well, he has testified to all the facts and I can determine what Mr. Clay may know about it.

"Q. Now Mr. Moreland has endorsed this as cashier of the Peoples National Bank, and he was cashier of the Peoples National Bank at that time. A. Yes, I know he was at that time.

"Q. Then later on endorsed it below the signature of F. M. MacDole? A. Yes, sir.

"Q. How did he happen to endorse it again? A. When he transferred it to me.

"Q. When he transferred it to you? A. Yes.

"Q. That was after the so called sale?

"The Court: That is when you paid the $5.00." (Mr. Clay in an offer to stipulate, which was apparently not accepted, had stated to the court that MacDole sold the note under the provisions of the collateral agreement to Moreland for $5.00.) "A. I didn't pay $5.00; I paid $500 for it.

"Q. You knew Mr. Moreland had only paid $5.00 for it? A. I did.

"Mr. Pierson: Oh, I think that is all.

"Mr. Trevor: We rest, your honor. That is our case."

The case was later reopened by plaintiff and the collateral agreement mentioned was introduced.

The defendant testified that the note to which the note sued on here was collateral was "paid, satisfied and discharged." It might be inferred from the evidence that suit was brought on the principal note, judgment rendered and satisfied, but just when all this was done is not clear from the record before us. The defendant testified, "I think it is about six months ago," but the evidence does not show closer than such guess, and "about six months" could be stretched without using any imagination to a period of time that might antedate the "sale" testified to by plaintiff, as that date was not fixed so that we can tell when it occurred, and presumably the trial court had the same trouble.

[1, 2] We have quoted liberally from the record to show that the court might well have concluded either that there was no sale by the bank, the real owner, or that any sale was after the satisfaction of the principal note; and as the note sued on came into the hands of plaintiff long after maturity, he would be charged with notice of any infirmity either in his title or in the note itself. Therefore we cannot say that the conclusion of the court in its third finding is not supported by the evidence, regardless of the statement by the trial judge as to the applica-

bility of the pledge agreement introduced in evidence. The other findings questioned go merely to charge the plaintiff with knowledge of infirmities in the note, and plaintiff frankly stated in effect that he knew everything about it, so we do not see where he can complain, although the evidence clearly shows that it came into his possession long after maturity, and it would therefore seem to be immaterial whether or not the ninth finding is supported by the evidence.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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115 Cal.App. 656

In re EHLE'S ESTATE.

BARBER et al. v. BOATRIGHT

Civ. 4389.

District Court of Appeal, Third District, California.

July 27, 1931.

As Modified on Denial of Rehearing Aug. 26, 1931. Hearing Denied by Supreme Court Sept. 24, 1931.

1. Wills 🔑53(3).

Judgment in incompetency proceeding against testatrix is evidence of testamentary capacity on date of guardian's appointment.

2. Wills 🔑53(3).

Where testatrix's mental condition has not changed between date of will and subsequent incompetency proceeding against testatrix, judgment appointing guardian is evidence of testamentary capacity when will was executed.

3. Wills 🔑50.

Testator has "sound and disposing mind and memory" if he has mental capacity to understand nature of act and property and relation to persons having claims on his bounty.

[Ed. Note.—For other definitions of "Sound Mind and Memory," see Words and Phrases.]

4. Wills 🔑53(9).

One may legally make unnatural will, but unnaturalness thereof may be considered with other evidence in determining testator's mental capacity.

5. Evidence 🔑498½.

Whether witness is intimate acquaintance and qualified to express opinion regarding testator's sanity is primarily within judge's discretion.

6. Appeal and error 🔑1048(2).

Ruling that witness is intimate acquaintance and qualified to express opinion regarding testator's sanity will not be disturbed, unless abuse of discretion is clearly shown.

7. Wills 🔑55(1), 166(1).

Evidence supported verdict that will was invalid on grounds of testamentary incapacity, undue influence, and deceit and fraud.

Evidence disclosed in part that proponent, to whom testatrix left all of her property, had cared for testatrix for about eight years in consideration of payments by her son, on whom testatrix was entirely dependent for her means of subsistence, and that testatrix, who was 91 years of age when she executed will involved, was not told that her son had recently died or that she had inherited his estate worth about $55,000.

8. Appeal and error 🔑1001(1).

Verdict supported by substantial evidence will not be disturbed.

Appeal from Superior Court, Lassen County; Malcolm C. Glenn, Judge.

Proceeding by Laurence Barber and others to contest the will of Mary B. Ehle, deceased. From a judgment for the contestants and an order denying a motion for judgment notwithstanding the verdict, the proponent, Phœbe Boatright, appeals.

Affirmed.

R. M. Hardy, of Susanville, and William H. Metson, of San Francisco, for appellant.

Samuel G. Tomkins, of San Jose, James A. Nutting, of Quincy, and Tomkins & Tomkins, of San Jose, for respondents.

JAMISON, Justice pro tem.

On November 2, 1928, Mary B. Ehle made an olographic will as follows:

"November 2, 1928.

"My Will

"I leave to Phœbe Boatright everything I have at my death and I appoint her Executrix without bonds.

"Mary B. Ehle
"Arietta Estelle Coffin
"Ora Lee Boatright"

Contestants, who are nieces and nephews and the heirs at law of testatrix, filed a contest against the probate of said will, alleging therein as grounds for said contest: (1) Testamentary incapacity; (2) undue influence of Phœbe Boatright; (3) deceit and fraud of Phœbe Boatright.

The proponent answered, denying the alleged grounds of contest, and the issues thus formed were submitted to a jury, which returned a verdict in favor of contestants upon all of said alleged grounds. Appellant moved for a new trial and for judgment notwithstanding the verdict, which motions were denied. From the order denying the motion for judgment notwithstanding the verdict and from the judgment, proponent prosecutes this appeal.

The facts surrounding the execution of this will are substantially as follows: The testatrix, at the date of the execution of this will, was ninety-one years of age, and was feeble in mind and body. Dr. Hiram Ehle was her only child, and for many years had provided for her care and support. He was a practicing physician of Susanville, Cal., and was sixty-eight years of age at the date of his death, which occurred on the 28th day of October, 1928. Some eight years before his death he had placed the testatrix with appellant, who lived in Susanville, paying her for the care and support of his mother $60 per month during all of that time. Testatrix had no means of her own, and was entirely dependent upon her said son for her means of subsistence.

Dr. Ehle had a cousin named Alice Barber, who was a niece of the testatrix, who died in San Jose, Cal., on October 16, 1928, and who had left a will devising to Dr. Ehle 75 acres of orchard land of the value of about $45,000. Dr. Ehle left Susanville to attend the funeral of his said cousin, but, becoming ill while on his way, was forced to stop in San Jose, where he died on the 28th day of October, 1928. He also, some years prior to his death, had made a will in favor of his said cousin, leaving all of his property, amounting to several thousand dollars in value, to her, with a proviso that, if his death preceded that of his mother, from the funds bequeathed his mother should be kept and cared for in like manner in which she was then being cared for.

The evidence as to the testamentary capacity of the testatrix at the date of the execution of the will is conflicting. Respondents produced several witnesses who testified that the mind of the testatrix was unsound. Among them was Dr. Martin, who testified that he had known the testatrix for about eight years, and that during that time he on several occasions had been called to attend her professionally, that he last saw her about February 8, 1929. At this time she was in bed, was very feeble, practically blind, living the past, and that she was of unsound mind, totally incompetent to form any opinion as to the value of property, that she would not know the nature and extent of property if it were told to her, and that this condition of her mind had existed for more than a year before that time. Another witness produced by respondent was Dr. Coll, who testified that he went to see the testatrix about the 8th of February, 1929, for the purpose of ascertaining her state of mind. He found her in bed, that she was old, senile, and very weak mentally, with no co-ordinating mentality, lying lost in the past, with no thought of the future, that she did not have sufficient mental capacity to know the value of any property that she might possess, and that this condition had existed for a year and maybe longer.

Respondents also produced three witnesses, intimate acquaintances of the testatrix, who testified that the mind of the testatrix was unsound. On the other hand, appellant produced four or five witnesses, who were intimate acquaintances of the testatrix, who testified that the mind of the testatrix at the date of the execution of the will was sound, and among these witnesses was Dr. Collings, who attended her professionally from about October 10, 1928, until July 21, 1929, and whose testimony was to the effect that during all that time her mind was sound.

[1, 2] There was received in evidence, without objection, the record of the Superior Court of Lassen county, showing that on February 8, 1929, the Superior Court of that county appointed a guardian for the person and estate of testatrix upon the ground that she was mentally incompetent to care for herself and her property. The judgment in this incompetency proceeding was evidence of the mental condition of the testatrix on the date of its rendition. Estate of Johnson, 200 Cal. 299, 252 P. 1049. And while of itself it may not establish the want of capacity sufficient for making a will, it is certainly evidence proper to be considered on the issue of testamentary capacity at the time of the appointment of a guardian. And, where there is testimony tending to show that the mental condition of the person has not changed between the date of the act in question and the appointment of a guardian, although later in time, the testimony is admissible on the issue of capacity when the act was done. Estate of Loveland, 162 Cal. 595, 123 P. 801. It is the settled law of California that an adjudication of the incompetency of a testator is evidence of his incapacity to make a valid will. Hellman Commercial T. & S. Bank v. Holden, 206 Cal. 592, 275 P. 794.

The testimony of the two doctors produced by respondents tended to show that the mental condition of the testatrix, as it existed at the date of the judgment declaring her incompetency, had not changed between that time and the date of the execution of the will, something over three months before.

Testatrix was not informed of the death of her son, Dr. Ehle, and died without knowledge of that fact. At the time she executed her will to appellant she was ignorant of the fact that she had inherited through her said son his estate, including that which had been willed to him by her said niece, aggregating $55,000. These facts, according to the evidence of appellant, were known to her at the date of the execution of the will, and yet she admits that she did not disclose them to the testatrix, knowing that the testatrix was entirely ignorant of their existence, although appellant claims that prior to the execution of the will she informed the testatrix, immediately after the said niece's death that she (the testatrix) had fallen heir, through the death of said niece, to a lot of money, but that the testatrix made no inquiry as to the amount or value of the money or property to which she had fallen heir.

[3] A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember, and understand, his relation to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Ivey, 94 Cal. App. 576, 271 P. 559.

Testatrix believed that her son, Dr. Ehle, was living at the date of the execution of the will, and with that belief existing in her mind she willed all of her property to appellant, who was no blood relation, although testatrix was devoted to her said son and there is no reason why she should have disinherited him.

[4] While a person has a legal right to make an unnatural will, the fact that it is so may be considered with the other evidence of mental unsoundness in determining the mental capacity of the testator (Estate of Johnson, 72 Cal. App. 663, 237 P. 816), and such a fact has weight in determining whether a testator was mentally competent at the time of executing the will (Estate of Martin, 170 Cal. 657, 151 P. 138; In re Wilson, 117 Cal. 262, 49 P. 172, 711; Estate of Gallo, 61 Cal. App. 163, 214 P. 496).

The will was executed on November 2, 1928. Appellant's version of how it came to be made was as follows: "I said 'one thing I want you to do, Mrs. Ehle, before you die, and that is to will me your education' and she said, 'that is impossible.' 'I would if I could,' but she says, 'I tell you what I might do, I might will you something to get an education because you never get too old to learn' and I said 'Will you do that for me?' and she said 'Yes, I will.' I said, 'You will have to have that in black and white' and she said 'If I am in my right mind when I die I will write that out for you.' I said 'Are you in your right mind now?' and she said, 'I think so.' I said, 'You mean that?' and she said, 'I do. You have done more for me than anyone else. None of the rest of them take care of me.' I says, 'Well, if you mean that I am going to see an attorney,' and she says, 'All right, go on.'"

Appellant then called on R. M. Hardy, and was informed by him that he could typewrite a will, but that it would be better for testatrix to write it out herself. "He said 'you go back and let her write it out any way she wants to.' He said, 'I leave everything I have to Mrs. Boatright, something like that.' He said, 'I will come down and see if it is all right.'" On her way back she asked Mrs. Coffin to come down and be present, as Hardy had told her she had to have a witness. When appellant got back home she said to the testatrix: "'I have seen a lawyer. He told me for you to write that out yourself. Can you do that?' and she said 'I think I can.' A table was sitting by the bed with papers and books and pen and ink and I said 'You write it any way you want to. If you want me to have that, I leave everything to Phœbe Boatright' and she said, 'that will be all right.' When she got down to executrix, she said something about executor without bonds, and Mrs. Coffin spoke up and says 'She is a lady executrix' and she hesitated about that. I spelled it with one 'E' and she said 'two E?' and I looked it up and it was all right. She wrote it all down, ever word. When it come to the part to sign her name she hesitated about her full name or initials—Mrs. Coffin said, 'It would be Mary B. Ehle, wasn't that your maiden name?' and she said 'Yes' and wrote it that way."

Appellant then took the will back to Hardy, and he informed her that the will was not dated and that he would call later to have it corrected. Later in the day Hardy called and had testatrix insert the date. At that time Hardy asked her if she realized that she had fallen heir to money and she said "Yes," and then he asked her if she wanted appellant to have it and she said she did.

The testatrix for a period of eight years prior to executing the will had lived in the home of appellant, had been cared for in a manner that had gained the friendship and confidence of this aged woman. During the latter part of that period the testatrix had become almost blind, had become partly bedridden; the twilight of extreme old age was gradually enveloping her, rendering her weak in body and mind. There was evidence to the effect that what mind remained to her was centered in the past, with no thought of the future, and that she had become wholly dependent upon appellant.

In the Estate of Graves, 202 Cal. 258, 259 P. 935, 936, Mr. Chief Justice Waste used the following language, which can appropriately be applied to the facts of this case: "Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury. * * * Appellant correctly contends that mere proof of opportunity to influence the mind of the testatrix, even though shown to be coupled with interest, or a motive to do so, does not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on her testamentary act. * * * But in this case it clearly appears that the appellant took an active part in securing the execution of the will at a time when there existed a confidential relation between himself and Mrs. Graves. The rule is well settled that: '"Where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actively participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud" (citing authorities), and that "a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and such a beneficiary, coupled with activity on the part of the latter in the preparation of the will." (Estate of Higgins, 156 Cal. 261, 104 P. 6).' Estate of Relph, 192 Cal. 451, 465, 221 P. 361, 367."

[5, 6] Appellant contends that the court erred in admitting the testimony of respondents' witnesses, who gave their opinions regarding the mental sanity of the testatrix, because these witnesses had not qualified themselves as intimate acquaintances. The determination of the question whether or not a witness has shown himself to be an "intimate acquaintance" is committed in the first place to the sound discretion of the trial court. It is only upon a clear showing of abuse of such discretion that the ruling thereon will be disturbed on appeal. Estate of Relph, 192 Cal. 451, 221 P. 361; Huyck v. Rennie, 151 Cal. 411, 90 P. 929. From an examination of the record we think the trial court was well within its rights in admitting the testimony of these witnesses, and that there was no abuse of discretion in so doing.

Other alleged errors are claimed to have been committed by the trial court which we do not deem it necessary to consider.

[7, 8] We are of the opinion that there was substantial evidence to support the verdict of the jury, and, such being the case, it will not be disturbed on appeal. Estate of Snowball, 157 Cal. 301, 107 P. 598; In re Estate of Russell, 189 Cal. 759, 210 P. 249.

The order denying the motion for judgment notwithstanding the verdict and the judgment are affirmed.

We concur: PRESTON, P. J; THOMPSON, J.

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116 Cal.App. 237

CITY OF LOS ANGELES v. GRACE S. S. CO.

Civ. 6626.

District Court of Appeal, Second District, Division 1, California.

Aug. 21, 1931.

Rehearing Denied Sept. 19, 1931. Hearing Denied by Supreme Court Oct. 19, 1931.

1. Municipal corporations 🔑857.

Evidence sustained finding that employment of municipal pilot to shift ship to another berth in Los Angeles port was compulsory.

> Evidence was that "the rules and regulations governing the port of Los Angeles" contained a provision which by its terms in effect required that the ship, "on entering or leaving, or moving from point to point within, the port of Los Angeles, must be piloted by a municipal pilot."

2. Municipal corporations 🔑849.

Shipowner *held* not liable for compulsory municipal pilot's negligence in shifting ship to another berth, resulting in damage to wharves.

3. Appeal and error 🔑1010(1).

Whether pilot, officers, and crew were negligent in shifting ship, was fact question, upon which trial court's findings, sustained by substantial evidence, were conclusive.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the City of Los Angeles against the Grace Steamship Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Erwin P. Werner, City Atty., Frederick Von Schrader, and Clyde M. Leach, Asst. City

Attys., and Joseph T. Watson, Deputy City Atty., all of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, Albert Parker, H. R. Snyder, and Warren S. Pallette, all of Los Angeles, for respondent.

HOUSER, J.

It appears that the defendant is the owner of a tank steamship which at the time in question was berthed in the port of Los Angeles, which harbor was under the direct control of the harbor department of the plaintiff, and that the action of the defendant in shifting the position of said ship from the berth then occupied by it to another berth, which at that time was vacant and open to occupancy, resulted in damage to one of the wharves owned by the plaintiff. In an action subsequently brought by the plaintiff against the defendant for such damage, judgment was rendered in favor of the defendant, from which the plaintiff appeals to this court.

Appellant attacks the findings of fact made by the trial court to the effect that in compliance with compulsory requirements of the rules governing the port of Los Angeles, the pilot, who was supplied by the plaintiff at the request of the defendant, was in the employ of the plaintiff, but was in charge of the ship of the defendant continuously during the time that the change in the respective positions of the ship was being accomplished; and that the damage to the wharf of the plaintiff "was caused by the negligence of said compulsory pilot in directing the navigation of said tank steamship * * * and not * * * in any manner by the negligence or defection from duty of any of the officers or crew of the said tank steamship. * * *"

[1] As to that part of the specifications of error of plaintiff which relates to the compulsion of the defendant to employ a pilot furnished by the plaintiff, the record herein satisfactorily sustains the conclusions expressed in said findings, in that the "rules and regulations governing the port of Los Angeles" which were admitted in evidence contain a provision which by its terms in effect required that the ship of the defendant on "entering or leaving, or moving from point to point within, the port of Los Angeles, must be piloted by a municipal pilot."

[2] The contention of appellant, to wit, that because the master of the vessel ordinarily is the supreme authority thereon and has power to displace or discharge anyone engaged in assisting in the operation thereof, the negligence, if any, of the compulsory pilot in the instant matter is chargeable to the owner of the vessel, cannot be sustained. Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 21 S. Ct. 831, 45 L. Ed. 1155. See, also, Dampskibsselskabet Atalanta A/S v. U. S. (C. C. A.) 31 F.(2d) 961; The West Nohno (D. C.) 29 F.(2d) 950; The Hathor (D. C.) 167 F. 194.

[3] As to whether the pilot was guilty of negligence in directing the movement of the ship was a question of fact to be determined by the trial court. Its finding thereon, if sustained by substantial evidence, is conclusive. Likewise as to the negligence of the officers and the crew of the ship at the time in question. No useful purpose would be subserved by a narration herein of the evidence upon which the trial court was warranted in reaching its several conclusions regarding the facts in the case. It is sufficient to state that the evidence was substantial in its nature and thereby met the legal requirements.

No other question presented by appellant requires discussion by this court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 206

In re BREHM'S ESTATE.

PRESBYTERY OF LOS ANGELES et al. v. FORTH.

Civ. 7897.

District Court of Appeal, Second District, Division 1, California.

Aug. 20, 1931.

1. Wills 🔑105.

That testatrix used corporate legatee's common, rather than true or official, name could not defeat intention expressed in will, where legatee's identity was established (Civ. Code, §§ 604a, 1340).

2. Religious societies 🔑16.

Religious corporations *held* expressly authorized by statute to receive bequests and devises (Civ. Code, §§ 604a, 1275).

3. Religious societies 🔑16.

Respecting religious corporations' capacity to receive bequests and devises, presumption, in absence of contrary evidence, is that binding legal requirements at time of incorporation were fully complied with (Civ. Code, §§ 593, 594, 604a, 1275; Const. art. 12, § 1).

4. Religious societies 🔑2.

Constitutional provision authorizing alteration or repeal of laws concerning corporations justifies statute providing that religious corporations may receive bequests and devises (Civ. Code, § 604a; Const. art. 12, § 1).

5. Religious societies ⚷16.

That foreign religious corporation at time testatrix died had not filed in California copy of articles of incorporation did not prevent it from accepting legacy (Civ. Code, § 604a).

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding wherein, by virtue of an order or judgment, a portion of the estate of Marie C. Brehm, deceased, was distributed to the Presbytery of Los Angeles, a religious corporation, and to each of certain other religious corporations as legatees either specifically mentioned or sufficiently described in the deceased's will. From the order or judgment of distribution, the contestant, Elizabeth C. Forth, appeals.

Affirmed.

Earle Stuart Rhode and E. S. Green, both of Los Angeles, for appellant.

A. Vernon Green, of Pasadena, and Walter M. Campbell, of Los Angeles, for respondents.

HOUSER, J.

This is an appeal from an order or judgment by which a portion of the estate of the decedent was distributed to each of certain corporations either specifically mentioned or sufficiently described as a legatee by the provisions of the last will of the deceased.

That part of the will which is questioned by appellant was as follows:

"After funeral expenses are paid whatsoever property remains, is to go to the following Boards of the Presbyterian Church, U. S. A.

"One fourth to the Woman's Board of National Missions.

"One fourth to the Board of World Missions.

"One fourth to the Mission work for Mexicans in Los Angeles Presbytery."

It is contended by appellant that the findings of fact made by the trial court are not justified by the evidence. Without here setting forth in full the findings to which objection is made, it may suffice to state generally that, in substance, they were that each of the corporations either mentioned or described in the will was a religious corporation duly organized and existing; and that where, in the will, either of such corporations was misnamed, its identity as the corporation intended by the testatrix to take the legacy by her bequeathed to it was satisfactorily established by the evidence.

From the evidence adduced at the hearing, it appeared that the will was holographic in character; that the testatrix was an officer as well as a member of the Presbyterian church; that for several years she had served such church as a lecturer; from which it may be deduced that she was much interested along lines of Christian endeavor, indicated by the several legacies which are the subject of attack by appellant. It was also shown that a part of the work of the Presbyterian Church, U. S. A., consisted in each of such mentioned activities; in other words, that each of them was a corporation subsidiary to the parent organization, known as the Presbyterian Church of the United States of America, and that, although each of such legatees had an official name as provided in its charter, nevertheless it also had another name by which, if not actually so designated, at least it was frequently so described and recognized.

[1] The mere fact that in drafting her will and in designating the several beneficiaries thereunder the testatrix used the name by which the corporation legatee was ordinarily and commonly described, rather than the true or official name of such legatee, cannot defeat the wishes of the testatrix in that regard. Where, by competent evidence, the identity of the legatee is made to appear, the authorities are numerous in the declaration of the law that the intention of the testatrix as expressed in her will must prevail. Section 1340, Civ. Code; In re Gibson, 75 Cal. 329, 17 P. 438; Estate of Dol, 182 Cal. 159, 187 P. 428; Estate of Moeller, 199 Cal. 705, 251 P. 311; and, see, Gilmer v. Stone, 120 U. S. 586, 7 S. Ct. 689, 30 L. Ed. 734. It therefore follows that the fact that "the Presbyterian Church of the United States of America," "the Woman's Board of Home Missions of the Presbyterian Church in the United States of America," "the Board of Foreign Missions of the Presbyterian Church in the United States of America," and the "Los Angeles Presbytery," which conducts "a Mission for Mexicans," were and each of them was misnamed by the testatrix in her attempted designation of each of them as a legatee under the provisions of her will, cannot of itself have the effect of defeating the ascertained wish and direction in the will of the testatrix in that regard. An examination of the record herein discloses the situation that the evidence produced by the respondent was ample to justify the findings of fact to which appellant has here objected.

[2] Appellant further contends that "the decision of the trial court is against the law," in that it is in violation of the provisions of section 1275 of the Civil Code. The basis of the objection thus presented by appellant is that by the terms of the statute to which reference has been had neither of the corporation beneficiaries under the will was qualified to accept a devise or bequest. However, on reading the statute it will be noted that, although by its general provisions it is possible

that the position assumed by appellant might have some merit, in effect the inhibitory language of the statute is modified by the exception that corporations of the particular class or classes therein legislated against are "capable by law of taking the property so disposed of," if "expressly authorized by statute" so to do. Turning then to section 604a of the Civil Code, it will be found that a corporation of the kind represented by each of the legatees herein interested is "expressly authorized by statute" to "receive bequests and devises for its own use, or upon trusts, to the same extent as a natural person. * * *"

[3, 4] The further suggestion by appellant that, in order that either of the corporations herein interested may be legally qualified to accept a devise or a bequest under a will, it must first file its certificate of incorporation and of the election of its directors, attested by the signatures of its presiding officer and acting secretary, evidently has application to corporations of the kinds or classes referred to in section 604a, "organized or formed" after the enactment of said statute, and not to those organizations of the same character which were authorized to incorporate and which actually did incorporate under the provisions of the law (and especially those of sections 593 and 594 of the Civil Code), which were in effect prior to the enactment of section 604a. At least, in the absence of any evidence to the contrary (which is the instant situation), the presumption is that as to each of the corporations whose capacity to take property under the provisions of a will here is questioned, all binding legal requirements in force at the time of its creation were fully complied with; and by the express terms of section 604a its benefits accrued to "every such corporation heretofore organized or formed, or hereafter organized pursuant to the provisions of this section * * *"; which class of legislation is authorized by the provisions of section 1, article 12 of the Constitution, which, in substance, is that all laws of the state which concern corporations may at any time be altered or repealed by legislative act.

[5] Appellant predicates further alleged error on the fact that as to one of the corporations here in question (it being a foreign corporation), because of the presently asserted fact (and not because of any evidence thereof adduced on the hearing) that both at the time the will was made and at the time of the decease of the testatrix said corporation had not filed in this state a copy of its articles of incorporation, it was thereby prevented from accepting the legacy bequeathed to it. However, since the basic point is ruled adversely to such contention in each of the cases of Estate of Rawitzer, 175 Cal. 585, 166 P. 581, and Estate of Wellings, 197 Cal. 189, 240 P. 21, it is clear that appellant's contention in that regard cannot be upheld by this court.

For the reason that the finding of fact by the trial court that each of the corporations herein interested was "a religious corporation," which finding was fairly sustained by competent evidence to that effect, and because included within the purpose of each of said corporations, as set forth in its articles of incorporation, is a statement of similar import, it follows that the objection next presented by appellant, to the effect that, neither of such corporations being "a religious corporation," neither of them is legally qualified to take under the will, cannot be sustained. Moreover, the provisions of section 604a, Civil Code, apply to "any church," etc., or "any community or other council, or other organization of any such religious society."

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 93

RING v. LOS ANGELES RY. CORPORATION.

Civ. 862.

District Court of Appeal, Fourth District, California.

Aug. 11, 1931.

1. **Street railroads 🔑81(3).**

Violation of ordinance limiting speed of street cars is negligence per se.

2. **Street railroads 🔑117(34).**

Whether operation of street car at speed prohibited by ordinance proximately caused injuries to automobilist was jury question.

3. **Negligence 🔑135.**

Law forbids recovery on ground of contributory negligence only when evidence is unconflicting and reasonable men can draw no other inference from facts proved.

4. **Street railroads 🔑99(7).**

Automobilist crossing tracks had right to supplement his judgment of speed of approaching street car with presumption that ordinance limiting speed thereof was being obeyed.

5. **Negligence 🔑67.**

Person is not negligent in assuming that another will act carefully in observance of law when reasonable use of his faculties does not warn him to contrary.

6. Negligence 🔑105.

Voluntary assumption of certain degree of risk is not conclusive of negligence; question being whether chances taken were greater than reasonably necessary to meet ordinary requirements of business or pleasure.

7. Negligence 🔑136(9).

Contributory negligence is jury question when facts warrant honest difference of opinion between intelligent people.

8. Street railroads 🔑117(28).

Automobilist's contributory negligence in crossing ahead of rapidly approaching street car *held* for jury.

9. Appeal and error 🔑1064(1).

Street railroads 🔑118(4).

Instruction, that automobilist could recover for injuries sustained, if result of street car motorman's failure to use ordinary care to avoid striking automobile after observing its perilous position, *held* not erroneous, nor prejudicial.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by F. J. Ring against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, for appellant.

Thomas P. White, of Los Angeles, for respondent.

GRIFFIN, Justice pro tem.

This action was brought by respondent to recover damages for personal injuries alleged to have been sustained by reason of a collision between an automobile driven by himself and a street car alleged to have been negligently operated by the appellant on Grand avenue at its intersection with Twelfth street in the city of Los Angeles. The answer of appellant denied the negligence charged and specifically alleged contributory negligence on the part of respondent. Upon the issues thus framed the cause was tried before a jury and resulted in a verdict in favor of respondent in the sum of $6,000.

Appellant contends that the jury was not warranted in concluding that it was negligent, and that there is no evidence in the case which would warrant a conclusion that respondent was not himself guilty of contributory negligence.

A map received in evidence and made a part of the record on appeal fixes the width of Grand avenue at fifty-six feet and that it runs in a general northerly and southerly direction. Twelfth street is shown to be forty feet wide and intersecting Grand avenue at right angles. The record further establishes the fact that this intersection is in a business district as defined by a city ordinance of the city of Los Angeles, No. 50,515 (N. S.), regulating traffic of street cars in said city, and also as defined by section 28½ of the California Vehicle Act (as added by St. 1929, p. 510, § 7). It is referred to in the evidence as a "blind intersection."

Just prior to the accident respondent was driving a Ford roadster in a westerly direction on Twelfth street approaching Grand avenue. The street car of appellant was being driven northerly on Grand avenue. As the street car approached the point of the accident traveling at a fairly good rate of speed, respondent, driving the Ford with two companions seated with him, was about to cross the intersection. The evidence as to the speed of the street car and the automobile, and the relative distances of each as they approached the intersection, is so much in conflict that it is necessary to review some of it here.

Respondent testified that on the afternoon of July 22, 1926, at about 6 o'clock, he and two friends were returning to work and were traveling from fifteen to twenty miles an hour as they approached Grand avenue; that they came almost to a complete stop at the gully at the east side of the intersection where he shifted to low gear and proceeded into the intersection at possibly five to eight miles per hour; that as he approached Grand avenue he looked to the right and to the left and noticed the street car about in the middle of the block to his left; that he proceeded in low gear as far as the car track when the north-bound car collided with him; that his brakes were in good condition; that he estimated the speed of the street car as it approached him to be about twenty-five miles an hour or more; that the second time he saw the street car was when he was about seven and one-half feet east of the track, starting to cross; that the street car was then about fifty or more feet from him; that it did not slacken its speed until after it had struck his automobile. On cross-examination he testified that: "At this particular time, on this day, I don't know the different distances that I could stop my car in going at different rates of speed. I made no effort to stop, as it was not for me to try to stop. I say, it was not up to me to try to stop." He further testified that as he reached the gully, and before he started to cross the track he extended his left arm, indicating a left-hand turn. This evidence was corroborated by the driver of another car approaching closely behind him, except that this witness testified that in his opinion the street car was traveling about eighteen or twenty miles an hour.

The testimony of this last witness, however, was apparently impeached by a statement which he made at the time of the accident to one of the investigators of appellant, wherein he said that the Ford was traveling at a speed of from eighteen to twenty miles an hour and that it didn't slow down for Grand avenue but pulled onto the street car tracks directly in front of the north-bound car, and that the street car was traveling about fifteen miles an hour. He could not explain why the driver of the automobile pulled directly in front of the street car, but stated he believed he was equally to blame. When presented with this previously signed statement he accounted for this apparent difference by stating that he had signed the statement without reading it, and that had he known what was in it he would not have signed it.

Another witness, riding with respondent, testified that he saw the street car down the track about one hundred or one hundred and twenty-five feet, going twenty-five miles an hour when the Ford entered the gully on Grand avenue. When he next saw it, it was but ten or fifteen feet south of the Ford. He estimated its speed at that time to be twenty miles per hour, possibly faster.

The other witness, riding with respondent, stated that he was reading a newspaper as they approached the car track; that he looked up and saw the car coming; "It did not bother me and I returned to reading the paper. * * * I went back to reading the newspaper with confidence that the driver of the automobile would be able to cross the intersection in safety."

Ordinance No. 50,515 (N. S.) was received in evidence. This ordinance makes it a misdemeanor for the operator of any street car to drive the car faster than fifteen miles per hour in a business district.

A traffic officer testified that the street car did not come to a stop for a distance of one hundred twenty feet from the center of the intersection.

Appellant's witness Hickox testified that the street car and automobile were traveling about the same speed, to wit, eighteen or twenty miles an hour, and that the street car brakes were applied just before the collision; that it moved about thirty feet from the point of impact, which point was ten feet north of the button in the center of the intersection.

The motorman testified the street car was going twelve miles an hour when it entered the intersection at Twelfth street; that he first saw the Ford when it was forty-five feet from the intersection; that it was traveling from fifteen to eighteen miles an hour; that he rang his bell and applied his emergency brake at a point when the automobile was five feet from the east rail of the car track; that at that time the street car was five feet south of that point and the driver of the Ford made no attempt to stop; that he could stop the street car traveling at fifteen miles an hour in a distance of from sixty-five to eighty feet; that he made no stop at Twelfth street and Grand avenue to take on passengers; that he didn't notice the Ford at the time it came to the gully because there was other traffic on the street and he was watching that. Two passengers on the street car corroborated the testimony of the motorman.

A service man from the Ford agency testified that he had experience in driving and stopping cars as a test to determine what space it required to stop a car going at a given speed, and that a Ford roadster such as respondent's car, on dry pavement with brakes in good condition and going at eight miles an hour should stop in approximately three feet.

[1, 2] The violation of the ordinance above referred to would be negligence per se. Whether this negligence was the proximate cause of the injuries to respondent was a question for the jury. Having so found, it is sufficient to support the verdict rendered.

[3] On the question of the contributory negligence of respondent the evidence is conflicting and much could be said in favor of appellant's contention that respondent was negligent. Can this court say, from any fact left in doubt or from any deduction or inference to be drawn from the evidence, that as a matter of law contributory negligence has been established? Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

The determination of this question necessarily involves consideration of the evidence. When the evidence is such that the court is impelled to say that it is not in conflict on the facts and that from these facts reasonable men can draw but one inference, and that inference points unerringly to the negligence of respondent, then, and then only, does the law step in and forbid a recovery.

[4, 5] In the case of Commonwealth Bonding & Casualty Ins. Co. v. Pacific Electric Railway Co., 42 Cal. App. 573, 184 P. 29, the facts were similar to the facts presented in this case. We may adopt as part of this opinion the reasoning therein set forth and the law as therein applied. If the jury accepted the testimony of the witnesses for respondent, as they fairly could, it is evident that the element of miscalculation on the part of the driver of the automobile was in underestimating the speed of the approaching street car when he determined to pass in front of it. To what extent was he entitled to rely upon the presumption that the street car company's servant was observing the speed limit in justification for his mistake? Clearly not to

the extent of shutting his eyes and crossing blindly in front of a moving car. Adopting the most favorable evidence, this driver did not do that. He used his eyes and exercised his judgment and thought that the rate of speed was reasonable; and in view of the distance to be traveled by the street car it would not prevent him from crossing in safety. We may anticipate that this would have been the result if the appellant's street car had been traveling within the limits prescribed by law. Upon this theory and under these circumstances we think the jury would be justified in concluding that the driver of the automobile supplemented his own judgment of the speed of the street car with the presumption that the law was being obeyed. This he had a right to do. Although, as already stated, a person may not willfully close his eyes to danger on the assumption that another will act with care and prudence in observance of the law, yet he cannot be deemed negligent when, if a reasonable use of his faculties does not warn him to the contrary, he rests upon this assumption. Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Mann v. Scott, 180 Cal. 550, 182 P. 281; Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078; Clark v. Bennett, 123 Cal. 275, 55 P. 908; Scott v. San Bernardino Traction Co., 152 Cal. 604, 93 P. 677.

[6-8] The fact that a person voluntarily assumes a certain degree of risk is not conclusive of negligence. In these days of rapid transit and congested traffic every person who crosses a busy street or drives an automobile takes chances. The question is, are these chances greater than is reasonably necessary to meet the ordinary requirements of business or even pleasure? When the facts under consideration are such as to give rise to an honest difference of opinion between intelligent people the question is one for the jury. We think this is such a case. Commonwealth Bonding & Casualty Ins. Co. v. Pacific Electric Co., supra.

[9] The only other question presented by appellant is its objection to the giving of the following instruction by the trial court: "While it is the duty of the driver of an automobile upon crossing a street car track to give way to a car which is about to pass at the same time, since the automobile driver can give way and the street car cannot, and while a motorman of a street car has a right to assume that the driver of an automobile will stop or turn to one side or the other so as to avoid collision, still, when the conduct of the driver of the automobile is such as would lead a reasonable man in the position of the motorman to apprehend or fear that the driver would not stop or turn to one side to avoid a collision, then it becomes the duty of the motorman to use ordinary care to avoid injuring the driver of the automobile in the latter's perilous position; *and if the motorman observed the perilous position of the plaintiff Ring and failed to use ordinary care to avoid striking the automobile of the plaintiff Ring when the latter was in a perilous position, and as a result thereof the plaintiff sustained injury, then I instruct you that he is entitled to recover.*"

Appellant contends that the last portion of this instruction is an attempt on the part of the court to state the doctrine of the last clear chance rule and that it lacks several elements of this doctrine. If this instruction is an instruction based on this doctrine, appellant's contention finds support in the case of Palmer v. Tschudy, 191 Cal. 696–700, 218 P. 36. All of appellant's and respondent's instructions offered on the doctrine of the last clear chance rule were refused by the court.

Assuming that the above instruction does not contain all of the elements necessary to correctly set forth the doctrine of the last clear chance, we cannot perceive that the elimination of these elements constituted error, or if error, that it was prejudicial to the rights of appellant. As stated, the instruction correctly states the rule applying to a case where the motorman sees that the automobile is in a place of peril and could well have been followed by the declaration that if the motorman, in the exercise of ordinary care, should see the perilous situation of an automobile, but does not, he is nevertheless as negligent as if he does see it and fails to perform his duty in the premises. Taylor v. Pacific Electric Co., 172 Cal. 638–651, 158 P. 119.

The judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

116 Cal.App. 100

STERLING ADJUSTMENT CO. v. LAHER AUTO SPRING CO.

Civ. 7646.

District Court of Appeal, First District, Division 2, California.

Aug. 12, 1931.

1. Assignments 🔑**132.**

Right to recover as assignee of seller *held* dependent upon allegation and proof of assignment.

2. Assignments 🔑**132.**

In action by assignee, allegations of complaint relating to assignment must be proved as formally as other material allegations.

3. Sales 🔑**365.**

Finding that only half of goods ordered were delivered *held* not to support judgment for full purchase price where title to undelivered goods had not passed to buyer (Civ. Code, § 3311).

4. Sales 🔑**340.**

Seller's remedy for breach as to undelivered goods, to which title has not passed, is by action for damages, not action for goods sold and delivered (Civ. Code, § 3311).

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by the Sterling Adjustment Company against the Laher Auto Spring Company. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Carter, Peterson & McDonough, of Oakland, for appellant.

Penaat & Penaat, of San Francisco, for respondent.

SPENCE, J.

Upon a trial by the court sitting without a jury, plaintiff recovered judgment in the sum of $2,509.94, with interest, for goods alleged to have been sold and delivered to defendant by plaintiff's assignor. Defendant appeals from the judgment.

[1, 2] Appellant contends that the findings are not supported by the evidence. In our opinion this contention must be sustained, but we do not deem it necessary to discuss all of the various claims of insufficiency. Respondent's right to recover as the alleged assignee of the seller of the goods was dependent upon allegation and proof of an assignment. An assignment was alleged and made an issue by the pleadings, but the record fails to disclose any evidence to support the finding that such assignment had been made. Respondent argues that "the finding as to the assignment is a technicality not involving a substantial right of appellant." We do not believe that it may be so considered, for where an action is brought by an alleged assignee, the allegation of the complaint relating to the assignment must be proved as formally as any other material allegation. Brown v. Curtis, 128 Cal. 193, 60 P. 773; Ford v. Bushard, 116 Cal. 273, 48 P. 119; Read v. Buffum, 79 Cal. 77, 21 P. 555, 12 Am. St. Rep. 131.

[3, 4] It is further contended that the findings do not support the judgment, and we believe that this contention must likewise be sustained. The complaint was in the customary form for goods alleged to have been sold and delivered to defendant by plaintiff's assignor. The evidence showed and the court found that only about one-half of the goods ordered had been delivered to defendant, but judgment was entered for the amount which the court found to be the full contract price for all the goods. The findings do not support the judgment, as it does not appear nor did the court find that title to the undelivered goods had passed to the defendant. As to the undelivered goods to which title had not passed, the seller's remedy, if any, was by way of an action to recover the damages prescribed by section 3311 of the Civil Code and not by way of an action for goods sold and delivered. 22 Cal. Jur. 1077, § 134; Gopcevic v. California Packing Corporation, 64 Cal. App. 132, 220 P. 1078.

For the foregoing reasons the judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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116 Cal.App. 139

BURNS v. RENAKER CO. et al.

Civ. 6879.

District Court of Appeal, Second District, Division 2, California.

Aug. 14, 1931.

1. Appeal and error 🔑**757(3).**

Upon question whether evidence sustains findings, briefs must show reviewing court, either by quotation or statement of substance, evidence supporting or showing lack of support of assailed findings (Code Civ. Proc. § 953c, and § 953c et seq.; Rules for Supreme Court and District Courts of Appeal, rule 8).

Code Civ. Proc. § 953c, and § 953c et seq. provides that, in filing briefs in appeal thereunder, parties must print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, and Rules for Supreme and District Courts of Appeal, rule 8, provides that, where the parts of the typewritten record relied upon on appeal are required to be printed in the briefs, it shall be sufficient to state therein the substance of the record, parenthetically referring to the line and page of the typewritten transcript for verification.

2. **Appeal and error 🔑756.**

Matter from record may properly be reproduced in body of brief, supplement or appendix not being necessary (Code Civ. Proc. § 953c, and § 953c et seq.; Rules for Supreme Court and District Courts of Appeal, rule 8).

3. **Appeal and error 🔑757(3).**

Reviewing court will not search record to ascertain if testimony unincorporated in appellant's briefs is sufficient to support verdict (Code Civ. Proc. § 953c, and § 953c et seq.; Rules for Supreme Court and District Courts of Appeal, rule 8).

4. **Appeal and error 🔑901.**

Generally, appellate court must affirm judgments, if possible, since appellant has burden to show error.

5. **Appeal and error 🔑767(1).**

Respondent's failure, on question whether evidence sustained findings, to incorporate in brief specific testimony, either by quotation or statement of substance, required vacating order submitting cause for decision on merits, and striking respondent's brief from files, with leave to file substitute brief (Code Civ. Proc. § 953c, and § 953c et seq.; Rules for Supreme Court and District Courts of Appeal, rule 8).

Respondent's brief, with a few possible exceptions, presented general matter only, that is, showed no specific testimony, either by quotation or in substance, but stated conclusions of the author of the brief, such as the statement that a named person "had full charge of the undertaking establishment," supported by references to four places in the typewritten record.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Stella Burns against the Renaker Company, a copartnership, and others. From the judgment, defendants appeal.

Order submitting cause for decision on the merits vacated, respondent's brief stricken from the files, with leave to file a substitute brief within twenty days from the filing of the opinion, appellants to have fifteen days thereafter to file a new reply brief, if they be so advised, cause to be thereupon resubmitted on the merits.

Dunn & Sturgeon, of Monrovia, for appellants.

A. D. Orme, of Pasadena, for respondent.

WORKS, P. J.

This appeal is prosecuted under what is known as the alternative method, provided for by section 953a of the Code of Civil Procedure and by several other sections which follow it. Section 953c provides, in part: "In filing briefs in said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Rule VIII of the Rules for Supreme Court and District Courts of Appeal contains the following: "Where the parts of the typewritten record relied upon on appeal are required to be printed in the briefs (Code Civ. Proc. § 953c et seq.), it shall be sufficient to state therein the substance of such record, parenthetically referring to the line and page of the typewritten transcript for verification. * * *"

[1] The principal questions in the present case are whether the evidence is sufficient to support certain findings of the trial court. In such a case we have the right to expect that the briefs will show us, either by quotation or by statement of substance, the evidence which supports or shows the lack of support of the assailed findings. Instead of this desideratum, let us observe what has been presented to us.

The offenses against statute and rule of court do not appear in the opening brief of appellants. These parties have inserted an appendix to their brief, and in it we find over thirteen pages of testimony, quoted directly from the typewritten record. Various portions of this matter in the appendix are referred to in the argument which precedes it. Here appears, then, a satisfactory observance of statute and rule.

[2] We are in deep waters, however, when we take up respondent's brief. It contains no supplement or appendix, although, of course, this is not necessary, as matter from the record may properly be reproduced in the main body of a brief. But respondent does not even adopt this latter method. Counsel makes in the brief at least twenty-three statements in support of each of which citations of places in the record are appended. With the possible exception of four of these statements—and these four are somewhat in doubt—they all present general matter only, that is, they show no specific testimony, either by quotation or in substance, but state conclusions of the author of the brief. We

shall now set down a few of these statements, without explaining what relation they bear to a decision of the cause on the merits, as no such explanation is at present necessary. One statement: "Leslie Renaker had full charge of the undertaking establishment." In support of this conclusion four places in the typewritten record are pointed to. Another statement: "J. W. Burns did not contract that respondent's services were to be included in this compensation." This is followed by two citations from the record. Another: "Respondent was treated as an employee by C. Taylor Renaker and Leslie Renaker and they received the full value of her services." This statement is followed by six citations from the transcript. Again: "Respondent entered into an agreement under which she was to render services of a definite nature at a compensation of $100.00 per month." Four citations of the record appear here. These quotations and remarks will give some idea of the extent to which respondent has transgressed the provisions of the statute and of the rule of court.

The reply brief of appellants shows some very slight departures from the statute and rule, but they are so few and so trivial as to require but this brief notice.

This court has long been harassed by both minor and major violations of its rules of court. We have formerly been lenient as to these matters, but the evil seems to grow under this benevolent lack of regimen. We have lately, therefore, enforced the penalties incurred by a violation of the rules except in particular cases in which there has seemed to be some excuse for the dereliction, and the other courts of review of the state, apparently, have also become more severe in such cases. It seems that, in the matter of obedience to the rules of court, we should make strenuous endeavor to see to it that many of the members of the bar who are not now doing so shall resume the practice of the law, for rules of court, generally speaking, have the force of law, and a knowledge of their purport is as necessary to the practitioner at the bar as is his knowledge of the law itself, properly so called.

It is possible, although we do not decide, that because of the failure of respondent to observe the rule of court and statute above mentioned we have the power to disregard her brief, except that small portion of it which states a few rules of law, with citations of authority, and decide whether the evidence quoted in the appendix to the brief of appellants, alone, supports the assailed findings of the trial court. Bearing somewhat, but perhaps remotely, upon this question is the following portion of rule V of the Rules for Supreme Court and District Courts of Appeal: "If the respondent shall not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon the appellant's brief, in which case the court may, in its discretion, decide the case upon the statement of facts contained in such brief." In legal effect, it may possibly be said that upon the question whether the findings are supported by the evidence respondent has filed no brief. If that can be said, rule V may apply.

[3] There is no doubt that such a course as that just suggested may be taken in cases in which appellants have failed to incorporate in their briefs the parts of the record upon which they rely. In such cases "an appellate court will not search the record and ascertain if the testimony is sufficient to support the verdict. * * *" Brown v. Brown, 104 Cal. App. 480, 285 P. 1086, 1090. See, also, People v. Ferugia, 95 Cal. App. 711, 273 P. 99; Palmer v. Medico Dental Bldg. Corp., 105 Cal. App. 503, 288 P. 80.

[4, 5] The case of a respondent violating, even flagrantly, the rule as to reproduction of the record in his brief may occupy a different situation, for, generally speaking, at least, it is incumbent upon an appellate court to affirm judgments, if possible, this rule being a concomitant to the one that the burden to show error is upon the appellant. We have seen no case in which such extreme action as totally disregarding a respondent's brief and deciding the case without reference to it has been taken. We shall not now decide whether that course may be taken, but we do think the order which we are about to make is proper. Certainly, some penalty must be exacted under the statute and the rule when the offense is as extreme as it is here.

The order heretofore made, submitting the cause for decision on the merits, is hereby vacated. Respondent's brief is stricken from the files, with leave, if respondent be so advised, to file a substitute brief within twenty days from the filing of this opinion, appellants to file a new reply brief within fifteen days thereafter if they be so advised. The cause will be resubmitted for decision on the merits after the new briefs have been filed, or after the time provided therefor has expired, without such filing.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

116 Cal.App. 114

VERTSON v. CITY OF LOS ANGELES et al. (UNITED STATES FIDELITY & GUARANTY CO., Intervener).

Civ. 498.

District Court of Appeal, Fourth District, California.

Aug. 13, 1931.

1. Appeal and error 🔑933(4).

Presumption on appeal is that order granting new trial without specifying ground was not based on insufficiency of evidence (Code Civ. Proc. § 657).

2. Appeal and error 🔑854(6).

Order granting new trial without specifying ground should be affirmed, if proper on any ground specified in motion except insufficiency of evidence (Code Civ. Proc. § 657).

3. New trial 🔑99.

Only newly discovered evidence not discoverable before trial with reasonable diligence authorizes new trial (Code Civ. Proc. § 657, subd. 4).

4. New trial 🔑102(1).

Affidavits that boom of trench machine came in contact with power wires, which fell on plaintiff, *held* not to justify new trial over two years after accident, in absence of proper showing of diligence (Code Civ. Proc. § 657, subd. 4).

5. New trial 🔑102(3).

Claim of newly discovered evidence is not favored; strict showing of diligence being required.

6. New trial 🔑76(1).

Whether new trial should be granted on ground of excessive damages depends on whether verdict is so large as to indicate passion or prejudice.

7. Damages 🔑132(14).

$15,000 damages for third-degree burns, causing deafness in one ear, seriously impaired vision, limited motion in arm, ten months' hospital confinement and 26 skin-graft operations, *held* not excessive.

8. Negligence 🔑138(3).

Plaintiff alleging negligence generally, as well as specific negligent acts, is entitled to instruction on res ipsa loquitur doctrine.

9. Electricity 🔑19(13).

Complaint in action for injuries caused by falling power wires *held* not to preclude instruction on res ipsa loquitur doctrine as alleging specific negligence.

> The complaint alleged that defendants negligently constructed and maintained power line and fastenings of wires to crossbars and crossbars to poles, but alleged no particular act or omission, such as insecure attachment of crossbars to poles or power wires to cross-arms.

10. Electricity 🔑19(8).

Defendants in action for injuries caused by falling power wires *held* not entitled to nonsuit for failure to prove specific acts of negligence.

> The complaint alleged negligent construction and maintenance of power line and fastening of wires to crossbars and of latter to poles, without specifically alleging particular negligent acts or omissions.

11. Trial 🔑168.

Where no evidence warranting verdict for party having onus of proof is produced, court should direct verdict for opposite party.

12. Electricity 🔑19(8).

Whether boom of trench machine came into contact with power wires before they fell on plaintiff *held* for jury on conflicting evidence.

13. Electricity 🔑19(8).

Sufficiency of evidence to overcome presumption of negligence from fall of power wires *held* for jury.

14. Appeal and error 🔑978(1).

Trial court's erroneous application of legal principles in granting motion for new trial will be corrected on appeal as readily as if motion were overruled.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Martin Vertson against the City of Los Angeles and others, in which the United States Fidelity & Guaranty Company intervened. Verdict for plaintiff, and, from an order granting a new trial, plaintiff and intervener appeal.

Reversed.

A. H. Blum and John V. Morris, both of Los Angeles, for appellant Vertson.

Erwin P. Werner, City Atty., W. B. Matthews, William E. Balter, Kenneth K. Scott, and W. Turney Fox, all of Los Angeles, for respondents.

Edward C. Mills and Harold J. Hunter, both of Los Angeles, for appellant United States Fidelity & Guaranty Co.

JENNINGS, J.

This action was instituted to recover damages from the city of Los Angeles and the department of water and power of said city for personal injuries.

The United States Fidelity & Guaranty Company, compensation insurance carrier for Francisco and Ellington, plaintiff's employers, who were independent contractors with said city of Los Angeles, obtained permission to intervene in the action and filed a complaint in intervention seeking to recover from the city of Los Angeles and its department of water and power certain sums of money theretofore paid by said insurance carrier to plaintiff under the terms of the insurance contract made by said insurance carrier with plaintiff's employers and a larger sum which it alleged it would be compelled to pay to said plaintiff in the future because of the injuries suffered by plaintiff which it was alleged had rendered him permanently and totally disabled for the remainder of his life.

Upon the conclusion of the trial a verdict was returned in favor of plaintiff. The defendants moved for a new trial which was granted. Plaintiff and the intervener appeal from the order granting a new trial.

The following facts are alleged in the complaint, and at the trial evidence tending to support them was presented to the court. For some time prior to July 15, 1926, respondents owned and operated a system for the manufacture and distribution of electric current. As a part of this system, respondent the department of water and power of the city of Los Angeles maintained and operated an electric power line along the east side of Bernal avenue in the city of Los Angeles. This power line was constructed in the year 1923. On poles 40 feet in length set approximately 7 feet in the ground were strung two 4,600-volt primary power wires, and approximately 10 feet from the top of the poles and the same distance from the power wires were cross-arms, carrying telephone wires. Between the cross-arms carrying the power wires and those carrying the telephone wires were cross-arms at right angles to them which carried service wires to residences in the vicinity. The power line extended from a substation on Mateo street in the city of Los Angeles a distance of about 1½ miles from the place of the accident. In the substation there was an instrument termed a circuit breaker which was so constructed and arranged as to operate in such manner as to de-energize the power wires, in case they should come together or a short circuit should be caused by some outside agency coming in contact with them. This circuit breaker worked automatically.

On July 15, 1926, Francisco & Ellington, independent contractors with the respondent city of Los Angeles, were constructing a storm drain on Bernal avenue in the city of Los Angeles. In the construction of the storm drain, the contractors used a large drag-line machine for the laying of concrete pipe in the drain. The pipe was in sections, each section weighing about 4 tons. The drag-line machine had attached to it and as a part of it a steel boom or crane 40 feet in length, attached to which there was a steel cable having grab hooks at its end. In laying the sections of pipe, the machine was so operated that the boom was swung around so as to attach the hook at the end of the cable to the pipe and swing over the ditch and lower the pipe to men working in the ditch.

On July 15, 1926, Martin Vertson, appellant herein, an employee of Francisco & Ellington, was working in the storm drain, laying pipe. While he was thus engaged the power wires of respondents fell and coming in contact with him inflicted upon him painful and serious burns.

[1, 2] The trial resulted in a verdict in the sum of $15,000 in favor of appellant. A motion for a new trial was made by respondents on the following grounds: (1) Accident or surprise, (2) newly discovered evidence, (3) excessive damages, (4) insufficiency of the evidence, and (5) errors in law. The order granting a new trial was general and did not specify on what ground it was granted. It must be presumed therefore that it was not based on the ground of insufficiency of the evidence. Section 657, Code Civ. Proc. With the exception of this ground the court's order should be affirmed, if, upon examination of the entire record, it appears that a new trial should have been granted on any ground specified in the motion. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 129, 138 P. 712; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 451, 168 P. 1033; Phillips v. Powell (Cal. Sup.) 290 P. 441.

Respondents herein rely upon only three grounds, to wit: Newly discovered evidence, excessive damages, and errors in law. We may therefore properly confine our attention to them. Furthermore, it may be remarked that the voluminous record fails to disclose any irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial, or that there was any misconduct on the part of the jury, or that respondents suffered from any accident or surprise which could not have been guarded against by the use of ordinary prudence.

[3-5] In support of their motion for a new trial on the ground of newly discovered evidence, respondents presented the affidavits of 13 persons. Of these, but two contain the statement that the affiant actually saw the boom of the trench machine strike the power wires. Five other affidavits contain statements that affiant in each instance saw the

boom of the trench machine in proximity to the wires. This is significant, since respondents, during the trial of the action, strenuously maintained as their principal defense that the boom of the drag-line machine operated by the contractors then engaged in constructing the storm drain for the city of Los Angeles had come in contact with the power wires, causing them to short circuit and fall. Two affidavits are made by individuals who state that they are employees of respondent the department of water and power of the city of Los Angeles.

One of these affidavits states that the affiant, for two months prior to the accident which caused plaintiff's injuries and for a like period thereafter, had been kept busy repairing power wires along Bernal avenue, which had been struck and damaged by the boom of the trench machine of Francisco & Ellington. The second affidavit states that the affiant had inspected the power line on Bernal avenue three days prior to the accident, and found that it was in good safe condition; and, further, that affiant knew that the power line from the time of its construction in 1923 had been maintained in good condition and was in good condition on the date of the accident. Of the remaining four affidavits one is the affidavit of a photographer who states that on the day following the accident he took two photographs of the power line and drain and trench machine, which were attached to the affidavit. Three remaining affidavits are made by individuals employed by respondent the department of water and power of the city of Los Angeles to investigate the accident and secure the names and addresses of persons who might have witnessed it. The affidavits of these investigators have an important bearing on the question of diligence, since subdivision 4 of section 657, Code of Civil Procedure, reads as follows: "Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial."

It is therefore only such newly discovered evidence which could not with reasonable diligence have been discovered and produced at the trial that entitles the party aggrieved to a new trial on the ground of newly discovered evidence. It is to be remembered that the accident occurred on July 15, 1926, and that the trial which resulted in a verdict for appellant was begun on August 1, 1928, and continued from day to day until it was finally concluded on August 8, 1928, when the jury returned its verdict. This was more than two years subsequent to the happening of the accident. Further, it is to be noted that the trial wherein a verdict was rendered was the second trial of the action, a prior trial during the month of June, 1928, having resulted in a disagreement of the jury. It is therefore highly significant that for a period of more than two years following the accident, during which two trials of the action were had, evidence bearing on the important feature of the boom of the trench machine coming in contact with the power wires should not have been discovered, but that within ten days subsequent to the date upon which an adverse verdict was returned it should come to light. Despite the emphatic avowals of diligent search for witnesses contained in the affidavits of the gentlemen who conducted the investigation of the accident for respondents, the bald facts indicate surprising lack of diligence. During the hearing of the motion for a new trial the trial court made the pertinent observation that the court was amazed at the number of affidavits presented and their contents and expressed its inability to understand that counsel for respondents should not have discovered the evidence contained in the affidavits prior to the trials of the action and particularly prior to the second trial.

There is no showing whatever that the testimony of the two employees of the department of water and power of the city of Los Angeles who made affidavits relative to their inspection of the power line and their declarations that it had been maintained in good condition since its construction and was in safe condition a few days prior to the accident could not have been produced at the trial.

The claim of newly discovered evidence is not looked upon with favor by the courts (People v. Byrne, 160 Cal. 217, 225, 116 P. 521; Guderitz v. Boadway Bros., 39 Cal. App. 48, 52, 177 P. 859), and strict showing of diligence is required (Pollard v. Rebman, 162 Cal. 633, 636, 124 P. 235; People v. Byrne, supra). Under the circumstances herein appearing, it is a fair conclusion that the court did not grant the motion on the ground of newly discovered evidence. If the court did grant the motion on this ground, we are of the opinion that it abused the discretion vested in it in such matters in view of respondents' failure to make proper showing of diligence.

[6, 7] It is contended that the court may have granted the motion for a new trial on the ground that the damages awarded by the jury were excessive. It appears that, during the trial, the court, over the objection of respondents, permitted appellant to exhibit to the jury deep scars upon his body caused by the burns which he suffered as a result of the electric power wires coming in contact with his person. It is said that this exhibition may well have excited the sympathy of the jury and aroused in their minds a prejudice against respondents which is reflected in the verdict. As to this point, the important question is whether, bearing in mind the injuries sustained, the verdict is so large as to indicate that it was given as a result of passion

or prejudice. It is elementary that in cases of this character damages are properly awarded for the purpose of compensating the injured party for the injuries sustained. The uncontradicted evidence presented by appellant shows that he suffered third-degree burns involving a large area on the left side of the head which eventually sloughed off, that the left ear was completely burned off and the bone was exposed over the mastoid down into the neck; that he received a deep burn on the left side of the neck and another on the right shoulder involving the right upper arm with the muscles sloughed off down to the large bone in the upper arm; that there was a large burned area about 14 inches long and from 8 to 10 inches wide in the lower back which sloughed off down to the bones of the lower part of his back; that as a result of the injuries sustained by him he became totally deaf in the left ear and has a constant loud roaring noise in the left ear due to injury to the internal ear; that his vision is seriously impaired; that he has marked weakness and limited motion in his right arm. It appears that subsequent to the date of his injuries he was confined in a hospital for about ten months, during which time approximately 26 skin-graft operations were performed. The physician who cared for him was of the opinion that appellant is totally and permanently disabled, and stated that appellant is the most extensively burned case that he had ever seen recover, and that he suffered a very great deal because of the extensively burned areas on various parts of his body, rendering it necessary for him to lie on one of them during all of the time he was in the hospital. The bare recital of the unusually painful and serious injuries sustained by appellant and the results of these injuries produces certain conviction that the damages awarded by the jury were not excessive, that they could not have been awarded as a result of passion, sympathy, or prejudice, and leads irresistibly to the conclusion that the trial court could not, without seriously abusing the discretion vested in it, have granted the motion for a new trial on the ground that the damages awarded were excessive.

[8, 9] It is finally urged that the motion for a new trial may have been granted because of errors of law committed by the court during the trial of the action. The errors which it is contended were committed are the following: First, that the trial court improperly gave to the jury instructions defining the doctrine of res ipsa loquitur and relating thereto; second, that the court improperly denied a motion for a nonsuit made by respondents upon the close of appellant's case; and, third, that the court improperly denied the motion of respondents for a directed verdict at the conclusion of the trial.

With reference to the first of the three alleged errors, it is contended that the complaint sets out a cause of action for the recovery of damages for personal injuries wherein are contained allegations of specific negligence in the maintenance and operation of the power line, and it is said that, this being true, appellant was held to proof of the specific negligence charged, and that the doctrine of res ipsa loquitur is not applicable, and that the court erred in giving instructions relative to the doctrine.

That portion of the complaint wherein are contained allegations charging respondents with negligence is as follows: "That the defendants and each of them carelessly, negligently and unlawfully constructed and maintained said power line and the fastenings of the wires thereto to the cross-bars, and the cross-bars to the poles upon which the said power line was suspended, and that at the time of the plaintiff's injuries the defendants, and each of them, were negligently, carelessly and unlawfully maintaining and operating said described power lines so that on the 15th day of July, 1926, the wires thereof, a short distance from the cross-bars on the said described Pole 3, broke and fell on, upon and against the plaintiff who was at said time and place working in the said storm drain, and that the said wires discharged fierce, seething flames of electricity which came in contact with the body of the plaintiff causing the injuries hereinafter described."

It is to be observed that it is therein alleged that respondents carelessly and negligently constructed and maintained the power line and the fastenings of the wires thereto to crossbars and crossbars to poles upon which the power line was suspended, and that this declaration is followed by a general allegation that respondents were negligently and carelessly maintaining and operating the power line at the time of the accident so that the wires broke and fell upon the appellant, causing injuries thereafter described. In Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462, it is said that the general rule relative to the application of the doctrine of res ipsa loquitur is that, where a plaintiff in his complaint gives the explanation of the cause of the accident alleging specifically the negligent acts or omissions complained of instead of relying upon a general allegation of negligence, the doctrine does not apply. The decision in Marovich v. Central Cal. T. Co., 191 Cal. 295, 216 P. 595, is to the same effect. In the latter case it is said that, where a plaintiff in his complaint makes no general allegation of negligence or no allegation of general negligence, instructions applying the doctrine of res ipsa loquitur should not be given, since the plaintiff is held to proof of the specific negligent acts alleged. In Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627, it is said that the general rule with respect to the application of the doctrine of res ipsa loquitur is subject to the limitation that, where negligence is alleged generally and specific acts of negligence are also alleged, the plaintiff is entitled to have an instruction relative to the doctrine given, even where the allegations appear in the same count. This declaration finds support in the decisions in Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 111 P. 519, 527, and Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 181 P. 669, cited by the court as sustaining authorities. However, it would appear that appellant was entitled to the instruction defining the doctrine of res ipsa loquitur under the general rule above stated, for analysis of the language of the complaint hereinabove quoted indicates an attempt on the part of the pleader to allege negligence generally without describing specifically acts or omissions complained of as negligent. The language relied upon by respondents as containing specific allegations of negligence is as follows: "That the defendants and each of them carelessly, negligently and unlawfully constructed and maintained said power line and the fastenings of the wires thereto to the cross-bars, and the crossbars to the poles upon which the said power line was suspended." This amounts to no more than a general allegation that respondents negligently constructed and maintained the power line and its various instrumentalities consisting of wires, fastenings of wires to crossbars and crossbars to poles. There is no attempt to plead any particular act or omission, as for instance that the crossbars carrying the power wires were insecurely attached to the poles or that the power wires were insecurely attached to the cross-arms. Since this is the case, the general rule hereinabove noted would appear to be applicable, and the trial court committed no error in giving instructions relating to the doctrine of res ipsa loquitur. Diller v. Northern California Power Co., 162 Cal. 531, 123 P. 359, Ann. Cas. 1913D, 908.

[10] The contention that the trial court committed error in denying respondents' motion for a nonsuit at the close of appellant's case is closely related to the matter discussed in the preceding paragraph. Appellant in his case in chief introduced evidence which established the happening of the accident and the injuries sustained by him as a result of the accident, and, it being stipulated that respondents maintained and operated the power line, rested. Respondents thereupon moved for a nonsuit on the ground that, the complaint having specifically alleged negligence, appellant was required to offer proof tending to show the specific acts of negligence alleged. The motion was properly denied, and no error was committed thereby, for there are no specific allegations of particular acts or omissions claimed to have been negligent; hence it was sufficient for appellant to prove merely the happening of the accident and the injuries sustained by him, and it was then incumbent upon respondents to offer proof tending to show that, in spite of the presumption of negligence raised by the falling of the wires of a power line under the exclusive control of respondents, there was in fact no act committed and no failure to perform any act required that would constitute negligence on the part of respondents.

[11, 12] It is contended that the trial court committed error in denying defendants' motion for a directed verdict at the conclusion of the trial. The rule with respect to granting motions of this character is well settled in California. If no evidence is produced upon which a jury could properly find a verdict for the party upon whom rests the onus of proof, the court should direct a verdict for the opposite party. Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 622, 91 P. 115. The determination of whether the court erred in denying a motion for a directed verdict necessarily involves a consideration of the evidence produced at the trial. After appellant had rested and the court had denied a motion for a nonsuit, respondents produced the testimony of a number of witnesses tending to show that the power line had been properly constructed and properly maintained and operated. Evidence was also presented tending to show that the boom of the trench machine operated by the contractors constructing the storm drain had come in contact with the power wires and that they thereupon fell, striking appellant. The intervener and the appellant in rebuttal produced the testimony of witnesses tending to show that the boom of the trench machine did not prior to the accident come in contact with the power wires. The evidence on this point was obviously in conflict, and there were presented questions of fact for the determination of the jury.

[13] Respondents' evidence tending to show proper construction and careful maintenance of the power line and the various instrumentalities connected with it, including the circuit breaker, was evidence whose effect would be to overcome the presumption of negligence which arose from the happening of the accident. It was for the jury to determine whether such evidence was sufficient to overcome the presumption. Brown v. Davis, 84 Cal. App. 180, 257 P. 877; Ireland v. Marsden (Cal. App.) 291 P. 912.

Under the circumstances herein appearing, it seems clear that the motion for a directed verdict in respondents' favor was properly denied.

[14] It follows, therefore, that there was not, in our opinion, any legal showing made by respondents sufficient to justify the trial court in granting the motion for a new trial. It is true that the trial court is vested with extensive discretion in the consideration and determination of motions of this character. Nevertheless, the power of the court is not

unlimited, and if, upon full consideration of the record, it appears that the court erred in the application of the legal principles applicable to a cause in granting a motion for a new trial, such action will be corrected on appeal as readily as if the motion had been overruled. Estate of Baird, 198 Cal. 490, 507, 246 P. 324.

For the reasons hereinabove set forth the order of the court granting a new trial is reversed.

We concur: BARNARD, P. J.; MARKS, J.

HOWLAND v. SCOTT.*

Civ. 863.

District Court of Appeal, Fourth District, California.

July 31, 1931.

Rehearing Denied Aug. 26, 1931. Hearing Granted by Supreme Court Sept. 28, 1931.

1. Appeal and error ⟹475.

Where appeal bond is filed sufficient in form to stay execution, pending justification of sureties, but sureties fail to justify, appellant may not take further proceedings in trial court to stay execution (Code Civ. Proc. §§ 942, 946, 948).

2. Appeal and error ⟹464.

That wives of sureties did not sign appeal bond went to sufficiency of sureties and not to form of bond (Code Civ. Proc. §§ 942, 946, 948).

3. Stipulations ⟹14(12).

That parties stipulated second appeal bond might be filed within five days, did not entitle appellant to file third bond where second was defective (Code Civ. Proc. §§ 942, 946, 948).

4. Execution ⟹70.

Court may issue execution without motion, unless execution is stayed by sufficient undertaking (Code Civ. Proc. §§ 942, 946, 948).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Charles T. Howland against Sallie O. Scott. Judgment for plaintiff. From order granting motion for issuance of execution, defendant appeals.

Affirmed.

Crail, Shutt, Penprase & Miller, of Los Angeles, for appellant.

Salisbury & McNeil, of Los Angeles, and M. W. Conkling, of San Diego, for respondent.

BARNARD, P. J.

In this case, a judgment was rendered in favor of the plaintiff and against the defendant, and after a motion for a new trial had been denied, an appeal was taken which is still pending. An undertaking was filed for the purpose of staying execution pending the appeal. The sureties being excepted to, one of them failed to appear at the time and place fixed for their justification. The attorneys for the respective parties then entered into a stipulation that a new undertaking might be filed within five days thereafter, and the sureties might justify within twenty days; it being stipulated that the sureties to the new undertaking would also be excepted to. A new undertaking was not filed within five days, but on the seventh day one was filed. At the time fixed for the sureties on this second bond to justify, the attorneys for the plaintiff objected to the new undertaking as being insufficient in form, which objection was sustained by the court. On the following day the defendant filed a third undertaking which, it is conceded, is satisfactory in form, and on the same day gave notice to the plaintiff that the same was filed. Two days later counsel for plaintiff gave notice of a motion to strike the last undertaking from the files, and also of a motion for the issuance of an execution. These motions were heard on December 6, 1928, and the court struck from the files the plaintiff's motion to strike the third undertaking, but granted the motion for the issuance of an execution. The defendant has appealed from the order for the issuance of an execution and from the whole thereof.

The main point raised by appellant is that the court erred in granting the motion for the issuance of an execution, for the reason that at the time this order was made a good and sufficient undertaking for the purpose of staying an execution was on file. It is contended that whatever the effect of the first undertaking filed, that effect was waived by the stipulation of counsel that a second undertaking might be filed. It is conceded that the second undertaking was not filed within the time mentioned in the stipulation, and also conceded that it was not sufficient in form. It is then contended that under the rule laid down in Bradley Co. v. Mulcrevy, 166 Cal. 326, 136 P. 60, 62, the first undertaking was void, and therefore the third had the effect of staying an execution, since the Code fixes no time within which an undertaking to stay execution must be filed.

Section 946 of the Code of Civil Procedure provides that whenever an appeal is perfected

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*For subsequent opinion see 9 P.2d 824.

in accordance with the provisions of certain preceding sections, including section 942, all further proceedings in the court below upon the judgment appealed from is stayed. Section 948 of this Code gives to the adverse party the right to object to the sufficiency of the sureties on the undertaking mentioned in section 942, and then provides that unless the sureties on such undertaking or other sureties justify within the time named, "execution of the judgment, order, or decree appealed from is no longer stayed." In Hill v. Finnigan, 54 Cal. 493, the court said: "But section 948 of the Code of Civil Procedure provides that unless the sureties upon the stay-undertaking, or others in their stead, shall *justify*, 'execution of the judgment * * * is no longer stayed.' After a careful consideration of the different sections of the Code, we are convinced that they contemplate but one proceeding to stay the execution below, and that the failure of the sureties to justify, leaves the plaintiff in a position to enforce the execution of his judgment—a position the advantages of which he cannot be deprived by any further act of appellant in the Court below. Otherwise a series of pretended efforts to *justify* might lead to great delay in setting aside the stay, without respondent being afforded any real security for the payment of his judgment in case it should be affirmed."

In Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 22 P. 594, 596, 15 Am. St. Rep. 50, the court said:

"Section 946 provides that whenever an appeal is perfected as provided in the preceding sections proceedings shall be stayed. This must be so, without reference to the sufficiency or insufficiency of the sureties. It is only necessary, under these sections, that a bond be given at the proper time and in due form.

"If the sureties are insufficient, pecuniarily, the opposite party has his remedy under section 948. He may, as provided in that section, except to the sureties at any time within 30 days after the filing of the undertaking; and, unless they, *or other* sureties, justify, as therein provided, within 20 days after the appellant has been served with notice of such exceptions, 'execution of the judgment, order, or decree appealed from *is no longer stayed.*' That is, the proceedings are stayed until the necessary exceptions are made, and time given for the sureties to justify, and no longer."

The fact that the Code contemplates but one proceeding in the court below for the purpose of staying execution was again referred to by the Supreme Court in Tompkins v. Montgomery, 116 Cal. 120, 47 P. 1006. In Bradley Co. v. Mulcrevy, supra, the Supreme Court again sets forth this rule, stating the reasons therefor; the court saying: "Where a bond sufficient in form is filed, but the sureties are in fact insufficient, the undertaking does, until the sureties, after exception, have failed to justify, operate as a stay. During the intervening time, which may extend to 50 days (Code Civ. Proc. § 948), the respondent has been prevented from enforcing his judgment, although he may not have had adequate security, or perhaps any substantial security. If, upon the failure of the sureties to justify, the appellant could file a new stay bond, the same condition might again arise, and it would be possible, by a series of successive bonds executed by insufficient sureties who would fail to qualify, to obtain all the benefits of a stay without furnishing to the respondent the security contemplated by the Code. These are the considerations which led the court in Hill v. Finnigan, supra, to the conclusion that the appellant was not authorized, except upon order of the appellate court, to file a second staybond where the sureties upon a first had failed to justify."

The court then differentiates the facts in that case from those existing in Hill v. Finnigan, pointing out the difference between a case where a bond is filed, sufficient in form, but where the sureties fail to justify, the bond actually operating as a stay for a time, and a case where the original undertaking is so deficient in form as not to comply with the statute. It is held that such a bond, so deficient in form, is entirely void and never has the effect of staying an execution at all. In such a case, it is then held that another undertaking may be filed at any time before the judgment has been enforced, since the Code fixes no time within which an undertaking to stay execution must be filed.

[1-3] We understand these cases as establishing the rule that where an undertaking is filed which is sufficient in form to operate as a stay of execution, pending the justification of the sureties thereon, but where those sureties, or other sureties, fail to justify in accordance with the provisions of section 948 of the Code of Civil Procedure, this constitutes the one proceeding to stay the execution which is contemplated by the Code, and a second undertaking may not be thereafter filed or a second proceeding had in the court below. A different situation is presented where the first undertaking is void because of its form, without reference to the justification of its sureties. In the case before us, we find no deficiency in form in the first undertaking filed, and none is pointed out to us. It is conceded that one of the signers of this undertaking failed to justify thereon. While it is suggested that the form of this bond is not sufficient because the wives of the sureties did not sign the undertaking, it neither appears that either of the signers was married, nor, if so, that he was not in a position to justify without her signature. This suggestion goes to the sufficiency of the sureties

and not to the form of the bond. Nor do we think the stipulation of the parties that a new undertaking might be filed within five days after one of the sureties on the first undertaking failed to appear, is conclusive under the facts existing. It appears that such a new undertaking was not filed until after the five days had expired, and that when filed it was deficient in form, as is now conceded by appellant. Appellant is not relying upon that second undertaking, but upon a third bond filed still later. Assuming that a bond, sufficient in form, and filed in accordance with the terms of the stipulation, would have been effective to stay execution, the stipulation did not have the effect of permitting an undertaking to be filed at any time in the future, irrespective of the stipulation, or of the statutes. No sufficient bond was filed in accordance with the stipulation, and we think the question of the effectiveness of the undertaking which was later filed, upon which appellant relies, depends upon the statutes. We conclude that the first undertaking being sufficient in form and actually staying execution for a time, and the sureties thereon, after being excepted to, failing to justify in accordance with the statute and no other sureties justifying within that time, the appellant could take no further proceedings in the court below to effect a stay of execution. As has been pointed out in the cases cited, a contrary rule would enable an appellant, by a series of successive bonds executed by insufficient sureties, to stay an execution without furnishing to the respondent the security provided for in the Code.

[4] The only other point raised by appellant is that the court erred in denying her motion to strike the plaintiff's motion for the issuance of execution. In support of this point, it is urged that counsel for the plaintiff had not complied with rule 20 of the Judicial Council Rules, effective August 1, 1928, in that he had not served and filed with said motion a memorandum of his points and authorities. The record neither shows any such motion made by appellant, any ruling thereon by the trial court, nor any appeal from such a ruling. Neither, it may be observed, does it show any compliance by the appellant with the rule of the judicial council referred to. In any event, the issuance of an execution is a matter that may be done by the court without a motion, unless the same is stayed by a sufficient undertaking, in accordance with the provisions of the Code. The only real question here presented is whether, under the facts existing, the third undertaking filed had the effect of staying the execution. For the reasons given, we think this must be answered in the negative.

The order appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

Robert S. HOWLAND, Plaintiff and Respondent, v. Sallie O. SCOTT, Defendant and Appellant. *

Civ. 864.

District Court of Appeal, Fourth District, California.

July 31, 1931.

Rehearing Denied Aug. 26, 1931. Hearing Granted by Supreme Court Sept. 28, 1931.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Crail, Shutt, Penprase & Miller, of Los Angeles, for appellant.

Salisbury & McNeil, of Los Angeles, and M. W. Conkling, of San Diego, for respondent.

BARNARD, P. J.

The facts in this case are essentially the same as those in the case of Charles T. Howland v. Sallie O. Scott (Cal. App.) 2 P.(2d) 416, this day decided, and the same questions of law are here presented. For the reasons set forth in the case referred to, the order here appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

Charles T. HOWLAND, Plaintiff and Respondent, v. Roy O. SCOTT, Otis Scott, and John Scott, Jr., Defendants; Roy O. Scott and Otis Scott, Appellants. *

Civ. 865.

District Court of Appeal, Fourth District, California.

July 31, 1931.

Rehearing Denied Aug. 26, 1931. Hearing Granted by Supreme Court Sept. 28, 1931.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Crail, Shutt, Penprase & Miller, of Los Angeles, for appellants.

Salisbury & McNeil, of Los Angeles, and M. W. Conkling, of San Diego, for respondent.

BARNARD, P. J.

The facts in this case are essentially the same as those in the case of Charles T. Howland v. Sallie O. Scott (Cal. App.) 2 P.(2d) 416, this day decided, and the same questions of law are here presented. For the reasons set forth in the case referred to, the order here appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

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*For subsequent opinion see 9 P.2d 824.

LEWIS v. SOUTHERN CALIFORNIA EDISON CO. et al.

CITY OF LOS ANGELES v. SAME.

Civ. 861.

District Court of Appeal, Fourth District, California.

Aug. 6, 1931.

Rehearing Denied Aug. 28, 1931. Hearing Denied by Supreme Court Oct. 5, 1931.

1. Appeal and error 🔑854(6).

Appellate court is precluded from considering question whether evidence sustains verdict, if order granting new trial was general, unless evidence is insufficient in law and without material conflict in any material point (Code Civ. Proc. § 657).

2. Appeal and error 🔑854(6).

Order granting new trial on all grounds stated in notice of intention to move for new trial *held* not general order; hence appellate court could determine sufficiency of evidence (Code Civ. Proc. § 657).

This was so, since it could be determined from the order that new trial was granted on the ground of insufficiency of evidence to sustain the verdict which was one of the grounds stated in the notice of intention to move for a new trial.

3. Appeal and error 🔑302(2).

Alleged irregularity in proceedings of adverse parties as ground for new trial *held* not reviewable, where no error was pointed out under such specification of error (Code Civ. Proc. §§ 657–659).

4. Appeal and error 🔑302(2).

Alleged misconduct of jury as ground for new trial *held* not reviewable, where no errors under such specification were pointed out (Code Civ. Proc. §§ 657–659).

5. Appeal and error 🔑302(2).

Assignment of newly discovered evidence as ground for new trial could not be considered, where no error was pointed out under such specifications (Code Civ. Proc. §§ 657–659).

6. Evidence 🔑383(3).

Testimony in deposition of defendant introduced in evidence by plaintiffs as testimony of adverse party *held* not binding on plaintiffs (Code Civ. Proc. § 2055).

7. New trial 🔑70.

In action for death of one struck by automobile on stepping off truck, granting new trial for insufficiency of evidence *held* not abuse of discretion.

8. New trial 🔑71.

Trial court must grant new trial whenever in its opinion evidence is insufficient to justify verdict, although there is some conflict in evidence.

9. Appeal and error 🔑979(2).

If there is any appreciable conflict in testimony, discretion of trial court in granting new trial is not reviewable.

10. Appeal and error 🔑977(3).

Action of trial court in granting new trial will not be disturbed unless it is apparent that there has been abuse of discretion.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Separate actions by Luvada R. Lewis and another and by the City of Los Angeles against the Southern California Edison Company and another. The actions were consolidated for trial and for appeal. Judgment for plaintiffs. From an order granting defendants new trial, plaintiffs appeal.

Affirmed.

Root, Bettin & Painter, Vernon Bettin, D. Howard Painter, Conant Wait, Kenneth Rhodes, Jess E. Stephens, and Frederick Von Schrader, all of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

GRIFFIN, Justice pro tem.

The above-entitled action, Luvada R. Lewis and Mary Lewis v. Southern California Edison Company, a corporation, and Harry Plohr, was an action brought by appellants for the wrongful death of Henry E. Lewis, husband of Luvada R. Lewis, and father of Mary Lewis. The action entitled City of Los Angeles v. Southern California Edison Company, a corporation, and Harry Plohr, was an action brought by the city of Los Angeles against respondents under the provisions of the Workmen's Compensation Law (St. 1917, p. 831, as amended) to recover a lien on any judgment rendered in favor of appellants Luvada R. Lewis and Mary Lewis by reason of an award granted under the Workmen's Compensation Law because of the death of deceased in the course of his employment by the city of Los Angeles. The two actions were consolidated for trial in the superior court, and a stipulation was entered into by and between the respective parties hereto that the same be consolidated on appeal.

On the 25th day of February, 1927, the deceased, Henry E. Lewis, was employed by the engineering department of the city of Los Angeles as a swamper on a certain garbage truck being operated in a northerly direction on North Doheny drive in the city of Los Angeles. In the performance of his duties he rode on the left running board of the truck and would step down from the running board with a tub in his hand into which he emptied pails of garbage which were placed along the curb. The crew on the truck on which deceased was working on the morning of the accident consisted of Clarence H. Wade, the driver, and Mora Higgins, another swamper who was operating on the right-hand side of the truck. The running boards of the truck were from twelve to eighteen inches from the ground.

North Doheny drive is a public highway in the city of Los Angeles. At the point where the accident occurred and for about two blocks in both directions it is concrete paved, has a grade of approximately 9 per cent., from curb to curb is thirty feet wide, and at the point of the accident was covered with a small amount of loose sand and gravel. On the morning in question, passenger automobiles were parked on the east and west sides of the street. The cars on the west side were headed down grade in a southerly direction with the right front wheels against the curb and the right rear wheels about two feet from the curb. The cars on the east side of the street were parked parallel to the curb with the right front and right rear wheels about the same distance from the curb. The space between these parked cars was approximately sixteen feet. The garbage truck was approximately six feet wide measured from hub cap to hub cap. The driver's seat was partially inclosed with a cab. A Ford automobile of the type driven by Mr. Plohr for the Southern California Edison Company, was approximately six feet wide. The total available clearance for the two cars to pass at the point of the accident was therefore approximately four feet.

On the morning of the accident the truck on which deceased was working was proceeding in a northerly direction on North Doheny drive. Prior to the accident, the respondent, Harry Plohr, passed the truck from the rear on the left-hand side and proceeded in a northerly direction to a point north of the scene of the accident, turned around and started down North Doheny drive in a southerly direction. In the meantime the truck was moving northerly at the rate of about four miles per hour. The deceased was standing on the left running board of the garbage truck at the time Mr. Plohr passed him going north. When the Ford, returning in a southerly direction, reached a point somewhere between eighty and ninety feet north of the scene of the accident, deceased stepped off the running board of the truck on to the center line of the street facing in a westerly direction, turned slightly to the south to reach for his tub, which was hanging from the side of the truck, and in so doing was placed in such a position that his back was toward the north. Respondent's automobile which was being driven at a speed of approximately thirty miles per hour entered the space between the truck and the cars parked on the west side of the street, struck deceased on the right leg, and hurled him about ten or twelve feet. Mr. Plohr applied his brakes immediately after the impact and slid in a southerly direction for approximately seventy-two feet, finally coming to a full stop with his right front wheel over the west curb of the street, his tires leaving a solid skid mark for that entire distance. He gave no warning of his approach, nor did he attempt to slacken his speed before negotiating the narrow passageway between the truck and the cars parked along the west side of the street. Deceased suffered a concussion of the brain, from which he died.

At the time of the accident deceased was earning about $35 per week and had an expectancy of life of approximately twenty-one years. His widow and daughter sought to recover the sum of $25,000 damages for his wrongful death. The jury returned a verdict in favor of the appellants Luvada R. Lewis and Mary Lewis for the sum of $7,500. By reason of the stipulation entered into by the respective parties, the city of Los Angeles was given a lien on said judgment in the sum of $4,836.90.

Under all the grounds set forth in section 657 of the Code of Civil Procedure, except that of "accident or surprise, which ordinary prudence could not have guarded against," the respondents filed notices of intention to move for a new trial in both actions. These motions were granted by the court "on all grounds stated in the notice of intention to move for a new trial." Appellants are appealing from the order granting the new trial.

Respondents pleaded, as a defense to each of the actions, contributory negligence on the part of the deceased. Their notices of intention to move for new trial stated the following grounds: "1. Insufficiency of the evidence to justify the verdict. 2. That the verdict is against the law. 3. That the verdict is against the evidence. 4. That the verdict is against the law and the evidence. 5. Errors of law occurring at the trial and excepted to by said defendants. 6. Excessive damages appearing to have been given under the influence of passion or prejudice. 7. Newly discovered evidence material for the defendants which it could not with reasonable diligence have discovered and produced at the trial. 8. Irregularity in the proceedings of the adverse parties, to-wit: the plaintiffs, by which the defendants were prevented from having a fair trial. 9. Misconduct of the jury."

[1, 2] After the hearing on the motion, the minutes of the court disclose the following order: "Motion for new trial on the part of the defendants, having heretofore been heard

and submitted, it is ordered that the said motion be granted *on all the grounds stated in the notice of intention to move for a new trial.*" (Italics ours.)

One of the contentions of appellants is that the court erred in granting the motion for new trial. They contend that the order above set out granting a new trial was a general one and did not specify that it was granted on the grounds that the evidence was insufficient to justify and sustain the verdict; therefore, under the amendment of 1919 (Stats. 1919, p. 141, amending section 657 Code Civ. Proc. by adding the last clause thereto), it must be presumed on this appeal that the order was not based on that ground. It is clear from the above amendment that we are precluded from considering the question of whether or not the evidence is sufficient to sustain the verdict, if the order granting the new trial was a general order, unless the evidence was insufficient in law and without material conflict in any material point. Biaggi v. Ramont, 189 Cal. 675–677, 209 P. 892; Yoakam v. Hogan, 198 Cal. 16, 243 P. 21; Wilkinson v. United Railroads, 195 Cal. 185, 232 P. 131; Tasker v. Cochrane, 94 Cal. App. 361, 271 P. 503, 504. In Tasker v. Cochrane, supra, defendant's motion for new trial contained similar specifications of error separately stated. The order of the court granting a new trial was in these words: "The motion for new trial having heretofore been submitted, the court at this time grants the motion for a new trial." In that case it was held that such an order was general and failed to specify the ground. In the case before us the order specifies the grounds by reference to the notice of intention to move for new trial which does set forth the grounds in detail and which notice is made a part of the record.

We are of the opinion that such an order is not a general order, but that it can be determined therefrom on appeal, that the order granting a new trial was granted also on the ground of insufficiency of the evidence to sustain the verdict. Randall v. Duff, 79 Cal. 115–123, 19 P. 532, 21 P. 610, 3 L. R. A. 754, 756.

Appellants further contend that in granting the motion for new trial the court abused its discretion for the reason that the evidence relative to the negligence of the respondent was conclusive and was undisputed, and the verdict rendered was the only verdict which could have been rendered on the facts submitted to the jury.

[3-5] No affidavits were filed by respondent in support of its motion based on the first four grounds mentioned in section 657, Code of Civil Procedure, and, no error under these specifications having been pointed out, they will be disregarded. Sections 658, 659, Code Civ. Proc. Hence the only grounds upon which the motion could have been properly granted, which this court will consider, are (a) excessive damages, (b) error in law occurring at the trial, (c) insufficiency of the evidence to justify the verdict, (d) that the verdict is against the law.

[6] From a reading of the reporter's transcript it appears that most of the important and material facts were undisputed. The evidence produced in the deposition of the defendant Plohr introduced in evidence by appellants under section 2055, Code of Civil Procedure, did tend to contradict some of the material points as to the speed of his car and his actions. Appellants contend that, as the deposition of this defendant was received in evidence on their motion under section 2055, Code of Civil Procedure, they were not bound by such evidence. The case of Schwarz v. Schwarz, 93 Cal. App. 252, 269 P. 755, 757, supports this contention. The court there said: "The conflict arose in the testimony of the defendant, who was called by the plaintiff under section 2055 of the Code of Civil Procedure. As to such testimony the plaintiff was not bound, but, in any event, the conflict should be disregarded." Grantham v. Ordway, 40 Cal. App. 758–764, 182 P. 73; Weir v. New York Life Ins. Co., 91 Cal. App. 222, 266 P. 996.

[7] Wade, the driver of the garbage truck, was the only witness that testified as to the speed of defendant's car. He estimated the speed to be thirty miles per hour. He further testified that deceased stepped off the running board when defendant's car was from eight to ten feet from him; later he testified it was fifteen feet. Then he visited the scene of the accident and returned to the stand and changed his testimony, stating that the distance was about ninety feet. He further testified that the left wheels of the truck were a foot east of the center of the street, and on a previous occasion testified they were but four inches east of it and stated that it was only an estimate.

The only other eyewitness to the accident was Higgins, the other workman, who was on the right or easterly side of the truck picking up garbage from the right-hand curb. He had just stepped off the truck when deceased was hit. He admitted he did not see the collision or impact.

The witness Plohr did not testify at the trial. The defense apparently believed they might rely upon his deposition, which was offered in evidence by plaintiffs, under section 2055, to establish their claim. In his deposition he stated: "Well the truck started to pull away from the curb and just when I got to where the truck was, the whole front of the truck had been pulled out from the rear of another machine that was parked in front of, and I managed to get—it was quite narrow and there was a space about two feet between the corner of the truck and the other side, and it was about six inches from my fender to their cars, and just as I passed the front of this truck, this fellow jumped off of the truck and he made about two steps and he jumped off so fast that it just happened in an instant, my left fender hit him." He testified further that he was going about twenty miles per hour and that as he approached the truck he blew his horn once or twice.

Anthony Miller, a witness for the defense, testified that Wade did not know that deceased had been struck until he (Miller) had called to him a second time to stop, that one of his men had been hit, and also that Wade told him then that he did not see the collision and did not know how it happened.

Mark M. Christianson, testifying for the defense, stated that Wade had told him that he did not see the collision and did not know the man had been struck.

Maytor Hoppenyan, who lived across the street from the point of the accident, testifying for the defense, stated that both Wade and Higgins told him at the time that they did not know how it occurred, as they did not see it. He testified that the body of deceased was lying on the west side of the street about halfway between the center of the road and the curb, which would be in the path of defendant's car, and that by reason of the gravel on the pavement the length of the skid marks was no indication of the rate of speed.

From the analysis of the evidence it will be observed that Mr. Wade was the only one who claimed to have seen the approach of respondent Plohr, and that Wade was engaged in the act of driving the truck, seated in a seat where his vision was so obstructed by the cab of the truck that it would appear unlikely that he was able to see the deceased stationed on the running board back of him. Accordingly, in the final analysis of its decision on the question of the granting of the motion for new trial, the court, after having seen and heard this witness testify and after a calm and dispassionate consideration of his evidence, which he repeatedly corrected and contradicted, and which was impeached by at least three witnesses, felt that its weight was not sufficiently convincing upon material questions to justify the verdict of the jury.

In weighing the evidence on a motion for new trial the trial court may have been justified in believing the deceased guilty of contributory negligence as a matter of law, even considering the surrounding circumstances and the evidence of Wade himself.

"Q. And what did he start to do after he (Lewis) got down from the truck? A. He reached for a tub, hanging on the left-hand side, just back of the cab.

"Q. How far from the truck was he when he was struck by this southbound automobile? A. Just on the ground.

"Q. Just stepped off? A. Yes, to get his tub.

"Q. Where is this tub located? A. Hanging on the same side he was on.

"Q. Was your truck moving at the time? A. Yes, moving slowly and in low gear. We drive very slowly, picking up as we go.

"Q. He stepped off the running board to take the tub when the automobile struck him? A. Say, he got off the truck like this, and here is the tub, like this, and the fellow hit him, like this, and that throwed him like that.

"Q. Now, when Mr. Lewis got down from the truck onto the street, what was the position of his foot in relation to the center of the street? A. Well, I would say on the mark, on the center of the street.

"Q. And just as he stepped off, he was struck, wasn't he? A. Yes.

"Q. As a matter of fact, he stepped off within two or three feet—of the front end of the automobile, didn't he; is that right? A. When he stepped off—

"Q. Answer my question, please, if he did not step off within two or three feet of the front end of the Ford automobile, and then he was struck. A. Yes."

The foregoing testimony of Mr. Wade corroborates the testimony of Mr. Plohr on this point. The record shows that the witness Wade demonstrated to the court and jury the manner in which the deceased acted at the time and place of the accident. The court therefore was able to determine a fact that is not before this court.

[8-10] The rule is firmly established that the trial court is, not only authorized, but that it is its duty to grant a new trial whenever in its opinion the evidence upon which the former decision was made was insufficient to justify the decision. Its action in granting a new trial upon this ground is so far a matter within its discretion that, if there is any appreciable conflict in the evidence, it is not open to review in this court. Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L. R. A. 124; Domico v. Casassa, 101 Cal. 411, 35 P. 1024; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019.

Upon the question as to whether deceased was guilty of contributory negligence, there was apparently some conflict in the evidence. This, however, was not sufficient to prevent the trial court from granting a new trial on the ground of the insufficiency of the evidence. It is established by numerous decisions in this state that, although there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on such grounds whenever the judge is convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be disturbed unless it is apparent that there has been an abuse of the discretion confided to him. Green v. Soule, 145 Cal. 96, 102, 78 P. 337; Bates v. Howard, 105 Cal. 173–178, 38 P. 715; Mock v. Los Angeles Traction Co., 139 Cal. 616, 73 P. 455. The record on this appeal affords no basis for any claim that there was any such abuse of discretion in this case.

We are aware of the decision in the case of State Compensation Ins. Fund v. J. W. Scamell et al., 73 Cal. App. 285, 238 P. 780, upon which respondents rely, which holds that one engaged in work upon the streets, such as a street sweeper, may assume that a driver will give a signal or warning so that an accident may be avoided, and that the workman's rights cannot be determined by the same rules applicable to pedestrians generally, and modifies the stop look and listen rule accordingly. We believe such rules do not apply if the workman, as in this case indicated, without notice, suddenly jumps from the left running board of the garbage truck in front of the approaching car.

The last ground is that the verdict is against the law. The instructions given and those refused are made a part of the record on appeal. Our attention has not been called to any error that would justify us in holding that the verdict was contrary to, or in conflict with, the instructions given the jury by the court. It is clear that the order granting a new trial on this ground cannot be sustained.

It is therefore manifest that, regardless of other reasons that may exist, the order granting a new trial on the ground of insufficiency of the evidence to sustain the verdict must be, and is, affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

HYNDING v. HOME ACCIDENT INS. CO.*

Civ. 417.

District Court of Appeal, Fourth District, California.

Aug. 17, 1931.

Rehearing Denied Sept. 15, 1931. Hearing Granted by Supreme Court Oct. 15, 1931.

1. Insurance ⚿311(1).

That insured failed to assist liability insurer in suit brought against insured *held* not to defeat statutory rights of injured party securing judgment against insured and suing insurer (St. 1919, p. 776).

> This was so, notwithstanding the liability policy expressly required the insured to assist the insurer in any suit, since the rights of the injured party, for whose protection St. 1919, p. 776, was enacted, could not be defeated by private agreement between the insured and insurer.

2. Contracts ⚿187(1).

Generally, rights of party for whose benefit contract is made must be measured by terms thereof.

3. Pleading ⚿121(4).

Liability insurer's denial on information and belief that writ of execution issued on injured party's judgment against insured was returned unsatisfied *held* insufficient.

> The denial on information and belief was insufficient, since the matters denied were matters of record.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Louie Hynding against the Home Accident Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

Adam Thompson and Renwick Thompson, both of San Diego, for respondent.

BARNARD, P. J.

This is an appeal from a judgment in favor of the plaintiff, and from an order striking out certain portions of the defendant's answer. Plaintiff was injured through the negligence of one S. K. Tucker in driving an automobile. Tucker was insured against such a liability by the defendant insurance company. In an action brought against Tucker this plaintiff recovered a judgment for $2,019.48, which has not been paid. It is conceded that Tucker is insolvent, and, after demand made, plaintiff brought this action for the purpose of securing payment of the judgment. The policy issued by the defendant contained a provision virtually in the language of our statute (Stats. 1919, p. 776), and reading as follows:

"D. *Insolvency of Assured.*—The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of this Policy and resulting from accidents covered by the Policy; and in case judgment shall be secured against the Assured by the injured person or his heirs or personal representatives in case death resulted from the accident, an action may be brought by such injured person, or his heirs, or personal representatives, in case the accident resulted in his death, to recover on the Policy the amount of such judgment, not exceeding the amount of the Policy and subject

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 7 P.2d 999.

to all its other terms, conditions and limitations; provided, however, that where two or more persons are injured in an accident covered by the Policy the Company may settle and pay any claim asserted, whether reduced to judgment or not, and such payments shall be accounted in diminution of the Company's total liability on account of such accident, and payment so made aggregating the full amount of the Policy shall extinguish all liability thereunder to said claimants and all other persons on account of such accidents."

The policy also contained the following provisions:

"E. *Reporting Accidents, Claims and Suits.*—Upon the occurrence of an accident covered by this Policy the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company or to its duly authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. If suit is brought to enforce such claim, the Assured shall immediately forward to the company every summons or other process as soon as the same shall have been served upon him. The Assured shall at all times render to the Company all cooperation and assistance (except in a pecuniary way) within his power.

"F. *Co-operation of Assured.*—The Assured, whenever requested by the Company, shall aid in securing information and evidence and the attendance of witnesses, and in effecting settlements and in prosecuting appeals; but the Assured shall not voluntarily assume any liability, either before or after an accident, nor shall he (without the written consent of the Company previously given) incur any expense or settle any claim except at his own cost nor interfere in any negotiations for settlement or in any legal proceeding conducted by the Company on account of any claim; except that the Assured may provide at the time of the accident (and at the cost of the Company) such immediate surgical relief as is imperative."

In its answer, as a defense to the action, the defendant alleged that Tucker had reported this accident to the company with a statement of his version of the facts, which, if true, would tend to show that he was free from blame; that he had failed, neglected, and refused to co-operate with the defendant in obtaining further information and in obtaining the attendance of witnesses at the trial of the former action, although requested so to do; that he was notified that the trial was set and requested to appear and testify, and his expenses were offered him, but he failed and refused to attend; and that at the time of trial a request for a continuance was refused. Upon motion of the plaintiff, the above defense was struck out. Thereafter the action proceeded to trial, resulting in a judgment for the plaintiff, followed by this appeal.

[1] The main point raised by the appellant is that the court erred in striking out its defense of lack of co-operation on the part of the insured. In other words, the question presented is whether, under our statute, the fact that an insured violates the provisions of such a policy, requiring him to assist the insurance company in any suit brought against him, will defeat the rights of an injured party who has secured a judgment against the insured, and who is suing the insurance carrier under the right of action given by the statute.

So far as we are aware, this question has not been directly settled in this state. The appellant argues that the co-operation clause in the policy was binding on the insured himself, and cites Bryson v. International Indemnity Company, 88 Cal. App. 100, 262 P. 790, in support of the proposition that the injured party has identically the same rights as the insured, and no more. While language was used in that case to the effect that under certain circumstances the injured person would have the rights the insured would have had if he had paid the judgment, the only thing there held was that a class of persons not covered by the policy could not recover under it. While this case supports the proposition that the terms of such a policy may limit the persons covered thereby, it does not hold that, when a third person is covered by the terms of the policy, his rights may be defeated by an act of the insured subsequent to the injury The appellant also cites Pigg v. International Indemnity Company, 86 Cal. App. 671, 261 P. 486, in which the court held that the evidence was sufficient to show that the insured had not violated a co-operation clause in the policy similar to the one now before us. While it is argued that this inferentially supports appellant's position, since the facts in that case were a sufficient answer to the contention made, it was unnecessary for the court to go further. Appellant also relies on Metropolitan Casualty Insurance Co. of New York v. Colthurst (C. C. A.) 36 F.(2d) 559, and Royal Indemnity Company v. Morris (C. C. A.) 37 F.(2d) 90. Both of these cases rely largely upon certain New York cases which arose under a statute materially different from our own, as pointed out in Malmgren v. Southwestern A. Ins. Co., 201 Cal. 29, 255 P. 512, 513. While these cases support appellant's position, we feel they are not controlling. **As we said** in Bachman v. Independence Indemnity Co., (Cal. App.) 297 P. 110, 116: "We have concluded that the construction placed on this statute by the Circuit Court of Appeals does not conform to that of the courts of California." While, under the New York statute, a cause of action does not accrue to the injured person until an execution is issued upon the judgment and has been returned unsatisfied by reason of insolvency or bankruptcy, under an additional provision contained in our statute insolvency is not a necessary condition to such an action, which may be brought after a judgment has been obtained against the insured. Marple v. American Automobile Ins. Co., 82 Cal. App. 137, 255 P. 260; Pigg v. International Indemnity Co., supra.

In Malmgren v. Southwestern A. Ins. Co., supra, the court said:

"The provisions of the statutes, as above quoted, are, as a proposition of law, a part of every policy of indemnity issued by a company or corporation engaged in transacting the kind of indemnity insurance business which appellant was authorized by the law of the state to transact. It was a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy. * * *

"The statute of this state, which is the final word on this issue, does not make the return of the execution unsatisfied a prerequisite to the commencement of an action upon the policy. The statute of the state of New York has such a provision, and appellant had caused to be incorporated in its policy the language of the New York statute verbatim. The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith. The statute is founded upon principles of public policy, and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a triparty contract. If appellant's contention be sound, then it could, with equal justification, require the question of the assured's bankruptcy to be adjudicated by a competent tribunal before it would be obliged to recognize his insolvency or bankruptcy, or impose other conditions precedent to the injured person's right of action in derogation of express provisions of the law's mandate. We see no merit in the contention. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606, relied upon as an authority in the instant case, is merely declaratory of the New York statute (Consol. Laws N. Y. c. 28, § 109), which provides that a cause of action does not accrue to the injured person until an execution issued upon the judgment against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. No such language or language equivalent thereto is found in the statute of this state and neither appellant nor this court is given authority to interpolate the provision of the New York law into a California statute. The clause in the statute which provides that an 'action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person,' was not intended to defeat its purpose upon the theory that an action brought 'on the policy' binds the injured person to a repudiation or waiver of the benefits of the statute expressly adopted for his protection, but it clearly has reference to those matters concerning which the insurer and assured could legally contract."

In Bachman v. Independence Indemnity Co., supra, we said:

"In the jurisdictions which do not recognize the right of an injured person to bring an action on the insurance policy to collect the amount of a judgment rendered against the insured for damages suffered at his hands, the policy is regarded and treated as a private contract of indemnity between the insurer and insured in which no other person may become interested. In the jurisdictions recognizing such a right of action the policy is regarded as a contract between the insurer and the insured for their benefit and for the benefit of an unknown third person who becomes known and identified upon being injured by the insured. The language of our statute authorizing the injured person to file suit against the insurance carrier, after recovery of a judgment against the insured, would indicate that the Legislature intended to adopt the latter rule in California. It would seem a strange and useless proceeding on the part of the Legislature to give to the injured the right to sue the insurer if a recovery in such an action could be defeated by the insurance company and the insured without the knowledge or consent of or any act on the part of the injured person. * * *

"We are of the opinion that after the happening of an accident coming within the coverage provisions of a policy of insurance, such as we are considering, neither the insurer nor the insured can, by any voluntary act, defeat the statutory right given to the injured person to bring an action on the policy after judgment recovered against the insured without some act or omission on the part of the injured which will relieve the insurer from liability. Of course, collusion or fraud between the insured and the injured to the damage of the insurer, when proven in a proper action, would furnish grounds for the release of the insurer. To adopt any other rule would permit the insurer and insured to revoke or cancel the policy or release the insurer's liability at will after the accident and thus defeat the purpose of the statute, giving the one injured a cause of action against the insurer to enforce his judgment."

As we understand the appellant's contention, it is that the provision of the statute that such an action may be brought subject to the "terms and limitations" of the policy makes the co-operation clause thereof binding on the respondent. In the Malmgren Case it was said that this wording of the statute could not be used to defeat its purpose, but that it had reference to those matters concerning which the insurer and the insured could legally contract. It was also said that the rights of third parties, for whose protection this law was adopted, could not be defeated by the private agreement of two of the parties to a triparty contract. The question now confronts us whether this agreement as to co-operation on the part of the insured was intended to bind the third party, and, if so, whether such an agreement is one that the insurer and insured may legally make. If the rights of such a third party cannot be defeated by a private agreement between the other two parties, can they be defeated by these parties thus privately agreeing that they shall be defeated, after they have arisen through the injury to the third party, by the failure of one of these parties to assist the other in the controversy which has arisen between them and the third party? If this can be done, it not only opens the door to collusion, but defeats the whole purpose of the statute by making the rights of the third party dependent upon what his adversary may do after the very injury has occurred for which the statute was designed to furnish him protection. From its very nature, this co-operation clause is one that applies to the insured but not to the injured party. It is neither possible for him to comply with it, nor to compel the insured to comply with it. It provides for an action which is adverse to him. It seems idle to say that in respect thereto he steps into the shoes of the insured. He is not claiming under an assignment of the insured's interest, but under an independent right given by the statute. While it may be said that his right does not fully accrue until judgment is obtained against the insured, in a very real sense his claim is initiated by the injury which gives rise to a potential liability on the part of the insurance carrier, and to potential rights in the injured person, which should not be defeated by the subsequent acts of another party who may happen to be also insured.

[2] It seems to be appellant's theory that such an insurance policy is a contract entirely between the insurer and the insured, but this contract is also for the benefit of a third party who does not become known until after the injury. While it is a general rule that the rights of a party for whose benefit a contract is made must be measured by the terms of the agreement between the principal parties, and while that rule may apply here up to the time of the injury, the rights of the third party which then arise are controlled also by the statute. After the injury, the third party for whose benefit the contract was also made becomes known, and he then has independent rights. We think that these rights do not depend upon the subsequent actions of the insured, who happens to be also protected by the policy. For himself, the insured may settle, waive his claim, or defeat the same by his own acts, but we think he may neither defeat the rights already accrued to the injured party by his subsequent act or failure to act, nor by any agreement that any such subsequent action shall have that effect. We conclude that this agreement for the co-operation of the insured was not binding upon the respondent, such a result being one for which the original parties could not legally contract.

[3] Only one other point is raised. The complaint contains allegations to the effect that, after judgment in the former action, a writ of execution was issued by the court and returned by the sheriff as unsatisfied; this return being filed with the clerk. The answer denied these allegations upon information and belief. These denials were struck out by the court, and this action is assigned as error. A denial of these matters which were of record, on information and belief, is not sufficient. Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 P. 602. In any event, these denials were properly stricken. Marple v. American Automobile Insurance Company, supra; Pigg v. International Indemnity Company, supra; Malmgren v. Southwestern Automobile Insurance Company, supra.

For the reasons given, the order and judgment appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

116 Cal.App. 82

WALLACE v. BOARD OF TRUSTEES et al.

Civ. 484.

District Court of Appeal, Fourth District, California.

Aug. 10, 1931.

1. Municipal corporations 🔑159(1).

City council must call recall election on petition substantially conforming to statute and properly certified by clerk as containing enough signatures (St. 1911 [Ex. Sess.] p. 128).

2. Municipal corporations 🔑159(1).

Evidence *held* not to show substantial compliance of recall election petition with statutory requirements (St. 1911 [Ex. Sess.] p. 128).

City clerk's certificate of insufficiency of number of signatures to petition did not appear thereon; there was no affidavit by circulator on eleven of fourteen pages, pasted end to end after copy of original petition, and not "an affidavit," but three separate affidavits, referring only to certain portions of paper, if entire number of pages be considered as one paper.

3. Municipal corporations ⟹159(1).

Statutory precautions to insure genuineness of signatures on separate papers of recall petition and signers' knowledge of contents are essential (St. 1911 [Ex. Sess.] p. 128).

4. Mandamus ⟹173.

Motion for nonsuit in mandamus proceeding, "on the grounds specified in our objections to the introduction of the petitions" for recall election, sufficiently stated grounds therefor.

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

Application by A. H. Wallace for a writ of mandamus, compelling the Board of Trustees, known as the City Council of the City of Oceanside, and the members thereof, to call a recall election. From an order granting a nonsuit and a judgment denying the application, petitioner appeals.

Affirmed.

Head, Wellington & Jacobs, of Santa Ana, and Dean Sherry, of San Diego, for petitioner.

J. C. Hizar, of San Diego, for respondents.

BARNARD, P. J.

The petitioner filed in the Superior Court a petition for a writ of mandamus to compel the city council of the city of Oceanside to call a recall election. The petitioner recites that he, and other qualified electors, prepared and circulated a petition for the recall of H. D. Brodie and E. A. Walsh as trustees and members of the city council of the city named. It is alleged that the petition was signed by qualified voters of said city in excess of 25 per cent. of the entire vote cast in said city at the next preceding regular municipal election; that the petition was filed with the city clerk on June 27, 1930; that on July 9, 1930, the city clerk reported said petition to the city council as having an insufficient number of signatures thereon; that the city council on July 9, 1930, passed a motion referring the petitions back to the petitioners so that they might be amended within ten days; that on July 11, 1930, a supplemental or amended petition was filed with the city clerk; and that on July 23, 1930, the city clerk certified the original petition as having a sufficient number of signatures. It is also alleged that a demand had been made upon the city council to call an election, but that such demand had been refused. An answer was filed by the respondents, and at the hearing permission was given to amend the petition so as to allege that two separate petitions for recall had been filed, one directed against Brodie and the other against Walsh. At the conclusion of the petitioner's evidence, a motion for a nonsuit was made and granted and a judgment entered denying the application for a writ. From this order and judgment this appeal is taken.

The two petitions for recall were admitted in evidence, and, under stipulation, the original petitions have been transferred to this court for our inspection. The petitioner herein testified that he signed both petitions for recall; that each of said petitions were read to him before signing; and that the same were signed in the presence of the circulator, Katherine M. Clark. Katherine M. Clark testified that this petitioner signed the two petitions for recall in her presence, and that she read the petitions to him at the time he signed. The city clerk of Oceanside testified that the petitions were filed, that he reported to the city council that the signatures on the two petitions were insufficient, and that the city council passed a motion that these petitions be referred back to the petitioners so that they might be amended within the ten-day period provided by law.

[1] The appellant contends that the two petitions for recall are prima facie evidence of petitioner's right to have a recall ordered, and that the evidence shows a substantial compliance with the requirements of law. It is settled that, where a petition is filed which substantially conforms to the provisions of the statute, and which is properly certified by the clerk as containing the sufficient number of signatures, the city council has no discretion as to the calling of an election. Martin v. Board of Trustees, 96 Cal. App. 705, 274 P. 1015. We think, however, that in a number of respects the evidence here fails to show a compliance with the law governing such proceedings. Stats. (Ex. Sess.) 1911, p. 128.

[2, 3] The law provides that within ten days from the date of filing such a petition the clerk shall examine and compare the signatures thereon with the records of registration, and that he shall attach to the petition his certificate showing the result of his examination. It also provides that, if by the clerk's certificate the petition is shown to be insufficient, additional papers may be filed within ten days from the date of such certificate. No certificate of insufficiency appears on either of the petitions here involved. While the city council ordered the petitions returned for the purpose of being amended, and while another sheet with additional signatures was filed on July 11, 1930, we are unable to tell when the ten-day period started to run, if at all.

The law provides that all of the signatures need not be on the same paper, but it also provides that "each" paper shall have an affidavit by the circulator thereof showing, among other things, that the persons whose names appear had actually signed the same. In each of the petitions before us, as originally filed on June 27, there are fourteen sheets of paper pasted together end to end. At the top is a copy of the petition itself, followed by nine sheets of signatures. Then follows an affidavit by Katherine M. Clark to the effect that she is a qualified elector, that she circulated "the foregoing paper" and saw the signatures thereon written, and that each is the genuine signature of the person whose signature it purports to be and of a registered qualified elector of the city of Oceanside. Then follow three more sheets with a similar affidavit by one Rickard, as circulator, and then follow two more sheets with a similar affidavit by one Peters. The other petition is in similar form, except that the first circulator's affidavit seems to refer to eight pages, the second to four pages, and the third to two pages. The entire document is marked as filed in the office of the city clerk on June 27, and contains no certificate by the city clerk as to any insufficiency in the number of signers. At the end of the document is a certificate of the city clerk dated July 23, 1930, to the effect that he had examined the "foregoing petitions"; that he had compared the signatures thereon with the affidavits of registration; and that the "signatures on said petition, as amended, represent more than 25 per cent. of the total number of votes cast at the last general municipal election" in said city. With each original petition, but not attached thereto, is another sheet labeled "Supplemental Petition," containing additional names, and marked as filed in the office of the city clerk on July 11, 1930. No certificate of any kind whatever is attached to the supplemental petitions. If each of the fourteen pages in each of these petitions be considered as "each paper," there is no affidavit by a circulator on eleven of them. If the entire fourteen pages be considered as one paper, there is not "an affidavit" by the circulator, but three separate affidavits each apparently referring, not to the entire paper, but to a certain portion thereof only.

It further appears that Katherine M. Clark, who apparently circulated nine sheets of the one petition and eight sheets of the other, testified that she had a number of sheets with headings on, that is to say, with a copy of the petition at the head thereof; that none of the signers signed the petition without the heading being on that sheet; and that she then cut off the headings and pasted the sheets together. In Fox v. Board of Supervisors, 49 Cal. 563, the following language is used:

" 'The petition, signed by qualified electors of the county equal in number to at least one third of all the votes cast in the county at the last preceding general election,' is the first step required by the statute, for it is only 'after receiving such petition' that it becomes the duty of the Board to order the election. The petition presented to the Board must be that petition which was signed by the petitioners. Both signature and presentation are necessary. In this view the identity of the instrument presented as being that which came from the hands of the petitioners is indispensable. To say that, though the signers did not affix their names to the petition presented, they did affix them to another and similar petition not presented to the Board, is no answer; nor does it satisfy either the terms of the statute or its obvious policy, which was to shut the door against frauds which would inevitably occur if the practice of detaching signatures from one petition and attaching them to another were permitted. * * *

"If numerous petitions with similar headings be circulated for signatures, and if the headings from all the petitions except one be cut off, and all the names, without the knowledge or consent of the signers, be pasted to the one heading, and in that form presented to the Board, it is clear that the paper thus presented, was not 'signed' by those whose signatures were affixed to it by pasting. Whether they signed another paper with a similar heading, will rest entirely in parol, and can only be ascertained by oral proofs. If such proof will suffice as to a portion of the petitioners, it will be equally effective as to all. We might then have the case of a petition, never in fact signed by any one; and the omission could be supplied only by oral proof that the petitioners had signed other similar petitions. If a practice of this kind was tolerated, it would open the door to numerous frauds, and would result in substituting oral proof for that which the statute requires to be in writing."

In People v. Town of Berkeley, 102 Cal. 298, 36 P. 591, 593, 23 L. R. A. 838, the court said: "There are some conflicting authorities in other states, and counsel for appellant insist that the decision in the Fox Case should be overruled. It has, however, so far as we know, remained unquestioned in this state for nearly 20 years, and seems to be based on sound and convincing reasoning. It should therefore, in our opinion, be upheld and followed."

While the language in those cases was used concerning petitions for a somewhat different purpose than the petitions here involved, they were of a similar nature and for a generally similar purpose, and we think the legal principles governing are the same. To here hold otherwise would be to open the door to fraud and to make easily possible the use, on a petition for a recall, of lists of signatures that had been obtained for an entirely different purpose. The law governing petitions for recall is most liberal, and not only permits separate papers to be used, but as many as may be desired. However, the precautions provided for the purpose of insuring their genuineness, and that the signers thereof knew what they were signing and intended their signatures for the particular purpose in view, are simple, easily complied with, and must be held to be essential. In our opinion, a substantial compliance with the requirements of the statute is not here shown.

[4] The only other point raised by appellant is that the court erred in granting the motion for a nonsuit; it being insisted that the grounds for the motion were not stated. The motion was made as follows: "We move for a nonsuit at this time on the ground specified in our objections to the introduction of the petitions."

The record shows that shortly before the making of this motion an objection had been made to the introduction of the two petitions in evidence, consisting of seventeen objections, taking up more than three pages of the transcript, and including the errors heretofore referred to in this opinion. While it has been held that a motion for a nonsuit which fails to state the grounds thereof is not sufficient (Mattson v. Mattson, 181 Cal. 44, 183 P. 443), we are of the opinion that the grounds for this motion were sufficiently stated by reference, and that it was not necessary to again repeat what had so recently been stated. In addition, the order made and appealed from not only granted the motion for nonsuit, but went on to deny the application for a writ of mandate. The latter portion of the order was correct, in view of the petition itself and the other evidence before the court.

For the reasons stated, the order and judgment appealed from are affirmed.

We concur: JENNINGS, J.; MARKS, J.

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116 Cal.App. 232

Ex parte McKENNA.

Cr. 2084.

District Court of Appeal, Second District, Division 1, California.

Aug. 21, 1931.

Divorce 🔑238.

Court, in granting divorce to husband for wife's fault, may not compel husband to pay alimony to wife (Civ. Code, § 139).

Application of Emmett W. McKenna for writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County, to secure release of petitioner on ground that court was without jurisdiction to punish him for contempt.

Petitioner discharged.

John J. Craig, of Los Angeles, for petitioner.

E. A. Klein, of Los Angeles, for respondent.

YORK, J.

This is an application for a writ of habeas corpus based principally upon the ground that the trial court was without jurisdiction to punish petitioner for contempt. The commitment was issued after the court had made two orders, one of which found the petitioner guilty of contempt of court for failure to pay alimony, and sentenced the petitioner to two days in the county jail, which order was afterward modified by the second order, and was made on application of petitioner, permitting him to pay $5 per month until he should have paid the sum of $60 ordered to be paid by him by an order made April 25, 1930, on which he had paid the sum of $10. Upon hearing of an order to show cause why plaintiff should not be punished for contempt, had on April 29, 1931, the court issued the commitment sentencing plaintiff to the county jail for two days.

The only judgment in this case ordering alimony is the judgment which was made by alteration of the original judgment, which alteration was made by stipulation entered into between the parties. The action was one for divorce, wherein the petitioner was granted a divorce from his wife on the ground of extreme cruelty. No order was made at that time providing for alimony and there were no children of the marriage. It was held in Lampson v. Lampson, 171 Cal. 332, 153 P. 238, and is provided in section 139 of the Civil Code, that the court has no jurisdiction to grant permanent support to a wife when the divorce is granted to the husband for the fault of the wife.

In this case the judgment was entered by consent, which provided for permanent support of the wife. The court was without jurisdiction to grant permanent support to the wife by reason of the fact that the divorce was not granted to her, but was granted to her husband for her fault, and jurisdiction cannot be conferred upon the court by consent or stipulation (Yore v. Superior Court, 108 Cal. 431, 41 P. 477), and the parties cannot make an effective waiver of such lack of jurisdiction by stipulation. Marin Municipal Water District v. North Coast Water Co., 178 Cal. 324, at page 328, 173 P. 469; In re McCarty, 154 Cal. 534, 98 P. 540.

The petitioner is ordered discharged.

CONREY, P. J. (concurring).

I concur in the judgment. It is clear, however, that the commitment under which the petitioner was placed in custody is not based upon the two orders mentioned in the opinion. The commitment is itself a copy of the order finding the defendant guilty of contempt and directing his imprisonment therefor. This commitment or order purports to find that the defendant is in contempt by reason of his failure to comply with a judgment entered on the 7th day of January, 1929, ordering that the plaintiff pay the defendant $60 per month. But said judgment contained no such order. It is conceded that the judgment of January 7th was an interlocutory decree, merely determining that the plaintiff husband was entitled to a divorce from the defendant, without making any provision for support of the wife. It appears that on February 29th, six weeks after the date of the interlocutory decree, the parties by stipulation prevailed upon the court to attempt to modify the interlocutory judgment by adding thereto an order that the plaintiff pay to the defendant the sum of $60 per month, "said payments to continue until defendant remarries." The provision in the said amendment to the decree, in accordance with the stipulation, that such payments should constitute a full and complete settlement of any and all property rights "now existing or which may hereafter exist between the parties hereto," is not sufficient to deprive said amendment of its true character, which is that of an attempt to require the payment of alimony. Considered in that aspect, the amendment was void, because there is no authority in law by which a court in granting a divorce to the husband for the fault of the wife may at the same time compel him to pay alimony to the wife. Lampson v. Lampson, 171 Cal. 332, 153 P. 238; McKannay v. McKannay, 68 Cal. App. 701, 705, 230 P. 214.

I agree that the petitioner should be discharged from custody.

I concur: HOUSER, J.

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116 Cal.App. 270

DIFFENDORF et al. v. PILCHER et al.

Civ. 431.

District Court of Appeal, Fourth District, California.

Aug. 24, 1931.

1. Vendor and purchaser 🔑22.

Generally, less strict description is demanded in sales contract than in deed.

2. Vendor and purchaser 🔑22.

Generally, contract for deed adequately describes property if it refers to something which is certain or provides means of identifying property.

3. Vendor and purchaser 🔑22.

Description in contract for sale of ranch in specified county containing approximately 1,000 acres, commonly known as "B. Ranch," *held* fatally uncertain.

> It appeared that vendors themselves did not know exactly what tracts they owned at time of execution of contract in question, and that not all of tracts were contiguous; the principal exception being a tract comprising 320 acres lying about half a mile from the main body of the land, and it appeared also that answer of purchaser, who was a party defendant in vendors' action to quiet title, did not contain any allegation of extrinsic facts in aid of description in contract.

Appeal from Superior Court, San Diego County; Homer G. Ames, Judge.

Action by Grace Baker Diffendorf and another against E. G. Pilcher, Murray Innes, and others. Judgment for plaintiffs, and defendant last named appeals.

Affirmed.

Honnold & Hubbell, of Escondido, for appellant.

Herbert C. Kelly, of San Diego, for respondents.

JENNINGS, J.

Plaintiffs instituted the present action alleging in their complaint that they owned and held legal title to a large number of parcels of real property specifically described, and that defendants claimed some interest in said property adverse to plaintiffs' ownership, which claims of interest were alleged to be without legal right, constituting clouds upon the title of plaintiffs. Plaintiffs prayed to have their title quieted against defendants, and that it be decreed that they are the rightful owners of the land. Defendant Murray Innes answered the complaint, admitting that he claimed an interest in the real property described in plaintiffs' complaint by reason of the execution of a certain agreement between himself and plaintiffs whereby plaintiffs agreed to sell to him the land in question for a certain consideration, alleged that the agreement was in full force and effect, and that plaintiffs had failed, neglected, and refused to furnish a deed and certificate of title to the property, and prayed that the action be dismissed.

The trial of the action resulted in a judgment in favor of plaintiffs quieting the title of plaintiffs to the land described in the complaint. From the judgment so rendered, defendant prosecutes this appeal.

The sole question involved in this appeal relates to the sufficiency of the description of the real property contained in the agreement entered into between the parties on February 18, 1926. This description is as follows: "The ranch belonging to said first parties located at Sorrento, in the Soledad Valley, San Diego County, California, a portion of said ranch being located in the City Limits of the City of San Diego, said ranch containing approximately one thousand acres of land and being commonly known as the Baker Ranch."

[1, 2] It is the general rule that less strictness in the description of property is demanded in a contract than in a deed of conveyance. Wright v. Wilson (Cal. Sup.) 299 P. 521; Russell v. Ramm, 200 Cal. 348, 369, 254 P. 532; Johnson v. Schimpf, 197 Cal. 43, 48, 239 P. 401, 403. As was said in Johnson v. Schimpf, supra: "In the construction of executory contracts of sale of real estate, courts have been most liberal, and have sought, as far as consistent with established rules, to give effect to the intention of the parties in applying descriptions of property. The usual rigid construction given to deeds has not been adhered to in the character of contracts under consideration here. The description may be supplemented by extrinsic evidence showing its application to particular property to the exclusion of all other property. Parol evidence is ordinarily admissible to show what property the parties intended to convey, and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject-matter of the contract. Preble v. Abrahams, 88 Cal. 245, 22 Am. St. Rep. 301, 26 P. 99; Marriner v. Dennison, 78 Cal. 202, 20 P. 386; Sparks v. Hess, 15 Cal. 186; Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 P. 889; Towle v. Carmelo L. & C. Co., 99 Cal. 397, 33 P. 1126; Carr v. Howell, 154 Cal. 372, 97 P. 885; Estate of Garnier, 147 Cal. 457, 82 P. 68; California Packing Corp. v. Grove, 51 Cal. App. 253, 196 P. 891."

[3] The test which is here to be applied, therefore, is whether the above-quoted language of the contract refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject-matter of the contract.

It is to be observed that appellant's answer does not contain an allegation of extrinsic facts in aid of the description in the contract. The only allegation in the answer which in any manner attempts to do so reads as follows: "V. Defendant further alleges that the lands described in said contract herein referred to include with other lands, the lands described in Paragraph One of plaintiffs' complaint herein filed, and that said lands were shown and designated by the plaintiffs herein to this defendant at the time of the making of said contract and identified between the parties hereto."

It will be noted that it is therein alleged that the lands described in the contract include with other lands the real property described in respondents' complaint. So indefinite an allegation can hardly be said to furnish the proper aid contemplated in Marriner v. Dennison, 78 Cal. 202, 210, 20 P. 386. It is further alleged that, at the time the contract was entered into, the lands covered by the contract were shown and designated by respondents to appellant, and that they were at that time identified between the parties to the contract. It is apparent that the identification of the land at the time the parties entered into the agreement is the important factor here to be considered, and it was so recognized throughout the trial of the action.

With respect to this vital feature of the case, the evidence of respondents shows that, at the time the contract for the sale of the property was entered into, but one ranch line was pointed out to the appellant by respondent Grace Baker Diffendorf. Evidence was produced by appellant showing that the husband of Grace Baker Diffendorf on this same occasion pointed out to appellant boundary line of different tracts comprising the holdings of respondents and various other lines and natural features relating to the boundaries of the property, and endeavored in a general way to indicate the land. That whatever identification of the property as was there made was general and uncertain is indicated by the fact, appearing in evidence, that appellant, some time subsequent to the making of the agreement, discovered to his surprise that a tract comprising 320 acres formerly owned by him was included in what was described in the agreement as the "Baker ranch." It further appears from the evidence that respondents did not themselves know just what tracts they owned at the time of the making of the contract, and that the land described in the contract as the Baker ranch had been gradually formed by the acquisition by respondents and their father of a large number of separate tracts over a period of approximately thirty years. It further appears that not all of these various tracts are contiguous one to another; the most notable exception being the 320-acre tract heretofore referred to, which lies about half a mile from the main body of the land.

Under the state of facts disclosed by the record herein, and particularly those hereinabove mentioned, it would appear that the description of the land contained in the contract fails to meet the test laid down in Johnson v. Schimpf, supra, and that the trial court's conclusion that the contract was fatally uncertain is correct.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

116 Cal.App. 55

PEOPLE v. McCOLLUM.

Cr. 216.

District Court of Appeal, Fourth District, California.

Aug. 6, 1931.

1. **Criminal law 🔑200(7).**

Generally, acquittal of statutory rape does not necessarily involve acquittal of incest, although both charges grow out of same transaction (Pen. Code, §§ 261, 285).

This is so since certain elements of respective crimes are different.

2. **Incest 🔑1.**

Age is not element of incest.

3. **Incest 🔑10.**

Information charging incest need not contain allegation that prosecutrix was not defendant's wife.

4. **Criminal law 🔑878(4).**

Acquittal of statutory rape *held* not inconsistent with conviction of incest, where count charging rape contained allegation that prosecutrix was not defendant's wife and that she was under 18 years (Pen. Code, §§ 261, 285).

5. **Rape 🔑22.**

Allegations that prosecutrix was not defendant's wife and that prosecutrix was under 18 years are essential to information charging statutory rape (Pen. Code, § 261).

6. **Criminal law 🔑555.**

In prosecution for statutory rape, prosecutrix' testimony as to her age *held* not conclusive if, in jury's opinion, her appearance proved otherwise.

7. **Criminal law 🔑878(4).**

Instruction, given at defendant's request, that should jury find defendant guilty of incest they must acquit of statutory rape, *held* to rebut any inference that finding of not guilty of rape constituted finding that no act of intercourse took place (Pen. Code, §§ 261, 285).

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

S. H. McCollum was convicted of incest, and he appeals.

Affirmed.

Kendall B. Perkins, of El Centro, and Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was charged with the crimes of incest and rape, in two counts of an information filed by the district attorney of Imperial county. The first count of the information charges the defendant with an act of intercourse with the prosecutrix, committed on January 15, 1931, alleging that the prosecutrix was "a female child of the age of 16 years, she * * * being then and there the daughter of the said defendant S. H. McCollum." The second count of the information is the conventional statutory rape charge, charging the offense to have been committed on January 15, 1931, and alleging the prosecutrix to have been "under the age of 18 years, and not then and there the wife of" said defendant. The defendant was tried by a jury, and only one act of intercourse, on January 15, 1931, was proved, although there was evidence of prior acts over a period of years. By the verdict of the jury the defendant was found guilty as charged in count I of the information, and found not guilty of rape as charged in count II thereof. Defendant's motion for a new trial was denied, and this appeal is from that order and from the judgment which followed.

The only point raised by appellant is that the verdicts of guilty as to the first count of the information and not guilty as to the second count are inconsistent, conflicting, and insufficient to support a conviction. It is claimed that the verdicts are inconsistent inasmuch as the elements of the two offenses are identical, in that they both depend upon one act of intercourse, and that the jury, by its verdict on the second count, found that the appellant had not committed the act of intercourse, and therefore that the essential element of the crime charged in the first count was not proved. In People v. Day, 199 Cal. 78, 248 P. 250, 252, the court said: "It may be conceded that, if the two counts stated precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count. If, however, the statute describing one offense prescribes as an essential element the statement of a fact not prescribed by the statute describing the other offense, and if in the statement of the transaction in the different counts that fact is included in the statement of the transaction based upon the statute requiring it, and omitted in the statement of the transaction based upon the statute not requiring it, the verdict of acquittal upon one of the counts is not necessarily an acquittal upon the other. In such a situation the jury may well find that the fact required as an essential element of one of the offenses is not true, and therefore be required to render a verdict of acquittal upon that count, but, since that fact is not an essential element to constitute the other offense, be justified in rendering a verdict of guilty as to that count. It is not the great similarity in most of the facts constituting separate offenses, but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate."

[1-5] In the case before us the real question is whether the offenses charged in the two counts of the information are so identical that, in effect, the jury has found under one count that a certain act was done, and has found under another count that the same act was not done. We are not able to agree with the appellant that that situation appears. It may be generally said that an acquittal on a charge of statutory rape does not necessarily involve an acquittal upon a charge of incest, where both charges grow out of the same transaction, since certain elements of the respective crimes are different. Pen. Code, §§ 285, 261; Stewart v. State, 35 Tex. Cr. R. 174, 32 S. W. 766, 60 Am. St. Rep. 35. While the first count of the information in this case alleged that the prosecutrix was of the age of 16 years, that allegation was surplusage and had nothing to do with the crime of incest charged in that count. Age is not an element of that crime. It is also to be noted that the first count had no allegation that the prosecutrix was not the wife of the defendant, such an allegation not being necessary in alleging the crime therein charged. Appellant urges that the allegation that the prosecutrix was the daughter of the defendant is equivalent to an allegation that she was not his wife, since such a marriage would itself be incestuous under section 59 of the Civil Code. This allegation was necessary to show the relationship existing, and it need not be distorted into one neither necessary nor intended. On the other hand, the second count contained both an allegation that the prosecutrix was not the wife of the defendant, and one that she was under the age of 18 years; both of these allegations, being necessary elements of the crime of statutory rape.

[6, 7] In People v. Andursky, 75 Cal. App. 16, 241 P. 591, the defendant was charged with the crime of rape in the first count of an information and with a violation of the Juvenile Court Law, growing out of the same incident, in a second count. He was found guilty on the first count and not guilty on the second. The verdicts were held inconsistent because the verdict of not guilty on the second count necessarily held that the act charged in the first count did not take place. It was pointed out by the court, however, that a verdict of not guilty on the first count and guilty on the second count would not necessarily have been inconsistent, as the second count included matters not included in the first. Appellant relies upon that case and argues that in finding him not guilty on the second count the jury necessarily found that the act of intercourse, being the same act of intercourse charged in the first count, did not take place. It does not certainly follow that the jury found that such an act of intercourse did not take place. To have found the defendant guilty of statutory rape as charged in the second count, it was necessary for the jury to also find that the prosecutrix was under the age of 18 years. No such a finding was necessary with respect to the first count. It may well be that the jury found that the prosecutrix was over the age of 18. Appellant points out that the prosecutrix testified that she was 16½ years of age. However, the prosecutrix was before them and the jury may not have believed her testimony. We think her testimony was not conclusive on the jury if, in their opinion, her appearance proved otherwise. Considering the verdicts alone, the most that may be said is that the jury found that all of the elements of statutory rape were not proved, and it may not be said that they found that one particular element, the act of intercourse, was not proved to have occurred. They may have found that it did occur, but under circumstances sufficient to bring it within the crime charged in the first count of the information. This view of the matter is strengthened by the fact that at the request of the defendant the court instructed the jury as follows: "With respect to these two charges, to-wit: the charges of rape and incest, you are instructed that under the law you cannot convict the defendant of both incest and rape under the evidence in this case. Should you find the defendant guilty of incest you must return a verdict of not guilty on the crime of rape, or, should you find the defendant guilty of rape, you must return a verdict of not guilty on the charge of incest."

We think the presence of this instruction does away with any inference or conjecture that the verdict certainly was based upon a finding that no act of intercourse took place on the date in question. Without approving this instruction as a correct statement of the law, we may say that under its terms the jury would have been justified in bringing in a verdict of not guilty on the second count even had they believed that all of the elements of statutory rape had been proved. In any event, with the difference in the elements of the crimes charged, as above pointed out, we conclude that the verdicts are not so inconsistent that an acquittal upon the second count operates as an acquittal on the first.

The defendant's guilt on the first count is overwhelmingly shown by the evidence, and the sufficiency of the evidence to support the conviction is not even questioned.

The order and judgment appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

PEOPLE v. McCOLLUM.*

Cr. 217.

District Court of Appeal, Fourth District, California.

Aug. 6, 1931.

Rehearing Denied Aug. 14, 1931.

Hearing Granted by Supreme Court Aug. 31, 1931.

Sodomy 🔑6.

Uncorroborated testimony of prosecutrix *held* insufficient to support conviction of fellation (Pen. Code, §§ 288a, 1111).

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

S. H. McCollum was convicted of fellation, and he appeals.

Reversed.

Kendall B. Perkins, of El Centro, and Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was charged in an information filed by the district attorney of Imperial county with a violation of section 288a of the Penal Code of the state of California. The information charges such an act as having been committed on the same day and slightly prior to the act charged in People v. McCollum (Cal. App.) 2 P.(2d) 432, an opinion in which has this day been filed. The two cases were consolidated for trial and the defendant was found guilty of the act here charged. By the judgment of the court the defendant's sentence on this charge was to run concurrently with the sentence in the other case. From this judgment the defendant has appealed.

The only point raised is that the record is devoid of evidence tending to corroborate the testimony of the prosecutrix to the effect that the act here involved was committed, and that under section 1111 of the Penal Code the evidence is not sufficient.

We are unable to find in the record any corroboration of the testimony of the prosecutrix, and for this reason the judgment appealed from is reversed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

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116 Cal.App. 359

KELLEY v. COCHRAN et al.

Civ. 6945.

District Court of Appeal, Second District, Division 2, California.

Aug. 27, 1931.

Chattel mortgages 🔑159.

Mortgagee *held* not entitled to possession of mortgaged property, where obligation supporting mortgage was not due, there was no breach of conditions, and mortgage did not provide for possession by mortgagee before maturity of obligation (Civ. Code, § 2927).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Paul L. Kelley against J. H. Cochran and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Fred W. Morrison, of Los Angeles, for appellants.

Raymond B. Wells, of Los Angeles, for respondent.

CRAIG, J.

The defendants appealed from a judgment rendered by the superior court of Los Angeles county in favor of the plaintiff for the possession of personal property.

Said judgment is based upon allegations of the complaint and findings of fact reciting merely that the plaintiff was the mortgagee and entitled to the immediate possession of the property described, and that the defendants were at all times in possession thereof; that the plaintiff had demanded possession, but that the defendants had refused to deliver the same. The appeal was taken upon the judgment roll.

Upon the record as presented it appears that the respondent claimed the right to possession of the property simply because he was the holder of a chattel mortgage lien thereon. It is not asserted that the mortgagors were chargeable with a breach of the conditions of the mortgage, nor does it appear that the obligation supporting it was due, nor that

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 7 P.2d 301.

the mortgage contained provisions for the possession by the mortgagee of the property prior to the maturity of the obligation. A mortgagee is not entitled to possession of mortgaged property in such a case. Civ. Code, § 2927; Bank of Woodland v. Duncan, 117 Cal. 412, 49 P. 414; Flinn v. Ferry, 127 Cal. 648, 60 P. 434.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

In re McDOLE'S ESTATE.*

RESER et al. v. BARNES et al.

Civ. 556.

District Court of Appeal, Fourth District, California.

July 24, 1931.

Rehearing Denied Aug. 20, 1931.

Hearing Granted by Supreme Court Sept. 22, 1931.

1. Wills 🔑2.

Validity of California will ostensibly making gift to foreign charitable institution must be determined by California laws.

2. Wills 🔑10, 105.

Under will purporting to make gift, disposition must be made to person or entity capable of identification or of taking gift (Civ. Code, §§ 1275, 1313).

> Civ. Code, § 1275, provides that testamentary disposition may be made to any person capable by law of taking property given, except that corporations, with certain exceptions, cannot take under a will, unless expressly authorized by statute, and section 1313 authorizes bequests or devises to any charitable or benevolent society or corporation, provided will be executed at least 30 days before testator's death.

3. Wills 🔑14.

Unincorporated charitable institution created and governed by foreign will, as applied by trustees named therein, *held* not "society" within statute authorizing bequests or devises thereto (Civ. Code, § 1313).

> A "society" has been defined as a number of persons united together by mutual consent in order to deliberate, determine, and act jointly for some common purpose, and institution in question was therefore not a society, since trustees themselves did not constitute a society, and there could be no claim that inmates of institution had anything to say about its organization, government, or control.
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> [Ed. Note.—For other definitions of "Society," see Words and Phrases.]

4. Wills 🔑440.

Testator's intent must be gathered from wording of will rather than outside evidence, where there is no uncertainty or ambiguity in language.

5. Wills 🔑456.

Words of will are to be taken in ordinary and grammatical sense, unless there appears clear intention to use them in another and ascertainable sense.

6. Wills 🔑14.

Where will purported to make gift directly to specified charitable institution, court properly concluded testator had no intention to create trust with such institution as beneficiary, thereby invalidating gift under statute (Civ. Code, §§ 1275, 1313).

7. Wills 🔑473.

Bequest for indefinite purposes, though part may be charitable, is void for uncertainty (Civ. Code, §§ 1275, 1313).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Petition by W. R. Barnes, executor of the estate of William M. McDole, deceased, for distribution of the estate, to which various heirs objected. E. A. Reser and others, trustees of the Stubblefield Home, and another, filed an answer to the objections, and, from the order for distribution, they appeal.

Affirmed.

Will R. King, of Los Angeles, Cary M. Rader, of Walla Walla, Wash., and Head, Wellington & Jacobs, of Santa Ana, for appellants.

R. Y. Williams, Charles D. Swanner, and Roland Thompson, all of Santa Ana, for respondents.

LAMBERSON, Justice pro tem.

By an order for distribution in the above-entitled cause, it was decreed that William M. McDole died intestate as to the residuary portion of his estate, and that the residue of the estate be distributed to his heirs at law. The appellants, Stubblefield Home and E. A. Reser, Francis M. Stubblefield and Cary M. Rader, trustees of the Stubblefield Home,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 10 P.2d 75.

question the correctness of the adjudication of the probate court. The facts are that William M. McDole died testate on March 25, 1925. His will was dated November 21, 1922, and provided for a bequest of $2,000 to his only sister, other nominal bequests to three brothers, and then provided as follows:

"Seventhly: I hereby will and bequeath to my brother, Henry McDole, the sum of Seventy-five Dollars per month during his natural life. The same to be paid to him on the first of each and every month out of my estate as long as he shall live.

"Eighthly: I hereby will and bequeath all the rest and remainder of my estate to the Stubblefield Home for the Aged, at Walla Walla, Washington."

By a codicil dated March 18, 1925, he bequeathed his household goods, furniture, and an automobile to his sister. The will was admitted to probate, after contest, and, in due course, the executor of the will presented his petition for distribution of the estate, to which various heirs objected upon the ground that the bequest made to the Stubblefield Home for the Aged at Walla Walla, Wash., was wholly invalid. An answer to the objections was filed by the three appellants, who describe themselves as trustees of the Stubblefield Home, a charitable institution, and by appellant Stubblefield Home. It appears that in 1902 one Joseph Stubblefield, a resident of the state of Oregon, died, leaving property both in Oregon and Washington. He left a will which had been deposited with his banker in Walla Walla, Wash., and which was admitted to probate in Walla Walla county in that state. No probate proceedings were had in Oregon. By clause 31 of his will the following provisions were made: "Thirty-first. I hereby bequeath and devise to R. M. Dorothy, E. A. Reser, of Umatilla county, state of Oregon, and C. M. Rader, of Walla Walla county, state of Washington, my executors, and the survivors or survivor of them and to their successors, hereinafter provided for as trustees, all the rest and residue of my estate, real and personal and mixed, of whatsoever kind and wheresoever situated in trust, to be devoted to, invested, and the income thereof to be expended by said trustees and their successors for the establishment, maintenance, and support of a home for the fatherless or motherless and indigent children, residents of the states of Oregon and Washington, and worthy elderly, indigent widows, residents of Oregon and Washington, and to their maintenance, and to the giving of a common-school education and to the teaching of some useful trade or occupation to the children inmates thereof. My said executors, as such trustees, and the survivors or survivor thereof, and their successors, shall have the sole and exclusive control and management of said home the amount of said income to be devoted to the maintenance, support, and education of children and the amount to be devoted to the support of widows shall wholly and entirely be within the discretion and judgment of said trustees and their successors. * * * It is my wish that said home be located at or near the city of Walla Walla, Washington, provided that within one year after the probate of my will there be donated to said trustees and to their successors the sum of ten thousand dollars, or its equivalent in value for the purpose of securing ground and the erection thereon of suitable buildings for such home. In case said sum or its equivalent in value be not so donated, then said home to be located at some other suitable place in either Washington or Oregon, to be selected by said trustees."

Under the laws of Washington, the executors, after the will had been admitted to probate, proceeded to manage and settle the estate without further intervention of the court. In 1904, the executors, as trustees, began the operation of an institution near the city of Walla Walla, the inmates of which averaged about twenty-five, and consisted of children and elderly indigent women. One of the trustees testified that parents of children sometimes contributed something to their maintenance in the home; that the title to the property used for the purposes of the home, and the funds thereof, stood in the names of the trustees, and the trustees signed checks as trustees under the last will and testament of Joseph Stubblefield, deceased. The institution itself was not incorporated and was variously known as Stubblefield Home, Stubblefield Home for Children, Stubblefield Home of Orphans and the Aged, Stubblefield Home for Old Women, Stubblefield Home for Old Folks, and Stubblefield Home for Old People. One witness described it as an institution for the care of indigent and aged women, and indigent and orphan children, and one of the trustees testified that he had heard all kinds of names applied to it. Another witness, who had a close acquaintance with the home, said that, so far as he knew, the institution had no definite name; that he did not recall ever hearing anybody refer to it as the Stubblefield Home for the Aged. The juvenile court of Walla Walla county sometimes committed dependent children to the home, and there were separate buildings provided for the children and for the elderly women who were inmates of the home.

After hearing of the petition for distribution, the probate court found that the bequest to the Stubblefield Home for the Aged is invalid and void; that the decedent intended to devise and bequeath the residue of his estate by the terms of his last will and testament as a gift to the Stubblefield Home for the Aged, but there was and is no such corporation or society in existence; that

Stubblefield Home is not a person, corporation, or society having such rules, by-laws, or regulations requiring the estate referred to in the residuary clause of the will of William M. McDole, deceased, to be used exclusively for charitable purposes, but is merely the name of a home used by the trustees to carry out the private trust created under the terms of the last will and testament of Joseph L. Stubblefield, deceased; that there was no intention on the part of William M. McDole, deceased, to create any trust in favor of any beneficiary known as Stubblefield Home or Stubblefield Home for the Aged, or any trust at all, and concluded, as a matter of law, that the Stubblefield Home for the Aged is not a person, corporation, or society authorized by the laws of the state of California to take a gift by will. It was decreed that the residuary clause of the will is invalid, and that the heirs at law are entitled to the residue of the estate, subject to the other bequests made therein. For the purposes of the case it will be assumed, but not conceded, that the Stubblefield Home, as well as the persons who appear as trustees thereof, had a right to appear in the probate proceedings and to perfect an appeal from the decree of the probate court.

[1] Whether or not the lower court was correct in its conclusions as to the invalidity of the residuary clause of the will of William M. McDole is to be determined by the provisions of the laws of California. Appellants have stressed the decision of the Supreme Court of Washington in the case of Rader v. Stubblefield, 43 Wash. 336, 86 P. 560, 10 Ann. Cas. 20, as being a conclusive determination of the status of the Stubblefield Home. It appears from the decision in that case that, after the institution of probate proceedings in the state of Washington, a settlement was effected for a valuable consideration with the widow of Joseph L. Stubblefield; that thereafter, and while the widow was a resident of the state of Washington, and within the jurisdiction of the courts of that state, she attempted to institute probate proceedings in the county in the state of Oregon of which county her husband was a resident at the time of his death. The Supreme Court of Washington held that the trust declared by the will was valid under the laws of Washington, and expressed the belief that the Oregon courts would be of the same opinion, and held that the widow was estopped from denying the validity of the will or its trust provisions and should be enjoined from instituting or carrying on probate proceedings in the state of Oregon in contravention of her settlement with the executors of the estate. The court did not attempt or purport to establish the identity of the Stubblefield Home.

Section 1275 of the Civil Code of California provides, in substance, that a testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes, or primarily for the public preservation of forests and natural scenery, cannot take under a will, unless expressly authorized by statute; subject, however, to the provisions of section 1313. The latter section reads as follows: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid. * * *"

[2, 3] The disposition must be made to a person or entity capable of identification or of taking the property bequeathed or devised. The Stubblefield Home is not a society or a corporation. A society has been defined as a number of persons united together by mutual consent in order to deliberate, determine, and act jointly for some common purpose. The institution created under the Stubblefield will was governed entirely by the provisions of that will as applied by the trustees named therein, and there can be no claim that the inmates of the institution had anything to say about the organization, government, or control of the home. The trustees themselves did not constitute a society. If the bequest has any claim to validity, it must be upon the theory that there was a devise to a person or persons in trust for charitable uses.

[4, 5] The intent of the testator must be gathered from the wording of the will itself, and not from any outside evidence as to what his intention was, where there is no uncertainty or ambiguity in the language used by the testator. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. Estate of Zilke (Cal. App.) 1 P.(2d) 475; Estate of Doane, 190 Cal. 412, 213 P. 53.

[6, 7] The bequest made under the will of McDole was directly to the Stubblefield Home for the Aged. The legal effect of the bequest is, as in the case of the Estate of Dol, 182 Cal. 159, 187 P. 428, to make the property the absolute property of the Stubblefield Home for the Aged, if it were an institution which could take and hold property. No declaration of a trust was made by the testator, and no intent was expressed to substitute another in the place of the Stubblefield Home. It was unquestionably the intention of the testator to give the property

to the Stubblefield Home as an institution. He did not, by any expression in the will, endeavor to create a trust, and the trial court was fully warranted in concluding there was no intention on the part of the testator to create a trust in favor of a beneficiary known as the Stubblefield Home, or Stubblefield Home for the Aged. Brittenbaker v. Buck, 58 Cal. App. 738, 209 P. 264; Estate of Sutro, 155 Cal. 727, 102 P. 920. If a bequest is made for indefinite purposes, though part may be charitable, the whole bequest is void for uncertainty. Estate of Hinckley, 58 Cal. 509; Estate of Sutro, supra. In Pomeroy's Equity Jurisprudence, page 1009, the author says: "The declaration of trust whether written or oral must be reasonably certain in its material terms; and this requisite of certainty includes the subject matter of property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general or equivocal that any of these necessary elements of the trust are left in real uncertainty, then the trust must fail."

The Stubblefield trust was created for the benefit of orphans and half orphans, for indigent children, and for worthy elderly indigent widows. It has been held that a devise "for an old men's home" does not cover "an old ladies' home." Green v. Old People's Home of Chicago, 269 Ill. 134, 109 N. E. 701. The provisions of the residuary clause of the McDole will having the effect of making an absolute unqualified gift, was the Stubblefield Home an entity which was capable of taking the property of decedent? In Estate of Glass, 164 Cal. 765, 130 P. 868, it was held that the estate of a deceased person is not a person or entity which can take under a will.

Appellants rely upon the case of Estate of Upham, 127 Cal. 90, 59 P. 315, 316, but that case is not in point, for the reason that the devise under consideration therein was directly to the "legally qualified and constituted trustees or managers of the Good Templars' Orphans' Home of Vallejo, said county of Solano, in trust for the use and benefit of the orphan children of said institution." Similar situations are found in Estate of Merchant, 143 Cal. 537, 77 P. 475; Estate of Irwin, 196 Cal. 366, 237 P. 1074; Estate of Graham, 63 Cal. App. 41, 218 P. 84, in each of which the bequest was to designated trustees.

The principles applicable to the situation now before us are fully expressed in Estate of Doane, 190 Cal. 412, 213 P. 53. In that case the will provided as follows: "All the rest and residue of my property of whatever nature and wheresoever located, I give, devise and bequeath to the National Bank & Trust Company of Pasadena, a national banking association, of Pasadena, California."

In holding that this provision of the will was invalid, the court spoke as follows:

"It is further contended by appellants that the National Bank & Trust Company of Pasadena has two legal capacities, one as an individual and one as a trustee, and in view of the presumption in favor of testacy, it is urged, parol proofs were admissible for the purpose of showing in which capacity the testator intended that the residuary legatee should take. This contention cannot be sustained, for the reason that there is no ambiguity or uncertainty in the language employed by the testator in disposing of the residue of his estate. While no particular form of expression is necessary for the creation of a trust, nevertheless some expression of intent to that end is requisite. Estate of Marti, 132 Cal. 666, 669, 61 P. 964, 64 P. 1071. In the present case there is nothing in the will in question which even hints at a restriction or limitation upon the residuary legatee. On the contrary, it affirmatively appears upon the face of the will that the residue is given, devised, and bequeathed, outright, to the National Bank & Trust Company of Pasadena, a national banking association of Pasadena, Cal. The bequest is absolute in terms. 'Where the language of the provisions of a will is plain and unambiguous the courts are not permitted to wrest it from its natural import in order to save it from condemnation.' Estate of Walkerly, 108 Cal. 627, 660, 49 Am. St. Rep. 97, 41 P. 772, 780.

"The decedent having made an invalid provision in clear, unequivocal language, the courts are without power to alter that language to express what may have been in the testator's mind but was not attempted to be expressed by him, however beneficent such unexpressed intent may have been. 'It may be said of all wills, that the testator's intent is to make a valid disposition of his property. * * * But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid.' Estate of Walkerly, supra, 108 Cal. 627, 659, 41 P. 772, 780, 49 Am. St. Rep. 97."

For the foregoing reasons, we are of the opinion that the decree appealed from should be affirmed, and it is so ordered. In view of this conclusion, we consider it unnecessary to discuss other questions raised in respondent's brief.

We concur: BARNARD, P. J.; MARKS, J.

116 Cal.App. 143

PETERS v. CALIFORNIA BUILDING-LOAN ASS'N.

Civ. 495.

District Court of Appeal, Fourth District, California.

Aug. 17, 1931.

1. Master and servant 🔑403.

Statutory presumption that employer's negligence caused injury stands as evidence until overcome (St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494).

> St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494, provides that if employer fails to insure, dependents of deceased employee may sue for damages as though Workman's Compensation Act did not apply, and that in such action it shall be presumed that injury to employee was direct result of employer's negligence; the burden of proof being on employer to rebut presumption of negligence.

2. Master and servant 🔑409½.

Whether statutory presumption that employer's negligence caused injury has been overcome is usually jury question (St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494).

3. Judgment 🔑199(3).

If deceased employee's dependents rely wholly on statutory presumption of employer's negligence, and presumption is overcome by uncontradicted evidence, employer's motion for judgment notwithstanding verdict is properly granted (St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494).

4. Master and servant 🔑367.

Salesman selling shares on commission, who furnished automobile and paid expenses, with time, place, and persons for interviewing being within salesman's discretion, *held* "independent contractor," not "employee" (Civ. Code, § 2009; St. 1917, p. 835, § 8, subd. b, and p. 857, § 29 (b), as amended by St. 1925, p. 494).

> Since salesman, who for a time had employed other salesmen with whom he divided commissions received by him for selling shares of building-loan association, was independent contractor rather than employee within St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494, establishing presumption of employer's negligence, there was no presumption that building-loan association's negligence caused injury, if any, to salesman, who, having started on automobile trip, was later found dead in automobile; the cause of death, according to coroner's certificate, being undeterminable, but probably heat prostration.

> [Ed. Note.—For other definitions of "Employé" and "Independent Contractor," see Words and Phrases.]

5. Master and servant 🔑367.

That salesman on commission furnishes automobile and pays expenses does not necessarily make him independent contractor (Civ. Code, § 2009; St. 1917, p. 835, § 8, subd. b).

6. Master and servant 🔑367.

That employer may terminate employment for breach of agreement is not conclusive in determining whether salesman on commission is independent contractor or employee (Civ. Code, § 2009; St. 1917, p. 835, § 8, subd. b).

7. Master and servant 🔑405(2, 4).

To invoke Compensation Act, evidence must establish that deceased was employee, not independent contractor, and that death resulted from injury in course of employment (Civ. Code, § 2009; St. 1917, p. 835, § 8, subd. b, and p. 857, § 29 (b), as amended by St. 1925, p. 494).

8. Master and servant 🔑373.

When employee without acclimation is placed at work in locality where heat is intolerable to one not acclimated, death from sunstroke is compensable "injury" (St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494).

> [Ed. Note.—For other definitions of "Injury," see Words and Phrases.]

9. New trial 🔑71.

Judge, if convinced that verdict is clearly against weight of evidence, has duty to set verdict aside, notwithstanding testimony may be somewhat conflicting.

10. Master and servant 🔑403.

Statutory presumption that employer's negligence caused injury disappears when completely contradicted by evidence of party relying on presumption in absence of mistake or inadvertence (St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494).

11. Master and servant 🔑403.

Statutory presumption that employer's negligence caused injury does not disappear notwithstanding contradiction, where contradictory evidence is offered by party against whom presumption was invoked (St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494).

12. Master and servant 🔑416.

That commission on application under Compensation Act determined that employee was not injured *held* no defense to subsequent action against employer under statute (St. 1917, p. 857, § 29 (b), as amended by St. 1925, p. 494).

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by Alta I. Peters against the California Building-Loan Association. After a verdict for plaintiff, defendant's motion for judgment notwithstanding the verdict was granted, and from the judgment and an order denying plaintiff's motion to vacate the judgment, plaintiff appeals.

Affirmed.

Doyle, Clark, Thomas & Johnson, of Long Beach, for appellant.

Hill, Morgan & Bledsoe and Flint & MacKay, all of Los Angeles, for respondent.

GRIFFIN, Justice pro tem.

This is an action brought by appellant against respondent under the provisions of section 29, subdivision b, of the Workmen's Compensation Act (St. 1925, p. 494), which, in brief, provides that in the event an employer fails to insure, the employee, or in the case of death, his dependents, may bring an action for damages against the employer as though the act did not apply, with the provision that negligence of the employer shall be presumed in such case, and certain defenses otherwise applicable to an action at law for negligence are taken from the employer.

The evidence discloses certain facts most of which are uncontradicted. Appellant and K. S. Peters were married February 20, 1894, and continually lived together as husband and wife until his death on or about June 2, 1926. During the latter part of the year 1924, Peters called upon W. T. Moore, manager of the respondent association, and orally applied for a position whereby he could earn some money by selling shares of stock of the association. He inquired into its financial condition and agreed to accept the commissions which the company paid if he perfected any sales of their securities. He asked Moore especially not to make any definite or fast arrangement in connection with his work because of certain conditions which he was then laboring under and which might interfere. Because of this request, Moore told him that he did not need anything but the regular rules that they were offering, and that he was not bound to do anything definite other than to bring in subscriptions.

A license from the corporation commissioner to act as agent and solicitor for the association was secured by Peters, apparently with the approval, or at the request, of the association. The terms of the oral agreement between Peters and the association as to his employment were known only to Peters and Moore.

Respondent furnished Peters with business cards on which appeared the name of the association, the name K. S. Peters, together with the statement "with the California Building-Loan Association." They also furnished him with literature explaining the character and nature of the membership shares and the conditions under which they were to be sold. They instructed him that the only condition which the association imposed upon a salesman was that he must understand the conditions of sale and that if he or any other salesman misrepresented any of the shares to any purchaser, he (Moore), for the association, would ask the commissioner of corporations to cancel his license.

Peters was given the privilege of selling wherever and to whom he pleased without restriction except that the association reserved the right to refuse applicants for shares if they did not deem them responsible. He entered upon his duties soliciting and selling in various Southern California cities receiving his commissions on sales made. It was his habit to report to the association office Saturdays to receive his commission check and to attend meetings of the salesmen. Attendance at these meetings was not compulsory, but was for the mutual benefit of the salesmen in exchanging experiences and information. Neither he nor any other salesman was furnished with an automobile or any other transportation, nor did the company make payments for expenses in the way of gasoline, oil, or anything else. During the middle of the year 1925, Mr. Peters occupied an office in Long Beach from which he operated to take subscriptions. He maintained this office at his own expense and during this period employed other salesmen and split his commissions with them. He was not given any special assistance in his work, but occasionally when the office learned of a prospective buyer, he or some of the other salesmen would be told about him. Certain papers were sent out by the association to its membership on which they were asked to suggest other people who might be prospective buyers of shares. It was customary to turn these over to the salesman who had procured the recommending member.

The last time Mr. Moore saw Mr. Peters was near the middle of May, 1926. This was after Peters had returned from a trip to Death Valley. At that time he brought in some shares which he had sold in Death Valley, stating that he had thought it advisable to go out there to get some applications and asked if Moore would accept them. After some discussion they were accepted and Peters was paid his commission. Nothing was said about his going back to Death Valley, but about June 1, 1926, without the knowledge of Moore or the association, he again started to Death Valley Junction. He stayed all night at Barstow and was last seen alive early on the morning of June 2d. About six weeks later his body was found in his car in Death Valley twelve miles from Cave Springs and about three and one-half miles off the main road leading from Cave Springs to Death Valley Junction. At the place where the car turned off from the road there was a sign. This sign did not point in the direction in which this automobile went, but pointed in the opposite direction. At the place where the car was found there was no road, just a trail over the desert sand and just the track which had been made by deceased's automobile. Beyond where it stopped there were no tracks. There was evidence that the rear wheels of the car had been jacked up and rocks placed under them and that some one had been working around the car, sagebrush having been placed in the tracks. There was no habitation in this locality. The temperature at the time the body was found, July 12th at 10:30 a. m., was 140 degrees. The certificate of the coroner disclosed the following cause of death: "Exact cause undeterminable, too badly decomposed, probably heat prostration." The deceased was a large man fifty-four years of age, and just prior to his death was in good health, happy, and in good spirits.

No insurance was carried by the association on Mr. Peters under the Workmen's Compensation Act. The association had tried to obtain insurance upon him and the other salesmen but was unsuccessful, having been advised by its attorney that it could not be obtained for contract agents.

Before the case went to trial respondent asked for leave to file a supplemental and amended answer to the first amended complaint in which it was alleged that appellant had filed her application before the Division of Industrial Accidents and and Safety under the provisions of the Workmen's Compensation Act for the alleged injury sustained by Keith S. Peters, and that after a hearing and rehearing before the department it was determined by the department that the evidence was insufficient to establish that Keith S. Peters received an injury arising out of and in the course of any employment with respondent, or that his death was caused by injury, and it was alleged that such decision had become final and was an adjudication between the parties in respect to the matters at issue in this action. The court ruled that such allegations did not constitute a defense as a matter of law, and denied the application to file the same on that ground, but not because of any prejudice which might result to appellant.

The case went to trial before a jury; motion for nonsuit on behalf of respondent was denied; motion for directed verdict on behalf of respondent was denied; the cause was submitted to the jury, together with certain special interrogatories; the jury returned a general verdict for appellant, together with answers to the special interrogatories. Thereafter motion was made by respondent for judgment notwithstanding the verdict, which, after argument and submission, was granted by the court. Thereafter, appellant moved to set aside the judgment notwithstanding the verdict, under section 663, Code of Civil Procedure, but that motion was denied. Whereupon appellant appealed, both from the judgment and from the denial of her motion to vacate the judgment.

Appellant contends that the denial of her motion to vacate the judgment notwithstanding the verdict and enter a judgment in accordance with the verdict of the jury, should be reversed and the trial court ordered to enter judgment in accordance with the jury's verdict.

Respondent contends that the judgment of the court in directing a verdict in its favor is amply supported on each and all of five different theories or grounds: First, that the evidence was insufficient to show that the deceased, Keith S. Peters, was an employee of respondent, but on the contrary it establishes that he was an independent contractor; second, the evidence was insufficient to show that the deceased was injured at all, or that death resulted from injury; third, there is no evidence to show that Mr. Peters was in the course of his employment at the time of the injury; fourth, the evidence is insufficient to show that the injury arose other than by reason of hazard to which the common public was subjected; fifth, the presumption of negligence was rebutted, and in the absence of further affirmative proof by the plaintiff, no recovery could be justified.

The following interrogatories were submitted to the jury resulting in the following answers:

"Under the arrangement between Keith S. Peters and the defendant did Keith S. Peters have the right to go where and when he pleased and to exercise his own judgment and discretion as to the parties whom he should seek as purchasers or borrowers or to whom he might present propositions for the purchase of stock and certificates of the defendant or for lending money of the defendant? Answer: Yes."

"Has the defendant by a preponderance of the evidence shown that it had no knowledge that Keith S. Peters was going to Death Valley on or about June 1st, 1926? Answer: No."

"Has the plaintiff by a preponderance of the evidence shown that the injury causing the death of Keith S. Peters occurred in the course of his employment by the defendant? Answer: Yes."

"Has the defendant shown by a preponderance of the evidence that under the circumstances of the case it did what an ordinary prudent person would have done under such circumstances? Answer: No."

The Workmen's Compensation, Insurance and Safety Act, § 29, subdivision b, provides as follows: "In such action it shall be presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof shall rest upon the employer to rebut the presumption of negligence. In such proceeding it shall not be a defense to the employer that the employee may have been guilty of contributory negligence, or assumed the risk of the hazard complained of."

"A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one." Jacobson v. Railroad, 175 Cal. 468, 166 P. 3, 6.

[1-3] It is to be noted that the presumptions in favor of appellant are clearly specified and will stand as evidence until controverted and overcome by competent evidence. Whether or not these presumptions have been overcome and controverted is usually a question for the jury. Smellie v. Southern Pacific Co. (Cal. Sup.) 299 P. 529. If appellant relies wholly upon these presumptions, and the uncontradicted evidence offered clearly controverts and overcomes them, then the trial court was justified in granting respondent's motion for a verdict in its favor.

[4] In determining whether or not the trial court was justified in directing a judgment for respondent notwithstanding the verdict of the jury, this court must take into consideration the evidence taken before the trial court. The question is this: Was the trial court justified in holding that the evidence was insufficient to establish the fact that K. S. Peters was an employee of respondent, and does it establish the fact that he was an independent contractor? All of the evidence on this question has been fully considered. Its volume prohibits a complete statement of all of the facts and circumstances as gleaned from the evidence and as pointed out in the briefs of appellant and respondent.

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter who is called his master." Section 2009, Civ. Code.

Section 8, subdivision b, Workmen's Compensation Act (St. 1917, p. 835, § 8, subd. b) defines an independent contractor as follows: "The term 'independent contractor' shall be taken to mean, for the purposes of this act: Any person who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

The facts related in the case of Barton v. Studebaker Corp. of America, 46 Cal. App. 707, 189 P. 1025, 1028, are so similar, and the law as there applied is so applicable, to the facts in this case, that a restatement of those principles is deemed unnecessary. That was a case where a certain automobile salesman was paid on a commission basis only by the defendant corporation, for his services in bringing customers to the salesroom and disposing of automobiles owned by the corporation. To close the deal he would bring the customer to the salesroom in his car, paying his own operating expenses. While thus engaged an accident occurred which resulted in injury to one of his customers. The court there held that the salesman was an independent contractor within the meaning of section 2009, Civil Code.

The evidence disclosing the nature of the relationship between the California Building-Loan Association and Peters is undisputed, and it is clear therefrom that the relation of master and servant, within the legal definition of that relation as defined by the section of the code above mentioned, and section 8, subdivision b, Workmen's Compensation Act, did not exist between the respondent association and the deceased Peters at the time of his death, and it is also clear that Peters while engaged in the business of procuring applications for shares, was exercising an independent calling. He was, in other words, an independent contractor, and the association had no control over him as to the means by which he was to execute or perform the work which he assumed in his engagement with it.

"The real test as to whether a person is an independent contractor or a servant is whether the person alleged to be the master, under his arrangement with the other party, has or has not any authoritative control of the latter with respect to the manner in which the details of the work are to be performed, and therefore this test or element 'must, in the last analysis, always determine what was the essental nature of the relationship between the person who performed the given work and the person for whom it was performed.' Labatt on Master and Servant, § 18, p. 56." Barton v. Studebaker Corp. of America, supra; La Franchi v. Ind. Acc. Com. (Cal. App.) 298 P. 44.

[5] As evidence of the nature of the relationship existing between the association and Peters, there is the fact that Peters received no definite compensation, only commissions; that the automobile used by him in soliciting his customers was his own property; and that he paid the expense of its maintenance and care and for the gasoline necessary to run it, together with all his other expenses.

But more important than these considerations, which are not always in themselves determinative of the issue (Press Publishing Co. v. Ind. Acc. Com., 190 Cal. 114, 210 P. 820; Easton v. Ind. Acc. Com., 34 Cal. App. 321, 167 P. 288), and which really involve evidence only tending to show the relationship the probative value of which as disclosing the nature of the relationship must of course be measured by other considerations more directly addressed to the fact, is the fact, clearly and unquestionably established that his business under his engagement with the association was that of seeking and soliciting membership in the association for which he would receive his commission if the applicant was accepted by them, and the further fact that in prosecuting that work he was at liberty under his engagement with the association to go where and when he pleased and to exercise his own judgment and discretion as to the parties whom he should seek as purchasers or to whom he might present propositions for the sale and purchase of the association shares. He was, in other words, perfectly free to choose his own time, place, manner of transportation, and means of seeking and procuring applicants. There was nothing in his agreement with the association to prevent him from employing assistants to aid him in this work, paying them out of his own commissions for any customers they might bring to him, which, in fact, he did. In brief, he was perfectly free to prosecute the work he agreed by his contract to do for the association in any manner he saw fit, using such means or methods as to his judgment might seem the most effective for accomplishing the ends of the business. When a sale was made through him, and the applicant accepted by the association, he was paid the stipulated commission but received no compensation unless a sale was effected through him. He was as much engaged in business for himself when prosecuting the work called for by his contract with the association as is the contractor who engages to construct a building for a stipulated sum of money. And in this case the association could exercise no authoritative control over the work of Peters except perhaps the right to require him to carry out his instructions as to the representations he should make to prospective purchasers of the character and worth of the securities.

Appellant lays stress upon the fact that Peters' authority to act for the association was evidenced by a printed card of the latter and on which his name was printed. The character of the relation between Peters and the association was not stated on the card. This is only an evidentiary circumstance, and under some circumstances it might be of some value as proof of the nature of the relationship existing between the parties; but in this case it possesses no significance in view of the undisputed evidence disclosing the terms of the agreement. Naturally, whether a servant or an independent contractor, a party engaged to perform for another, acts or work requiring dealings with the public, would carry with him some evidence of his authority to do what he claimed the right to do. Barton v. Studebaker Corp. of America, supra.

We have not thought it necessary to review the many cases cited by appellant in support of her position as to the nature of the relationship existing between the association and Peters. She relies principally upon the holding in the case of Ocean Accident & Guarantee Corp. v. Ind. Acc. Com., 87 Cal. App. 290, 262 P. 38, which was a case where an employee of a society collected dues on a commission basis. In that case the record contained substantial evidence to support the finding that the manner in which the collector operated was subject to the direction of the board of trustees, and that the "determinative factor" of power or control lay with the latter, not only as to the result proposed to be obtained, but as well to the means and method by which such result was to be accomplished. She also cites Marks v. Hill, reported in volume 9, Ind. Acc. Com., Dec. 12/5, 1922; Cameron v. Pillsbury, 173 Cal. 83, 159 P. 149; Brown v. Ind. Acc. Com., 174 Cal. 457, 163 P. 664, in support of her contention.

[6] Evidence that the association might terminate the employment for breach of agreement at any time does tend to negative the independence of the employee, but it is not conclusive. Press Pub. Co. v. Ind. Acc. Com., supra.

[7] Respondent contends the evidence is insufficient to show the deceased was injured at all, or that death resulted from injury. This question becomes unimportant unless deceased was found to be an employee, in which case the evidence must establish, first, an injury; secondly, that death was the re-

sult of the injury sustained in the course of the employment.

[8, 9] "When an employee, without acclimatization is placed at work in a locality in which the heat is intolerable to one not acclimated, the special exposure is in excess of the risk of the commonalty, and death from sunstroke is compensable." 27 Cal. Jur., § 79, p. 373; Stammler v. Cal. Highway Com., 9 Ind. Acc. Com. Dec. 275; Hanley v. Union Construction Co., 9 Ind. Acc. Com. Dec. 48. If, under the circumstances disclosed by the evidence in this case, the jury had found that deceased so met his death, it would constitute an injury within the meaning of the Workmen's Compensation Act. However, if the trial court was not satisfied with the verdict, and was convinced that it was clearly against the weight of the evidence, then it was its duty to set it aside, even though there may have been some conflict in the testimony. Dickey v. Davis, 39 Cal. 565; Bates v. Howard, 105 Cal. 173, 38 P. 715; Green v. Soule, 145 Cal. 96–103, 78 P. 337.

[10, 11] While it is true that appellant may be entitled to the presumption of negligence on the part of the employer, if the evidence supports the finding of an injury received arising out of the employment, this however, is not a conclusive presumption but disappears when contradicted or controverted by the evidence of the party relying upon the presumption if the circumstances are such as to afford no indication that the testimony was the product of mistake or inadvertence and the fact so proved is wholly irreconcilable with the presumption sought to be invoked, but this rule is not applicable where the presumption is contradicted by evidence of the party against whom it is invoked. Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269; Smellie v. So. Pac. Co., supra.

[12] For reasons heretofore stated, the question of the weight to be given this evidence becomes immaterial. The striking of respondent's answer setting up as a defense the actions of the commission was justified under the holding in the case of Marshall v. Foote, 81 Cal. App. 98–101–102, 252 P. 1075.

For the reasons above stated, we are of the opinion that the order of the trial court rendering a judgment in favor of the respondent notwithstanding the verdict, and the order of the court denying appellant's motion to vacate judgment, must be affirmed. It is so ordered.

We concur: MARKS, J.; JENNINGS, Acting P. J.

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115 Cal.App. 740

BECKER v. STINEMAN et al.

Civ. 859.

District Court of Appeal, Fourth District, California.

Aug. 1, 1931.

1. Exchange of property 🔑3(1).

Stock exchanged for property being void, consideration for property exchanged failed and owner would ordinarily be entitled to recover property or its value.

2. Appeal and error 🔑1010(1).

In action for damages from sale of corporate stock, reviewing court cannot disturb finding supported by testimony.

3. Licenses 🔑39.

Transfer of invalid corporate stock *held* not to operate as equitable assignment of interest in or claim against corporation.

Stock had not been sold for cash as permit provided, and if transferee instituted action against corporation under transferors' claimed right of action it might develop that amount paid in was less than par value of stock, so that transferee would be forced to assume loss.

4. Contracts 🔑139.

In transaction involving transfer of invalid corporate stock, court must aid person not in pari delicto, though to some extent involved in illegality, but who is comparatively more innocent.

Such action must be taken in furtherance of justice, and court must permit such person to recover back property or its value as circumstances of case may require.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by F. W. Becker against F. L. Stineman and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Newlin & Ashburn and Clive W. Johnson, all of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondent.

GRIFFIN, Justice pro tem.

This is an action for damages arising out of the sale of 8,500 shares of the capital stock of Coast Amusements, Inc., under circumstances more particularly described in this and in the companion case of Coast Amusements, Inc., v. F. L. Stineman (Cal. App.) 2 P. (2d) 447, this day decided.

Respondent and appellants entered into a written agreement to operate a place of amusement at the Ocean Park Pier in Santa Monica. Appellants furnished certain materials, labor and cash. Subsequently they incorporated, each subscribing for certain shares of stock as follows: F. W. Becker, 3,500 shares; W. E. Knotts, 5,000 shares; F. L. Stineman, 5,000 shares; and Charles Paige, 6,500 shares—according to the interest each had, or was to have, in the business under some oral preorganization agreement. Respondent Becker did not sign the articles of incorporation.

After incorporation an application was made to the corporation commissioner for a permit to sell 20,000 shares of stock at a par value of $1 per share. This permit was granted on condition that the sale price would be *for cash*. The board of directors and officers included appellants and respondent. They proceeded to issue to themselves shares of stock in accordance with their respective interests as follows: F. L. Stineman, 4,000 shares; Charles Paige, 4,500 shares; F. W. Becker, 3,500 shares; W. E. Knotts, 5,000 shares; L. H. Hendricks, 1,500 shares—the consideration for the issuance of appellants' stock being cash and materials furnished and services performed prior to the incorporation and the granting of the permit. The books of the corporation do not show any money paid in by any of the incorporators.

It appears from the application to the corporation commissioner to sell stock that no mention was made that it was the intention of the applicants to issue stock to the incorporators in payment of moneys advanced, materials furnished, etc., consequently the permit provided "that the stock may be issued and disposed of for *cash only*." It was stipulated at the trial that all of the above-mentioned stock was issued in violation of the permit and was void ab initio.

Respondent contends that he was not present at the meeting in which appellants issued to themselves the shares of stock referred to but was out of the state and that he paid his $3,500 for the stock for which he had subscribed subsequent to the incorporation but prior to the issuance of the permit. He admits that he knew his money was to be used in purchasing materials for the erection and maintenance of the "Skooter."

On the 21st day of December, 1925, appellants traded their 8,500 shares to respondent Becker for real estate of the value of $8,500, Stineman turning 4,000 shares and Paige 4,500. The title to the real estate was taken in the names of appellants jointly. The real property was subsequently disposed of. The stock transferred to respondent was subsequently reissued by the corporation to respondent and his wife who enjoyed the dividends earned thereon to the extent of $1,997.50, voted the stock thus acquired and also that acquired by Becker under his subscription agreement. The corporation subsequently brought an action in the name of the corporation against appellants to compel them to pay for the stock for which they had subscribed, to wit: F. L. Stineman, 5,000 shares, and Charles Paige, 6,500 shares. Respondent was made manager by the new board of directors which consisted of himself, his wife, and Mr. Knotts, and his salary was fixed at $75 per week.

The record discloses that respondent was vice president of the corporation from its inception. He testified that he was not at the meeting at which the officers were elected, although the minutes of the meeting of August 15, 1925, show he was duly elected vice president and that he then nominated W. E. Knotts treasurer and subsequently nominated L. H. Hendricks secretary. At this meeting a motion was made that the corporation apply for the permit to sell the 20,000 shares of capital stock of the corporation.

Respondent testified that he did not take any part in the management or control of the company except that he greased the cars and assisted in the management one or two days a week from October, 1925, until January, 1926, and was paid 50 cents an hour for his services; that he did not know whether Mr. Paige or Mr. Stineman paid anything for their stock as there were no records kept by the corporation showing any payment or credits given them; that he was not allowed to see the books and didn't find out until February, 1926, that there were only books of operation kept and that there had been no books showing cash received or moneys disbursed. Such books as there were remained in the custody of Mr. Knotts, Hendricks, and Stineman. Mr. Stineman was signing the checks; that he did not know how much the skooter cost. Appellants testified that it cost $17,000. Respondent testified further that he was satisfied and that he did not intend to rescind the sale if appellants could satisfy the corporation commissioner as to the value of materials, etc., that were furnished to the corporation by appellants and make the stock issued valid under a proper permit.

In February, 1926, respondent discovered that the stock issued to Stineman and Paige was issued in violation of the permit and was consequently void. He then instituted this action to recover the value thereof. The court found for respondent and against appellants for the full value of said stock in the sum of $8,500, deducting therefrom the amount of dividends received by respondent during this period.

Appellants contend, first, that respondent was in pari delicto with them and therefore not entitled to any relief; and, second, that the transfer of the invalid stock operated as an equitable assignment of appellants' interest in or claim against the corporation.

[1] There is no doubt, under the stipulation and finding, that the stock issued is void; therefore, the consideration for the property exchanged failed. Respondent would therefore ordinarily be entitled to recover the property or its value.

The case cited by appellants, Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418, which was an action by certain directors against the corporation for the rescission of a deed wherein plaintiffs deeded certain mining property to the corporation in exchange for stock to be issued, believing, upon advice of counsel, that a permit so to do was not necessary, the court held, under the facts in that case and by reason of the participation of plaintiff in the control and management of the business, that it would be absurd to conclude that the landowners, directors of the corporation intended to perpetrate a fraud on themselves by directing the corporation to do so and so that it would render it inequitable to affirm the rescission and order a cancellation of the deed; that by reason of the participation of plaintiff in the enterprise from its inception, including especially his participation in the acceptance by the corporation of the terms of the promotion contract upon the issuance of stock, unlawfully, it would place him in pari delicto with the corporation under the doctrine of the case of Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 209 P. 36, and no relief should be accorded him on that ground alone. Several other reasons were assigned for denying plaintiff's right to rescind. If the facts as related by appellants were found to be true, we believe the case above recited would receive favorable application.

[2] The trial court found that the two appellants while directors of the company caused said permit to be requested and issued; that the 8,500 shares were issued by them to themselves in violation of the permit and that they knew at the time of the issuance that they were being issued in violation of the permit; that respondent had no knowledge of the business affairs or transactions of the company or that appellants had issued said shares of stock to themselves in violation of the permit; that respondent received nothing of value for the real property traded to the appellants and that the consideration failed. The evidence offered by appellants contradicts the testimony of respondent as to his participation in the organization and proceedings of the company, purchase of stock, and his knowledge of the various transactions. The record before us, however, is quite convincing in favor of appellants' contention. The court made a finding, apparently based on respondent's testimony, which, if true, will support its finding. This court cannot disturb such finding on appeal, therefore, it cannot be said that the actions of respondent are similar to the facts set forth in the case of Michell v. Grass Valley Gold Mines Co., supra. We cannot therefore hold that the parties were in pari delicto.

[3] The second point raised is that the assignment of the shares to respondent carried with it any right of action appellants might have against the corporation to reimburse them for the value of the stock which they issued without authority. We are of the opinion that an assignment of the shares under the circumstances here related did not carry an equitable assignment of such right. The evidence discloses that the amount paid into the corporation by appellants and the value of materials and labor furnished is not fixed, certain and definite. There was evidence that appellants had not paid in the full value of their stock in cash or its equivalent; therefore, if there was an equitable assignment of appellants' interest in a right of action against the corporation, respondent would not know and could not know the amount thereof.

If respondent did institute an action thereon against the corporation under such a claimed right it may develop that the actual amount paid in was much less than $8,500, therefore respondent would be forced to assume a loss of that difference. We see no merit in this contention. Under the authority cited (Klinker v. Guarantee Title Co. of Long Beach, 98 Cal. App. 469, 277 P. 177, 180), it was held that in an action to recover money paid for stock issued without a permit from the corporation commissioner "the void certificates of stock were not even choses in action, for, notwithstanding the alleged mistake of belief as to the validity of said certificates entertained by the appellants and acquiesced in by respondent corporation * * * the said certificates of stock would not have supported an action brought to recover money or value in the event of their transfer by the holder, because they were utterly worthless and invalid."

Based upon the findings of the court the evidence discloses facts similar to those in the case of Hemmeon v. Amalgamated Copper Mines Co., 95 Cal. App. 400, 273 P. 74, which was an action to recover from defendants on certain promissory notes issued by them in violation of a permit of the corporation commissioner. Defendant claimed and cited authorities holding that while one who has received the benefit of an illegal private contract is estopped to plead its invalidity, such rule does not apply to contracts which are void as against public policy. The trial court there found that the respondent had no knowledge of the failure to obtain a permit, but it was argued that she must be presumed to have known the law and that the notes were void, and that having failed to demand proof of the existence of a permit respondent passively if not actually became a participant in violating the law. The court held that it was true that respondent must be presumed to have known the law requiring the possession of a permit as a prerequisite to the issuance and sale of securities, but it does not follow that she should be assumed to have known the fact that appellant had violated the law. Respondent was entitled to assume that the law had been complied with. In such a case the complaining party is protected, the prohibition being for his benefit and not being in pari delicto he is entitled to relief. 13 Cor. Jur., p. 501, § 443.

[4] It is the duty of the court in furtherance of justice to aid one not in pari delicto though to some extent involved in the illegality, but who, as here found, is comparatively the more innocent and to permit him to recover back the property or its value as the circumstances of the case may require. Hemmeon v. Amalgamated Mines Co., supra, 95 Cal. App. at page 402, 273 P. 74. No other points having been raised on appeal, the judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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115 Cal.App. 746

COAST AMUSEMENTS, Inc., v. STINEMAN et al.

Civ. 860.

District Court of Appeal, Fourth District, California.

Aug. 1, 1931.

1. Licenses ⚷39.

Where corporate stock was void as issued in violation of permit, corporation could not recover full price of stock, notwithstanding assignment.

The corporation contended that though stock issued and delivered was void, it having come into hands of innocent purchasers, corporation was estopped from denying its validity, and therefore original holders would be liable to corporation for value thereof.

2. Corporations ⚷90(6).

Evidence not showing value of stock would not support judgment for its value, there being no presumption that par value is market value.

3. Corporations ⚷90(1).

Corporation cannot maintain action on stock subscription agreement while incompetent to issue stock (Deering's Gen. Laws 1923, Act 3814, §§ 12, 25).

4. Corporations ⚷89(1).

Under subscription agreement set out in articles of incorporation, persons named were bound to take stated amount of stock, but call or assessments was necessary to render them liable for price (Civ. Code, § 331 et seq.).

The agreement contained no promise to pay on demand or at any specified time the amount of the subscription, and though the agreement to subscribe and take the shares of stock set opposite their names bound persons named as stockholders in corporation, it did not bind them to pay for the stock otherwise than as assessments therefor might be legally made.

5. Corporations ⚷90(5).

In action for whole amount subscribed for stock, or for final installments, readiness and willingness to deliver stock certificates must be alleged.

Appeal from Superior Court, Los Angeles County; Thomas H. Selvage, Judge.

Action by the Coast Amusements, Incorporated, against F. L. Stineman and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Newlin & Ashburn and Clive W. Johnson, all of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondent.

GRIFFIN, P. J.

This is an action to recover the par value of 8,500 shares of respondent's stock alleged to have been subscribed for by appellants and for which they failed and refused to reimburse the company.

The court found that respondent was a corporation duly organized and existing under the laws of the state of California; that on or about July 7, 1925, appellants, together with W. E. Knotts, F. W. Becker, and L. H. Hendricks, entered into an oral agreement among themselves to form the respondent corporation and subscribe for certain stock, and pursuant thereto articles of incorporation were prepared and signed by appellants and W. E. Knotts in which articles they subscribed for the capital stock as follows: F. L. Stineman, 4,000 shares; Charles Paige, 4,500 shares; F. L. Stineman and Charles Paige jointly, 1,500 shares in the name of the High Boy Coaster Co.; F. W. Becker sub-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

scribed for 3,500 shares—all of the par value of one dollar each. That within thirty days thereafter the corporation was duly incorporated and a charter was granted by the secretary of the state of California, said corporation was duly organized, commenced the operation of its business and appellants became officers and directors thereof; that on August 15, 1925, an application was made to the corporation commissioner for a permit to issue the capital stock of said corporation and pursuant thereto a permit was regularly granted authorizing the corporation to issue 20,000 shares of its capital stock *for cash* so as to net the corporation the full amount of the selling price; that after granting said permit, appellants, without the knowledge or consent of the board of directors or officers of the corporation, issued to F. L. Stineman 4,000 shares, to F. L. Stineman and Charles Paige jointly, 1,500 shares of the capital stock, and that appellants did not pay for this stock at the time they accepted delivery thereof. (The court failed to find that appellant Charles Paige, individually, had issued to him 4,500 shares of stock for which he failed to pay.)

The court further found that thereafter appellants negotiated these shares of stock to F. W. Becker, an innocent purchaser who had no knowledge of the fact that this stock had been issued without cash having been paid therefor, and who was without knowledge of any infirmities pertaining to its issuance, as is more particularly related in the case of Becker v. Stineman et al. (Cal. App.) 2 P.(2d) 444, the opinion in which is this day filed.

The court further found that appellants had returned to the corporation the 1,500 shares of stock issued to themselves jointly. Judgment was entered against appellant Stineman for the sum of $4,000 and against appellant Charles Paige for the sum of $4,500, together with interest and costs.

Appellants contend that the evidence does not support the findings of the trial court. As an affirmative defense they contend that Knotts, Becker, and appellants entered into an agreement to construct the place of amusement, by the terms of which Becker was to furnish $3,500 in cash, and Knotts $5,000 in cash. Appellant Stineman was to contribute $5,000 towards the purchase of cars which were to be used by the corporation, and also to pay other small bills. Appellants contend this money, material, and services were furnished subsequent to the making of the agreement and prior to the issuance of the permit. Appellant Paige contends that he paid for $2,950 worth of steel that went into the construction of the place of amusement, $1,300 in cash towards the purchase of the cars, and in addition, paid certain small bills, waived his commission which he would ordinarily receive on the sale of the cars, and contributed approximately four or five weeks' time in supervising the construction of the ride. Appellant Stineman contends that he contributed $5,000 toward the purchase of the cars and paid other bills of the approximate amount of $500. And that by reason thereof they were entitled to receive as a credit the value of services performed, moneys paid and advanced, as well as the value of property furnished to the corporation. Appellants further contend that if the stock certificates previously issued by respondent to them were issued contrary to the terms of the permit and were void, then respondent corporation was in pari delicto with them and not entitled to any relief.

The place of amusement was substantially completed and ready for operation by the last of August, 1925. During the month of December, 1925, stock certificates were issued and delivered to all of the organizers in accordance with their joint subscriptions. On July 20, 1926, their permit to sell stock was suspended by the commissioner of corporations and the corporation has since been without authority to issue its capital stock.

Respondent contends that a recovery may be had on either of two theories: (1) That the stock issued and delivered was void, but having come into the hands of an innocent purchaser the corporation was estopped from denying its validity, therefore appellants would be liable to the corporation for the value thereof; (2) that if the stock was issued in violation of the permit and was void, appellants' subscriptions in the articles of incorporation, for the stock above subscribed, was an enforceable obligation on which the corporation could maintain an action recovering a judgment for the par value of the stock for which they had subscribed, and that as the permit required the payment to be made in cash no credit could be allowed as an offset against the judgment.

[1, 2] Answering respondent's first contention, the evidence conclusively establishes that the stock was issued in violation of the permit and accordingly void. In view of this fact and the facts stated in the companion case of Becker v. Stineman et al., we see little merit or justice to the claim which would permit respondent corporation to recover a judgment for the full price of stock issued which was void. The subsequent assignment thereof to Becker would not make this stock valid. The value of the stock issued was not proven by any evidence pointed out to this court. Therefore the evidence would not support a judgment for its value. There is no presumption that the par value of the stock is its market value. Castle v. Acme Ice Cream Co., (Cal. App.) 279 P. 1011.

[3] In answer to respondent's second contention, if the stock subscription specified in the articles of incorporation was an enforceable obligation, and the stock which was issued thereunder was void as contended, then

respondent is not now in a position to deliver over to these appellants upon payment of this judgment the stock so subscribed for, by reason of the fact that the corporation commissioner has revoked their permit to now issue or sell stock in any form.

Section 12, California Corporate Securities Act, Deering's General Laws 1923, Act 3814 as amended, reads as follows: "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void," etc.

It would indeed be a curious anomaly if a corporation could maintain an action upon a stock subscription agreement, recover judgment thereon, and at the same time be legally incompetent to issue the stock. Section 25, California Corporate Securities Act, Deering's Gen'l Laws 1923, Act 3814.

[4] Appellants contend that if recovery was had upon the theory of an unpaid stock subscription that respondent has failed to allege or prove compliance with section 331 et seq., Civil Code.

The evidence discloses some written agreement entered into on the 1st day of July, 1925, between W. E. Knotts, F. W. Becker, F. L. Stineman, and Charles Paige specifying that the interests of the parties in the "Skooter" was to be paid as follows: W. E. Knotts, one-fourth interest or $5,000; Charles Paige, one-fourth interest or $5,000; F. L. Stineman, one-fourth interest or $5,000; F. W. Becker, three-sixteenths interest or $3,500; Charles Paige, one-sixteenth interest or $1,500; and that there was to be no more cost to any of the above mentioned parties for the completion of the skooter other than their initial payment; and that the board of directors would consist of the above mentioned, excluding Charles Paige who was to act as treasurer.

From the finding of the trial court the only right of recovery under a subscription agreement is the purported subscription agreement set forth in the articles of incorporation. Therefore it will not be necessary to consider the agreement above referred to, but in passing we might say that it lacks the necessary elements to make it an enforceable contract without proving compliance with section 331 et seq., Civil Code.

The only provision in the articles of incorporation relating to the subscription of stock reads as follows:

"That the amount of said capital stock which has been actually subscribed is twenty thousand ($20,000) dollars, and the following are the names of the persons by whom the same has been subscribed.

"Name of Subscriber	Number of Shares	Amount
F. L. Stineman	5000	$5,000
Charles Paige	6500	6,500
F. W. Becker	3500	3,500"

The articles of incorporation were signed by appellants and W. E. Knotts.

We are of the opinion that the terms above set out merely bind appellants to take the number of shares set opposite their names but contain no promise to *pay on demand* or *at any specified time* the amount of the subscription. Under an unbroken line of decisions a call or assessment under section 331 of the Civil Code was necessary in order to render the appellants liable. 1 Thompson on Corporations, § 1185; Ventura, etc., Ry. Co. v. Hartman, 116 Cal. 260, 48 P. 65; Marysville Electric Light, etc., Co. v. Johnson, 93 Cal. 538, 29 P. 126, 27 Am. St. Rep. 217; San Joaquin Land & Water Co. v. Beecher, 101 Cal. 70, 35 P. 349; Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 P. 298; Bell Development Co. v. Marshall, 35 Cal. App. 324, 169 P. 717. The agreement to subscribe and take the shares of stock set opposite their names bound them as stockholders in the corporation, but not to pay for the stock otherwise than as assessments therefor might be legally made. Cook on Stocks and Stockholders, § 105.

[5] It is not necessary to allege a tender of a stock certificate, but "a readiness and willingness, however, to deliver the certificates must be alleged in the complaint in actions for the whole amount subscribed, or to enforce payment of the final installment of the amount subscribed." 14 Cor. Jur. 658, § 1016; Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149.

Respondent neither alleged nor proved compliance with section 331 et seq., Civil Code, nor alleged nor proved ability to issue valid stock on payment of the judgment.

Appellants filed a cross-complaint in the above entitled action seeking to recover from the corporation the value of labor and material contributed to the corporation prior to its incorporation, but during the trial of the case appellants dismissed their cross-complaints for reasons not stated in the record.

In the case of Klinker v. Guarantee Title Co. of Long Beach, 98 Cal. App. 469, 277 P. 177, an action to recover money paid to a corporation for stock issued in violation of a permit, it was held that upon payment of the money the obligation arose either to issue to plaintiff value received in the shape of valid stock, or lacking authority to do so, to return the money to him. This is supported by Natl. Stone Corp. v. Voorheis, 93 Cal. App. 738, 270 P. 286.

We believe the decision in Los Angeles Athletic Club v. Spires, supra, sufficiently supports appellants' contention. "The only question demanding consideration that is presented by this appeal may thus be stated: Where a stock subscription contract is silent upon the question, may the directors of the corporation, upon call or demand, enforce against the subscriber the full payment of the subscription and enforce his delinquency by an action in assumpsit, as could unquestionably be done at common law, or do the sections of the Civil Code, 331 et seq., enter into and become a part of such contract, with the result that calls or assessments for unpaid subscriptions can be made only upon the terms and in the manner and form in those sections prescribed? This precise question has never before been presented to this court for decision. We are of the opinion that the sections referred to do enter into and become a part of the subscriber's contract, with the result that, in the absence of provision to the contrary therein, calls or assessments by the corporation for unpaid subscriptions can be made only upon the terms and in the manner and form in those sections prescribed. A careful consideration of the opinions of this court relied upon by appellant satisfies us that there is nothing therein inconsistent with this conclusion. It is still, of course, permissible for the subscriber, by terms expressed in his contract of subscription, to modify or waive the provisions of the Code clearly designed for his benefit, but unless the subscriber has done so he will be held to have entered into the subscription contract in contemplation of the protection which the Code provisions afford him."

For reasons above stated the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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115 Cal.App. 677

PEOPLE v. OLIVER.

Cr. 127.

District Court of Appeal, Fourth District, California.

July 27, 1931.

Rehearing Denied Aug. 10, 1931.

1. **Criminal law** ⟹444.

Assistant cashier's testimony that ledger sheet was correct bank record, compiled by bank officers' direction, *held* sufficient foundation for admission thereof.

2. **Criminal law** ⟹1169(2).

Admission of bank's ledger sheet in trial for uttering fictitious check *held* harmless, in view of other evidence of essential facts.

3. **False pretenses** ⟹49(4).

Bank's record and assistant cashier's testimony in trial for uttering fictitious check *held* sufficient to show defendant's lack of funds and credit at bank.

The bank ledger sheet showed that defendant's account was opened after he drew and delivered check and assistant cashier testified that he searched records and knew they were correct.

4. **False pretenses** ⟹49(2).

Evidence *held* sufficient to sustain conviction of uttering fictitious check as against contention that intent to defraud was not shown.

5. **False pretenses** ⟹14.

It is not necessary to show in trial for uttering fictitious check that it resulted in financial loss to payee.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

E. D. Oliver was convicted of making, drawing, uttering, and delivering a check on a bank without sufficient funds to meet it, and he appeals.

Affirmed.

H. L. Meyers, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was charged with the crime of making, drawing, uttering, and delivering a check upon a bank without sufficient funds to meet the same, the information containing three counts. In the first count it is charged that the defendant on or about the 15th day of May, 1930, in the county of Fresno, committed a felony in that he, with intent to defraud Arthur R. Lindburg, Inc., a corporation, and also the Fresno Branch of the Bank of America, made, drew, uttered, and delivered to Arthur R. Lindburg, Inc., a check, drawn upon the Fresno Branch of the Bank of America, knowing at the time that he did not have sufficient funds in or credit with said bank to meet said check. The other two counts relate to other checks given in the month of June, 1930. The defendant was acquitted on counts 2 and 3 and found guilty as charged in count 1 of the information. This appeal is from the judgment, and from the order denying a motion for a new trial.

[1-3] The first ground urged for a reversal is that the trial court erred in admitting into evidence what purported to be the original ledger sheet of the bank named, showing the defendant's account at that bank for the months of May and June, 1930. According to this ledger sheet, defendant's account with the bank was opened on May 28, 1930. The assistant cashier of this bank appeared as a witness and testified that this ledger sheet was compiled by another person in the bank and that he would not say that it was done

under his personal direction. Appellant urges that, under the circumstances, this ledger sheet constituted hearsay evidence and should not have been admitted. He relies on People v. Frey, 165 Cal. 140, 131 P. 127, and People v. Owens, 57 Cal. App. 84, 206 P. 473. In the Frey Case, aside from the defendant's confession, there was no evidence that the defendant had no funds or credit in the bank on which the check was drawn, that bank being out of the state, except that there was written across the face of the check "no account." There was no evidence that these words were written by any one connected with the bank or by any one who knew or could know the facts. It was held that the absence of some such proof was fatal. In the Owens Case, while it was shown that the bank records did not contain the name of the defendant as a depositor, there was no proof of any sort that the defendant did not have credit with the bank to meet the check. Neither of these cases settles the point now before us. The witness, through whom this ledger sheet was admitted into evidence, testified that he was an assistant cashier of the bank in question and had worked for them for twenty years. He testified that the ledger sheet in question "constitutes a record of the bank," and that he knew that it was true and correct, and also that he had examined the original account in the bank. The ledger sheet showed that the account of this defendant was opened on May 28, 1930. When asked if the ledger sheet was compiled under his direction he replied that it was "compiled at the direction of the officers of the bank, in that way it includes myself and others." We think that sufficient foundation was laid for the admission of the ledger sheet in evidence. People v. Kuder, 98 Cal. App. 206, 276 P. 578; People v. Woollacott, 80 Cal. App. 275, 251 P. 826. Even if the ledger sheet were improperly admitted, the error would be harmless, as there was other evidence of the essential facts. The assistant cashier of this bank testified that he had examined the defendant's account in the bank and knew that it was true and correct; that the defendant had no account in the bank on May 15, and none on May 19, the day when the check was presented for payment. He further testified that there was no credit arrangement between the bank and the defendant by means of which this check could be taken care of at any time, and that he had searched through the records of the bank and found no such credit arrangement. In addition, it was shown that payment of the check had been refused by the bank. We think that a lack of both funds and credit at this bank on the part of the defendant was sufficiently shown, both by the record of the bank and by the testimony of the assistant cashier, who testified that he had searched the records and knew that they were correct. People v. Weaver, 96 Cal. App. 1, 274 P. 361.

[4, 5] The only other point raised by the appellant is that the evidence is not sufficient to sustain the verdict, in that the intent to defraud was not shown. Appellant testified that he was a dealer in secondhand cash registers and office equipment. The check involved in the first cause of action was given as a first payment upon an automobile. The check in the second cause of action was given some three weeks later to another automobile dealer, as the first payment on another automobile. The check involved in the third cause of action was given two days later to a garage, the nature of the transaction not appearing. In the transaction involved in the first cause of action, the appellant, as a first payment upon this automobile, gave the dealer $5 in cash and the check in question, signing a contract covering the balance. He also promised to bring in a cash register as additional security, which he later did. He first argues that an absence of criminal intent is shown by his giving this cash register as additional security on the balance of the contract. It may first be observed that this additional security was on the balance of the contract and had no relation to the check here in question, or to the first payment on the automobile. It is also the law that it is not necessary, in a case of this character, to show that the check as issued results in financial loss to the party to whom it is given. People v. Cortze (Cal. App.) 290 P. 1083; People v. Williams, 69 Cal. App. 169, 230 P. 667. As showing absence of criminal intent, the appellant also relies upon his testimony that, at the time the check was given, he told the employees of Arthur R. Lindburg, Inc., that he desired them to hold the check for a few days. However, two of the employees of this company who were present when the check was given testified positively that no such request was then made, although one of them testified that a day or two later appellant called him up on the telephone and asked him to hold the check. Nothing more is here presented than a conflict in the evidence. However, the fact that he phoned and asked them to hold the check indicates that he knew it was not good and could be considered in passing upon the question of his intent.

We think the evidence is sufficient in the respects questioned to sustain the verdict of the jury.

The judgment and order are affirmed.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

116 Cal.App. 31

JOHNS v. MECCHI et al.
ATKESON v. SAME.

Civ. 7863.

District Court of Appeal, First District,
Division 2, California.
Aug. 6, 1931.

1. Appeal and error ⚿1002.

Conflicting evidence regarding facts of automobile collision were for jury, not for reviewing court.

2. Automobiles ⚿171(9).

Where motorist stopped at intersection and started to make left turn, colliding with another automobile within 35 feet of place where he stopped, motorist did not have duty to continuously give left turn signal for 50 feet back (St. 1923, p. 558, § 130, as amended by St. 1925, p. 413, § 15a).

> Motorist did not have duty, under the circumstances, of continuously giving a left turn signal for distance of 50 feet back, since, under California Vehicle Act (St. 1923, p. 558), § 130, as amended by St. 1925, p. 413, § 15a, when coming to the stop, it was the motorist's duty to hold his hand down indicating a stop, and, when he commenced to make the turn, it was his duty to hold his hand straight out to indicate a left-hand turn, and the motorist could not have given the left-hand turn signal before coming to the stop, without disobeying the statutory provision requiring a stop signal, since he could not give both signals at the same time.

3. Automobiles ⚿244(31).

Finding that motorist involved in automobile accident occurring at 3 a. m. was not intoxicated *held* not erroneous under evidence that motorist had four drinks between 8 p. m. and 11 p. m. on preceding evening.

4. Appeal and error ⚿1060(1).

Introduction of hearsay in opening statement *held* cured by court's instructions that verdict must rest on evidence admitted, not on excluded questions, nor on counsel's statements.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Actions by Myrtle Johns, by J. B. Alexander, her guardian ad litem, and by Martha Atkeson, by Gail G. Atkeson, her guardian ad litem, against Lawrence Mecchi, sued herein as Louis Mecchi, by Peter Mecchi, his guardian ad litem, which were consolidated for purposes of trial. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Clifton Hildebrand and Carlton D. Dethlefsen, both of San Francisco (Thomas F. McCue, of San Francisco, of counsel), for appellants.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

STURTEVANT, J.

The plaintiffs commenced separate actions against the defendant to recover damages caused by the collision of two automobiles. The defendant answered, and thereafter both actions were consolidated for the purposes of the trial. In each action judgment went for the defendant and the plaintiffs have appealed.

[1] At about 3 o'clock in the morning, on January 1, 1930, the defendant was driving a Ford automobile north on Sixty-Fourth avenue in Oakland and Ralph Wood was driving a Buick automobile east on Foothill boulevard. The automobiles collided in the intersection. As to how the accident occurred the testimony is distinctly conflicting. The defendant introduced evidence: That before entering Foothill boulevard he came to a full stop at the stop sign which is located at the southeast corner of the intersections; that he had a red courtesy light on the left side of his car, which was lighted at the time of the accident; that as he started to leave the stop sign his car was in low gear and that just before he was hit he shifted into second; that before he entered the intersection he looked in all directions and that he saw the Buick nearly a block and a half away; that as he started up he gave the signal for making a left-hand turn; that he continued to give that signal with his hand extending directly to the left until he had to put his hand on his wheel to make the turn; and that during all of that time his hand was out on the left-hand side of his car. The speed limit in that neighborhood was twenty miles per hour, but the defendant introduced evidence that the Buick was traveling over thirty-five miles per hour immediately before the accident. As to nearly every one of these facts the plaintiff introduced at least some evidence conflicting with the evidence given by the defendant, but the conflicts in the evidence were for the jury and not for a court of review.

[2] The plaintiffs earnestly press the point that for a distance of fifty feet back the defendant did not continuously give the signal of his intention to make a turn to the left. The distance that intervened between the point where the defendant came to a stop and the point where the accident occurred was about thirty-five feet, and during that time defendant was giving the signal. If the defendant stopped exactly at the stop sign, then it would appear that he did not have his hand extended directly out while traveling the last

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fifty feet. However, it is likewise apparent that when he was coming to a stop it was his duty to hold his hand down indicating a stop, and, when he commenced to make the turn, it was his duty to hold his hand straight out to indicate a left-hand turn. California Vehicle Act, § 130, as amended by St. 1925, p. 413, § 15a. He could not do both at one and the same time. It is patent that these two calls of the statute, under the facts of this case, are conflicting. If the jury believed the testimony given by the defendant, it was justified in assuming that the defendant made a substantial compliance with the terms of the statute. Moreover, it is absurd to maintain that the defendant under the circumstances, for the full space of fifty feet, should have given the signal. Having come to a stop, it would have been necessary for him to back up fifteen feet and then commencing to give the signal drive forward for the distance of fifty feet. Then as he drove forward he must stop again and so on ad infinitum.

[3, 4] The plaintiffs also claim that the defendant was intoxicated. The evidence on that subject is that between 8 o'clock and 11 o'clock on the evening before the accident the defendant had four drinks. The accident occurred at 3 o'clock next morning. At the time of the accident it does not appear that he was under the influence of intoxicating liquor. We may not say that the jury erred when it declined to find to the contrary. The plaintiffs also assert that misconduct occurred on the part of the defendant in the trial of the action. The incident arose as follows: After the jury had been selected one of the attorneys for the plaintiffs made an opening statement. When he took his seat one of the attorneys for the defendant immediately arose and proceeded to make the opening statement for the defendant. Toward the close of the latter statement counsel stated:

"We will also show you that at the Highland Hospital, I believe before all of them, that Mr. Wood, the driver of this car in which the plaintiffs were riding said not once but many, many times that the accident was all his fault and that he didn't see—

"Mr. Hildebrand (interrupting): Such testimony would be hearsay as far as the plaintiffs are concerned and we object to any statement of counsel as obvious hearsay. * * *

"The Court: I don't know—the evidence will be offered, but in any event at this time I will advise the jury that they are not to take as evidence any statement made by counsel at this time." Thereafter during the course of the trial the defendant attempted to introduce the declarations so claimed to have been made by Mr. Wood. The plaintiffs objected that the declarations were hearsay. The court sustained the objections. Moreover, the court gave instructions fully cautioning the jury that the verdict of the jury must rest on evidence admitted, not on questions, objections to which were sustained, and not on statements of counsel. The plaintiffs claim that they were entitled to a fair trial. No one would claim to the contrary. However, a most cursory reading of the record discloses that they had an eminently fair trial.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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115 Cal.App. 672

BERGERON et al. v. EMPLOYERS' FIRE INS. CO.

Civ. 325.

District Court of Appeal, Fourth District, California.

July 27, 1931.

1. Appeal and error 🔑673(2).

In action on fire policy, court could not consider claim that notice to insured to submit to examination was insufficient; notice not being before court, and court below having found insured was duly notified.

2. Insurance 🔑612(2).

Insured, if properly notified pursuant to fire policy clause, must submit to examination under oath as condition precedent to action.

3. Insurance 🔑548.

Insurer having, pursuant to fire policy, duly notified insured to submit to examination under oath, insured must, though excused by illness from attending at time and place set, offer to submit to examination as soon as able.

That insured was justified by her illness in not submitting to examination at place and time named in notice was not sufficient excuse for not submitting to such examination at some other time and, if necessary, at some other place.

4. Insurance 🔑548.

Fire insurer, having duly notified insured to submit to examination under oath and not knowing any reason for nonappearance, would not be required to give further notice or take further steps to secure examination.

5. Insurance 🔑548.

Findings that insured, at time set by notice to submit to examination under oath, was ill and shortly thereafter removed to other city because of illness, *held* insufficient, without more, to excuse compliance with fire policy.

> This was so since, in absence of facts showing that insured's disability continued to time of trial, or that in some way burden of making new demand was shifted to insurer, there would be no sufficient excuse for noncompliance with policy provision requiring insured to submit to examination under oath as often as required.

Appeal from Superior Court, Kern County; E. F. Brittan, Judge.

Action by Lyman Bergeron and another against the Employers' Fire Insurance Company. From a judgment in favor of plaintiffs, defendant appeals.

Reversed and remanded for a new trial.

Percy V. Long and Bert W. Levit, both of San Francisco, for appellant.

Coker F. Rathbone, of Taft, and Aldrich & Mack, of Bakersfield, for respondents.

BARNARD, P. J.

The defendant insurance company issued to one Nettie E. Ratchford a policy of fire insurance covering certain property in Taft, Cal. The plaintiffs herein held a mortgage on the property, and a mortgage clause in their favor was attached to the policy. The insured property was destroyed by fire on February 7, 1928, while the policy was in force. Subsequently, Nettie E. Ratchford conveyed the property to the plaintiffs and assigned to them all of her rights under the insurance policy. This action was brought to recover for the loss sustained. The policy contained the following provisions:

"The insured * * * shall submit to examination under oath, as often as required. * * *"

"No suit or action on this policy for the recovery of any claim shall be sustained until after full compliance by the insured with all of the foregoing requirements. * * *"

In its answer the defendant alleged as follows: "That said Nettie E. Ratchford failed and/or refused to submit to said examination under oath or to any examination under oath and said Nettie E. Ratchford did not appear at the time and place specified for said examination under oath nor give any excuse for her nonappearance; that said Nettie E. Ratchford never since nor before nor at any time has offered to submit to any examination under oath."

The action was tried before the court without a jury, and judgment was given for the plaintiff, based upon findings of fact. This appeal comes before us upon the judgment roll alone.

The court found that the insurance policy in question contained the provisions above quoted, and also that the said Nettie E. Ratchford was duly notified in writing that she was required to submit to an examination under oath at the city hall in Taft, Cal., on July 14, 1928. The court also found as follows: "That said Nettie E. Ratchford on and prior to the 14th day of July, 1928, was ill and unable to get out of bed; and was unable to attend to her business affairs because of her illness; that said Nettie E. Ratchford was justified by her illness in not submitting to the examination as was required by said defendant company on the 14th day of July, 1928, and that shortly after said date, the said Nettie E. Ratchford was obliged, because of her illness, to, and did leave the City of Taft, California, and go to the City of Ventura, California and remain there because of her health." No other findings in reference to the point in issue were made. The only point raised by appellant is that these findings do not support the judgment, in that they do not show that Nettie E. Ratchford submitted herself to examination under oath when required to do so, and that they do not show a reasonable excuse for her failure to comply with that provision of the policy.

[1-5] Respondents, while conceding that Nettie E. Ratchford did not submit herself to an examination under oath, and while admitting the validity of the provisions for examination contained in the policy, seek to justify the failure of the insured in this respect, upon two grounds. It is first claimed that the notice itself was insufficient, as it did not specify the person before whom the examination would be held. Even if such a requirement were assumed, the notice is not before us and the court found that the insured was duly notified. This contention need not be further considered. The main reliance of respondents is placed upon the contention that the time and place set for the examination were not reasonable as to the assured, in view of her illness at that time, and that this illness excused her from appearing. Respondents devote most of their argument to the discussion of whether the particular time and place set were reasonable so far as the insured is concerned, in view of her illness. However, the real question presented is not as to the reasonableness of the time and place set, but is whether an insured, after receiving such a notice, may ignore the matter entirely, and, without either notifying the company of the reason for his nonappearance or offering to submit to an examination at some other time and place, proceed to trial, with nothing further being done in reference to the desired examination. In other words, the question is whether the court's findings that Nettie E. Ratchford was on and prior to that particular day ill and unable to get out of bed and unable to attend to her business affairs, and that

shortly after that day she was obliged, because of her illness, to move to Ventura and remain there because of her health, are alone sufficient to excuse compliance with the insurance contract and to sustain the judgment. We think this must be answered in the negative.

It is settled in this state that an insured, if required to do so by a proper notice, shall submit to an examination under oath, and that this is a condition precedent to any right of action. Hickman v. London Assurance Corporation, 184 Cal. 524, 195 P. 45, 49, 18 A. L. R. 742. In that case the court said: "The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent 'as often as required,' and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the conditions of which he has failed to perform; in other words, when he commenced this suit he was without a cause of action."

The respondents rely upon the cases of Phillips v. Protection Insurance Co., 14 Mo. 220; Pierce v. Globe & Rutgers Fire Insurance Co., 107 Wash. 501, 182 P. 586; Pearlstine v. Westchester Fire Insurance Co., 70 S. C. 75, 49 S. E. 4; and Central National Fire Insurance Co. v. Black (C. C. A.) 220 F. 8, as sustaining their position. None of these cases have that effect. In the Phillips Case a notice to appear for examination was served on the assured just as he was leaving home for the purpose of taking his sick child beyond the range of a cholera epidemic, which was then raging near the scene of the fire. Subsequently, however, and before suit was filed, the insured returned and offered to submit to examination, which offer was refused by the company. In the Pierce Case, even if it were conceded to be authority in this state, the place set for the examination was held as unreasonable, as not being the place where the fire occurred. In the Pearlstine Case it was held that the assured was not excused from appearing for an examination because he had fled the country to avoid arrest. The case of Central Fire Insurance Co. v. Black has no bearing upon the question before us on this appeal.

Conceding that the illness of this assured excused her attendance for examination at the particular time and place set, the fact remains that the appellant had done all that it was required to do to set in motion the policy provisions for an examination of the insured under oath, and it was then incumbent upon the insured to endeavor to comply with the contract as soon as she was able to do so, by offering to submit to such an examination at a later time. That she was justified by her illness in not submitting to an examination at the place and time named, is not a sufficient excuse for not submitting to such an examination at some other time, and if necessary, at some other place. No reason appears why she could not have been examined at Ventura, had she been willing. She could not ignore the notice and proceed to trial in disregard of the plain provisions of her contract. Not knowing of the existence of any reason for her nonappearance at the place and time set, the appellant would not be called upon to give a further notice, or to take further steps to secure the desired examination. In the absence of facts showing that her disability continued to the time of trial, or that in some way the burden of making a new demand was shifted to appellant, the respondents have not brought themselves within the established rules. We conclude that the findings of the court, standing alone, are not sufficient to excuse compliance with the contract and to sustain the judgment.

While the court found that the insured executed a conveyance of the property on July 18, 1928, four days after the time set for her examination, which might indicate that a complete disability was not continuous, the evidence not being before us, we are unable to tell what the facts are in that regard, and for that reason we think the case should be retried.

The judgment is reversed, and the case remanded for a new trial.

We concur: MARKS, J.; GRIFFIN, Justice pro tem.

115 Cal.App. 646

MEYER et al. v. JOHNSON et al.

Civ. 6751.

District Court of Appeal, Second District, Division 2, California.

July 27, 1931.

1. Insurance ⚷448.

When beneficiary under life insurance policy murders insured, beneficiary cannot recover on policy.

2. Insurance ⚷448.

When beneficiary under life policy murders insured, proceeds of policy become part of insured's estate.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Mary Meyer, as administratrix of the estate of Hazel Edna Johnson, deceased, and another, against Granville William Johnson and another. From a judgment for defendants, plaintiffs appeal.

Reversed.

Laird L. Neal and Burke, Catlin & Burke, all of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent New York Life Ins. Co.

WORKS, P. J.

The complaint in this action purports to state two causes of action, each designed to recover on one of two policies of life insurance. We shall treat the controversy, in our discussion of it, as if there were but one cause of action, as the questions presented by the appeal are identical as to each of the two alleged causes.

Among other things, it is alleged in the pleading of plaintiffs that Mary Meyer is administratrix of the estate of Hazel Edna Johnson, deceased, and the guardian of Robert William Paul, all as stated in the title to the action; that Robert Paul is a minor, the only living child and heir at law of Hazel Johnson; that on or about April 21, 1926, there was issued by defendant life insurance company and delivered to Hazel Johnson and defendant Granville William Johnson, her husband, a policy of insurance on the life of Hazel payable to Granville; that on or about May 2, 1926, Granville did unlawfully and feloniously kill and murder Hazel; that he was arrested, tried and convicted of the murder, in Arizona; and that judgment of death was pronounced by the court against him. Judgment is prayed in the complaint here that the face of the policy and interest thereon be by defendant life insurance company paid to the estate of Hazel, for the benefit of the plaintiff Paul.

Defendant life insurance company interposed an answer to the complaint, in which it pleaded both defensive and affirmative matter.

At the trial objection was made to the reception of evidence to support the allegations of the complaint on the ground that the pleading did not state a cause of action. The objection was sustained and judgment went for defendants. The plaintiffs appeal.

[1] When the beneficiary under a life insurance policy murders the insured he cannot recover on the instrument. This rule is based upon public policy and is supported by a multitude of cases extending over a widespread jurisdiction, so much so that it is unnecessary to refer to any of them.

[2] The question presented for our decision is whether the avails of the policies here in question have become, because of the murder of the insured by the beneficiary, a part of her estate, and therefore, ultimately, the property of the minor Paul, her sole heir; it being conceded in the briefs that he is not an heir of the beneficiary. The authorities on one side of this question are quite numerous and thoroughly convincing. It can hardly be said that any cases cited by respondent really oppose them. The authorities first mentioned support the sensible view that the fund here in question is a part of Hazel Edna Johnson's estate. It is contended that those cited by respondent take the very unsatisfactory view that the fund goes to the heirs of her murderer, despite the fact that it can never become a part of his estate. It is to be observed here that it appears from remarks in the briefs that the sentence of death passed upon Johnson was commuted to life imprisonment and that he is now confined in a penitentiary in Arizona.

We shall cite but a few of the authorities to the effect that the proceeds of the insurance policy here in question are rightfully a part of the estate of Hazel Johnson, deceased. It is said in 29 Cyc., at pages 156, 157, in an article entitled "Mutual Benefit Insurance," "In case the designation of a beneficiary proves for any reason to be ineffectual, the fund does not as a rule revert to the society," and the text then shows to whom the fund does go under certain varying conditions. It is stated, for instance, that where the beneficiary was eligible at the time of his designation but "since became ineligible or disqualified and so not entitled to take the benefit at the time of the member's death," some other person will take. To this portion of the text is appended the following note: "If the beneficiary murders the member, and so loses his rights as such * * * the fund may be recovered by such other persons (clearly the heirs of the insured) as would take had no beneficiary been designated." To this statement are cited two cases, one of which is Schmidt v. Northern Life Association, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323. This case upholds the rule as stated in the note in 29 Cyc. and gives most excellent reason for it. The second case cited in the note in 29 Cyc. is Supreme Lodge, etc., v. Menkhausen, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239. This decision also deserves a careful reading as supporting the contention made by appellants. A short but lucid and convincing opinion in support of the view of appellants is to be found also in Anderson v. Life Ins. Co. of Virginia, 152 N. C. 1, 67 S. E. 53. Another valuable case is Equitable Life Assur. Soc. v. Weightman, 61 Okl. 106, 160 P. 629, L. R. A. 1917B, 1210. Not only is this so because the opinion rendered by the court sustains the contention of appellants, but also because the court cites several text-writers and several other decisions to the same effect. See, also, Sharpless v. Grand Lodge A. O. U. W., 135 Minn. 35, 159 N. W. 1086, L. R. A. 1917B, 670, and the note appended to the report last mentioned.

It is difficult to see how this line of cases can be overcome and how the public policy which seems to shine through them can be shown not to exist, but let us now turn to the cases cited by respondent. Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. Ct. 877, 880, 29 L. Ed. 997, is not in point. In that case the only question decided was that the trial court had erred in excluding certain evidence which was material to a determination of the point as to whether an assignee of the beneficiary had murdered the insured. Because of the exclusion of this evidence the cause was sent back for a new trial. There is, however, some obiter in the opinion which leans toward the contention of respondents. Of this we shall make some mention for the reason that it has been given a fictitious value in one or two other cases. The opinion was rendered upon writ of error and related to an action brought in New York by the administratrix of a deceased insured who was murdered by or at the instance of an assignee of the insurance policy upon the former's life. The defendant in this action was the insurance company, and by the action it was attempted to procure judgment for the avails of the policy. In the course of the opinion Justice Field said (the individual named in the quotation having been the murderer of the insured): "The assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it, if the policy were not void in its inception." This language is obiter for the reason that the evidence which was ruled out by the trial court, the reversal having been ordered because thereof, was properly admissible whether that court were finally to decide that the "valid claim" could be made only by the personal representatives of the insured or by those of the murderer. It was therefore necessary to go no further than to say that the evidence was admissible, especially as the order made was for a reversal and for a new trial. The refused evidence went only to the question whether Hunter was the murderer of the assured.

The obiter in Mutual L. Ins. Co. v. Armstrong, supra, is quoted in Spicer v. New York L. Ins. Co. (C. C. A.) 268 F. 500, 501. In the last-mentioned case the court also, following certain other cases decided by the Supreme Court of the United States, says: "The liability imposed on the insurer by the policy is purely contractual. That instrument is the measure of the rights of everybody under it. It furnishes no support for a recovery against the insurer by one in whose behalf or favor the insurer has promised to pay nothing in the event of the death of one of the insured, leaving the other surviving." We think this language can have no application here. In the case cited the policy was one insuring the lives of both husband and wife, the amount named in the instrument to be paid to either spouse upon the decease of the other. The husband murdered the wife, and the federal court held that the personal representatives of the wife could not recover, for the reason stated in the above quotation, declaring, incidentally, that the murderer, who was under life imprisonment because of the murder, had no interest in the instrument. We are not concerned with the question whether the language quoted from the opinion affords support for the conclusion reached by it, but we are amply satisfied that it has no bearing whatever upon the case now before us.

We have also examined Goldstein v. N. Y. Life Ins. Co., 225 App. Div. 642, 234 N. Y. S. 250, cited by respondent, but see nothing in the opinion there rendered which can be of assistance to us.

As we have already observed, a murderer of a person whose life is insured, the murderer being the beneficiary under the insurance policy, cannot make a valid claim upon it. This rule is announced even in the cases cited by respondent. The rule is no violation of the provision of American codes to the effect that the commission of crime shall not result in the corruption of heritable blood. In the interest of the common welfare and in the maintenance of a just and enlightened public policy it merely prevents the perpetrator of the most hideous of crimes from profiting by his felonious conduct. This public policy surely extends further than we have indicated heretofore. If the rule were that the personal representatives of murderously inclined beneficiaries might take money made bloody by the slaying of those inclined to generosity, how many individuals who now walk the streets might ride in Rolls-Royces or emulate the eagle in his dizzy flight? By such a rule many a beneficiary, aged or infirm, and contemplating a young and healthful assured, would be tempted to commit a crime which would enrich his heirs, although it were too late to enrich himself. Indeed, many a man has committed atrocious crimes for the benefit of his children.

In some of the earlier cases like the present some of the insurance companies attempted to void policies when those who were assured had been murdered by those they had named as beneficiaries. So far as we have discovered these attempts have been uniformly frustrated, and it has been decided that the avails of the policies must be paid to some one. It is horrifying to think that the money could be paid to the representatives of murderers. It is soothing to think that it can go to the heirs of the murdered. At any rate, we think it is the law that these latter should receive it.

Judgment reversed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

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115 Cal.App. 732

CONTE v. BUSBY et al.

Civ. 7880.

District Court of Appeal, First District, Division 2, California.

July 31, 1931.

1. Contracts ⚷137(1).

Where part of consideration for one or more objects is void, whole contract is void (Civ. Code, § 1608).

2. Contracts ⚷112.

Indorsement of draft for purpose of enabling indorser to conduct house of prostitution *held* void and unenforceable in hands of one taking it with knowledge of unlawful consideration (Civ. Code, § 1608; Pen. Code, § 316).

3. Contracts ⚷138(1).

Contract against public policy or against mandate of statute may not be made foundation of any action.

4. Contracts ⚷138(7).

Where indorsement of draft was to enable indorser to conduct house of prostitution, evidence of illegality *held* available to third party.

5. Appeal and error ⚷237(2).

Failure to make motion to strike testimony on ground of failure to plead defense of illegality of contract *held* waiver of such objection to admission of testimony.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Chas. L. Conte against Janis Busby, also known as Claire O'Brien, also known as Mabel O'Brien, also known as Marciea Janis Wells, and another. From the judgment, plaintiff appeals.

Affirmed.

Russell P. Tyler, of San Francisco, for appellant.

Byrne & Lamson, of San Francisco, for respondents.

NOURSE, P. J.

Plaintiff sued on a common count for money had and received in the sum of $1,015.20. The cause was tried without a jury. Judgment went for plaintiff against defendant Busby for $145, and for the other defendant for its costs. Plaintiff appeals upon typewritten transcripts.

On April 15, 1929, plaintiff sold to defendant Busby his leasehold interest, together with the furnishings and equipment of certain premises to be used as a house of prostitution. In payment Busby gave plaintiff a postdated draft for $1,015.20 drawn in her favor by Wm. Cavalier & Co. upon Logan & Bryan. Plaintiff accepted the draft and paid Busby the sum of $145, representing the difference between the agreed purchase price of the property and the face of the draft. Before the draft became legally presentable for payment, defendant Busby stopped payment and claimed the property purchased did not meet representations. She thereafter obtained possession of the draft from plaintiff on the promise that she would have it paid and accompanied plaintiff to the office of her codefendant, where she presented the draft with instructions to disregard her former protest and to pay the money to her. Plaintiff made no objection to these instructions, but did inquire if the money could be paid to him, and was informed: "Yes, if Mrs. Busby says to." Later in the same day Mrs. Busby returned alone and received payment for the full amount of the draft. Plaintiff's testimony differed in some respects from what has been stated, but there is ample evidence in the record to sustain the findings of the trial court, and it would serve no purpose to repeat that testimony here.

[1-3] The case is controlled by the general principle that, where a part of a consideration for one or more objects is void, the whole

contract is void. Civ. Code, § 1608. The trial court found that the indorsement by Busby of the draft was in consideration of and for the purpose of enabling her to conduct a house of prostitution, which is declared an unlawful act. Pen. Code, § 316. This assignment, or indorsement, was therefore void, and was unenforceable in the hands of the appellant as he took it with full knowledge of the unlawful consideration. "A void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action, either in law or in equity. Estate of Groome, 94 Cal. 69, 29 P. 487; Buck v. Eureka, 109 Cal. 504, 42 P. 243, 30 L. R. A. 409." Chateau v. Singla, 114 Cal. 91, 94, 45 P. 1015, 1016, 33 L. R. A. 750, 55 Am. St. Rep. 63. See Haruko Takeuchi v. Schmuck, 206 Cal. 782, 786, 276 P. 345, 346, where many cases are cited to the same point, and where the Supreme Court says that this rule is enforced from a regard for the interest of the public "whose welfare demands that certain transactions be discouraged."

The debatable point raised on this appeal is whether respondents may avail themselves of this defense, not having specially pleaded it. Appellant cites Sharon v. Sharon, 68 Cal. 29, 8 P. 614, and similar cases holding that, unless the illegality appears on the face of the instrument, or is brought out without objection, evidence is not admissible to prove it, unless the defense has been specially pleaded. Respondent relies on the rule that, where the defendant does not set up the defense of illegality, "but that the case made by the plaintiff or the defendant shows illegality, it becomes the duty of the court sua sponte to refuse to entertain the action." Dean v. McNerney, 91 Cal. App. 206, 208, 266 P. 975, 976. In the early case of Valentine v. Stewart, 15 Cal. 387, 405, the Supreme Court says: "If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." To the same effect are: Kreamer v. Earl, 91 Cal. 112, 117, 27 P. 735; De Leonis v. Walsh, 140 Cal. 175, 182, 73 P. 813; Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 476, 209 P. 36.

Though he does not concede the rule of these cases, appellant voices the objection that all the evidence of the illegality of the transaction was improperly admitted. The record shows that he made no objection to the testimony on the ground that the defense was not pleaded, but that he objected solely on the ground that it was not competent nor material in relation to the case of Wm. Cavalier & Co. The objection was overruled at the time with leave to appellant to move to strike it out and to argue the point. The record does not disclose that the motion to strike was later brought to the attention of the court or that a ruling was made upon it, though, at the close of the case, appellant asked leave to submit authorities on "the point of law as to consideration."

[4, 5] The grounds urged in the objection—that the evidence of illegality was not available to the third party—are not good. 6 Cal. Jur., p. 150, N-6. If the motion to strike the testimony on the grounds now urged—the failure to plead the defense—was not made or was not urged, the failure to do so under the circumstances was a waiver of any objection to the admission of the testimony. Estate of Wempe, 185 Cal. 557, 564, 197 P 949, and cases cited.

We find no error in the record.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App. 703

PEOPLE of State of California, Plaintiff and Respondent, v. William H. CASPERSON, Defendant and Appellant.

Cr. 2105.

District Court of Appeal, Second District, Division 2, California.

July 29, 1931.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Frank J. Lavan, of Culver City, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant was convicted upon a charge of violating the provisions of section 288 of the Penal Code, denouncing the commission of lewd and lascivious acts upon the persons of children under the age of fourteen. Defendant's victim was a girl nearly twelve years of age. He himself was forty-nine. The cause was tried without a jury. Defendant appeals from the judgment of conviction and from an order denying his motion for a new trial.

The sole point made by appellant is that the evidence was insufficient to support the judgment; this contention, in turn, being based upon the assertion that the girl contradicted herself in her testimony to such an extent as to render it worthless. Upon reading the brief of appellant alone, we were much inclined to the belief that the point is without merit, but, particularly, as the charge against appellant was of so serious a nature we have read the entire transcript of the testimony. From the perusal we are bound to say that the evidence in support of the judgment is most ample. We are so well satisfied with this view that it would be a useless task and a waste of time to quote from the record. To do so would make a long opinion, whereas we are wholly content to write a short one.

Judgment and order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

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116 Cal.App. 211

PEOPLE v. VINCENT.

Cr. 123.

District Court of Appeal, Fourth District, California.

Aug. 20, 1931.

1. **Criminal law** ⚷1071.

Rule that appellant present application to trial court stating grounds of appeal and points relied on is mandatory (Rules of Judicial Council, rule 2, § 7).

2. **Criminal law** ⚷1104(6).

Rule that appellant present application to trial court designating portions of reporter's notes necessary to be transcribed is mandatory (Rules of Judicial Council, rule 2, § 7).

3. **Criminal law** ⚷1071.

Application for transcript of entire reporter's notes taken on hearing of motion for new trial *held* not sufficient statement of grounds of appeal and points relied on (Rules of Judicial Council, rule 2, § 7).

4. **Criminal law** ⚷1071.

Application for reporter's transcript containing no statement of grounds of appeal or points relied on *held* deficient requiring dismissal of appeal (Rules of Judicial Council, rule 2, § 7).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Harold Vincent was convicted of robbery in the second degree, and he appeals.

Appeal dismissed.

J. C. C. Russell, of Hanford, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

FINNEY, Justice pro tem.

The appellant, Harold Vincent, was convicted of robbery in the second degree and sentenced to serve the term prescribed by law in the state penitentiary at San Quentin. Judgment was pronounced on April 6, 1931, and on the same day defendant gave oral notice of appeal from the "judgment of conviction." On April 8, 1931, written notice of appeal was filed, stating that the defendant appealed from the judgment and from the order of the court denying his motion for a new trial. The motion for a new trial was dated March 30, 1931, and was filed the following day. The motion stated, among other things, that the defendant "moves the above-named court for a new trial under section 1181 of the Penal Code and all subdivisions thereunder and amendments thereto and more especially under subdivisions 4, 5, 6, and 7," and "that since the rendition of said verdict against said defendant, said defendant has discovered new evidence material to defendant's case, which, if produced at the trial of the case, would have resulted in a different verdict." The motion for a new trial was denied April 6, 1931. An application for a transcript of the phonographic reporter's notes was filed April 8, 1931, but this instrument does not contain any statement of the grounds of the appeal nor the points upon which the appellant relies, as required under section 7, rule II, of the Rules of the Judicial Council for the Supreme Court and the District Courts of Appeal, adopted June 1, 1928, and the Attorney General moves to dismiss this appeal on that ground.

[1, 2] The provisions of section 7, rule II, of the Rules of the Judicial Council provide that, in a criminal case, "the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed." This provision is mandatory, and it has been held that, where no such application has been presented or filed, the appeal must be dismissed. See People v. Rutledge (Cal. App.) 300 P. 828, and cases therein referred to. It has also been held that an application filed and presented to the trial court for an order directing the reporter "to make a transcript of the testimony taken at the trial of said cause, to be used on appeal," which did not state the grounds of appeal or the points on which appellant relies, is insufficient. People v. Flaherty, 61 Cal. App. 775, 215 P. 699; People v. Pierce, 89 Cal. App. 290, 264 P. 519.

[3] The application for the reporter's transcript, in the case at bar, was filed and presented to the trial court in due season and designates with great particularity the portions of the reporter's notes necessary to be transcribed, but it contains no statement of the grounds of the appeal or the points upon which the appellant relies. In this application demand is also made for a transcript of "the whole and entire phonographic notes taken by the phonographic reporter from the hearing of the motion for a new trial, together with all documents presented, heard, read and introduced upon said motion in the above-entitled cause, and the whole thereof." We do not regard this reference to the motion for a new trial as a sufficient compliance with the requirements of the rule under consideration, even if the reporter had incorporated in his transcript the motion for a new trial and the grounds/ stated therein upon which the motion was made.

A motion for a new trial is required to be set forth in the clerk's transcript, if anywhere (section 1, rule II, Rules of Judicial Council), and it was not contemplated, under the rules referred to, that a mere reference thereto in the application for the reporter's transcript or incorporation thereof in the reporter's transcript would suffice for the statement of the grounds of the appeal and the points upon which appellant relies. In fact, the two may differ greatly. In a motion for a new trial it is common practice to incorporate all the statutory grounds upon which a new trial may be based, whether they are relied upon or not. On the appeal many of these grounds are waived or not urged at all by the appellant. He is required to place in his application for the reporter's transcript a statement showing the grounds of his appeal and the points upon which he relies. This is required in order to economize the time of the court in searching the record and to show good faith on the part of the appellant in taking the appeal. But in his notice of motion for a new trial no such requirement is placed upon him. In such a notice he may include whatever he chooses to place there, and one will not answer the purpose of the other.

[4] The application for the reporter's transcript in this case is deficient in that it contains no statement of the grounds of the appeal or the points upon which the appellant relies, and, inasmuch as the filing of an application containing such a statement is made a necessary prerequisite to the prosecution of an appeal from a judgment of conviction, the court is without jurisdiction to consider the appeal herein.

The appeal is therefore dismissed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

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115 Cal.App. 756

WHITING FINANCE CO. v. HOPKINS et al.

Civ. 7698.

District Court of Appeal, First District, Division 1, California.

Aug. 3, 1931.

1. Taxation 🔑108.

Stipulated facts *held* to support finding that investment company's indebtedness for government securities was created to evade taxation of credits.

The parties stipulated that finance company purchased tax exempt Liberty bonds and United States treasury certificates, bearing 4¼ per cent. interest, and gave thirty-day notes, bearing 7 and 6 per cent. interest, in payment therefor one week before tax date, and subsequently sold certificates and paid notes within fifteen days after their execution.

2. Taxation 🔑108.

Assessor's refusal to allow investment company credit for debts incurred by purchase of government securities to evade tax on credits will be sustained by court.

3. Taxation 🔑356.

Sworn declaration of deductible debts in taxpayer's property statement is condition precedent to deduction thereof in assessment of taxable credits (Pol. Code, § 3629, subd. 7).

4. Taxation 🔑446, 490.

Valuation of taxable credits is for assessor and board of equalization, and not open to judicial review.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Whiting Finance Company against Ed. W. Hopkins and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Victor Ford Collins, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Dep. Co. Counsel, both of Los Angeles, for respondents County of Los Angeles, Ed. W. Hopkins, and W. O. Welch.

Erwin P. Werner, City Atty., of Los Angeles, for respondent City of Los Angeles.

MURPHEY, Justice pro tem.

This action is predicated upon a stipulated statement of facts, from which the following, pertinent to the issues involved in this action, are taken:

Plaintiff, an investment company, was assessed in 1924 for city and county taxes in the city of Los Angeles and the county of Los Angeles in the sum of $463,573.91 as solvent credits. Against this amount, a deduction in the sum of $142,175.15 on account of debts was allowed. Appellant claimed that it was entitled to a further deduction of $350,000 arising out of the following transactions: On February 25, 1924, the appellant purchased $300,000 worth of Liberty bonds from the Security Trust & Savings Bank, giving in payment therefor its thirty-day promissory note bearing interest at the rate of 7 per cent. per annum. On the same day, the appellant purchased from the American Bank $50,000 in United States treasury certificates bearing interest at 4¼ per cent. per annum, giving in payment therefor its thirty-day promissory note bearing interest at the rate of 6 per cent. per annum. These transactions were both subsequently closed on the 10th day of March, 1924, the certificates sold and the indebtedness to the banks liquidated. This transaction, appellant contends, was declared to the assessor, respondent herein. It does not appear from the record or from the stipulation of facts by whom or in what manner such declaration was made. The assessor refused to allow credit for such indebtedness. The court adopted as its findings the stipulation of facts agreed upon by the parties, and in addition thereto found that all of said indebtedness which the assessor refused to allow as offset against plaintiff's solvent credits was incurred solely for the purpose of evading payment of taxes justly due on the property of plaintiff, and for no other purpose. The appellant was obligated in these transactions to pay 7 per cent. and 6 per cent. interest per annum respectively on these obligations, and in return received tax-exempt government securities bearing interest at the rate of 4¼ per cent. per annum.

It is the contention of appellant that there is no evidence to sustain the additional findings of fact of the trial court hereinbefore set out; that the findings are a mere surmise of the court, and furthermore, that even if it had been proved and found that these indebtednesses were actually created by appellant for the purpose of reducing its taxes, that nevertheless such fact would not be material, relying in support of this statement upon its construction of the conclusions of the New York case of People v. Ryan, 88 N. Y. 142, 42 Am. Rep. 239, and the assertion that this question has never been passed upon in this state. In the New York case, the court said: "We are referred to no statute which prohibits a property owner from choosing between the embarrassment of a debt and submission to a burden, justly indeed imposed on all, and which, if he escapes, must altogether fall upon his neighbors. The assessors, therefore, exceeded their necessary duty when, by inquisition, they so pressed the relator as to call from him a disavowal of that purpose and his innocence of intention to circumvent 'the tax laws.' The argument of the appellants is, in effect, to show that this was an ingenious falsehood. It touches, however, not the fact of an indebtedness, but the motive which led to its creation. The statute concerns itself only with the debt. It makes the 'taxable personal property' of an individual, so much only of that species of his estate as remains 'after deducting the just debts owing by him.'"

[1] In stating that this question has never been passed upon by the courts of this state, counsel for appellant entirely overlooked the case of Whiting Finance Co. v. Hopkins, 199 Cal. 429, 249 P. 853, 856, wherein the activities of this same corporation as appellant were concerned, and wherein the facts in substance and effect were identical with the situation involved in this litigation. In that case, the Supreme Court said: "It appears therefrom that the plaintiff, on February 17, 1923, opened a savings account with the Security Trust & Savings Bank of Los Angeles and deposited therein the sum of $1. On March 1, 1923, the plaintiff negotiated a loan of $175,000 from the commercial department of the same bank, and on the same day deposited said sum so borrowed in its said savings account in said bank. On March 7, 1923, the plaintiff withdrew from its said savings account the whole of said sum and repaid its loan thereof to the bank. The board of equalization of the county of Los Angeles, upon an investigation of the foregoing facts, held under the provisions of section 3673 of the Political Code, determined that the foregoing series of transactions on the part of the plaintiff had been undertaken for the purpose of evading taxation, and it accordingly acted * * * by ordering the plaintiff's assessment raised so as to make it conform to the true value of its assessable property. * * * We are of the opinion that the trial court committed no error in its ruling upon this phase of the plaintiff's case. The weight of authority, in our opinion, as well as the dictates of decency, honor, and loyalty, uphold the right of boards of equalization to fully inquire into transactions of this character with a view to preventing the evasion of taxation by individuals or corporations seeking by these and similar methods so to do."

The facts of this case tend more strongly to support the position taken by respondents than do the facts in the case just quoted between the same parties. The record shows that appellant is a finance company dealing in automobile conditional sales contracts. Practically its entire assets consist of solvent credits. Just before the tax date, under the procedure already detailed, appellant incurred debts in an amount sufficient, if effective for the purpose, to wipe out entirely the tax upon such credits. It was no part of appellant's business to deal in stocks and bonds. Its sole business was automobile sales contracts. Nevertheless it incurred debts in the sum of $350,000 in order to purchase government securities. On February 25, 1924, just a week prior to 12 o'clock a. m. of March 3, 1924, appellant, by two transactions, incurred debts in order to purchase $300,000 of tax exempt bonds and $50,000 of tax exempt United States certificates. The notes were given to run only thirty days. They paid respectively 7 per cent. and 6 per cent. interest on these obligations. In adjusting the matter, the period of interest payment and the consequent loss sustained thereby was cut to the lowest possible minimum, to wit, fifteen days. The purchased certificates were sold and the notes paid off within fifteen days, when but half their time had run. In other words, the securities were bought a week before tax day, and sold the Monday following. The transaction involved an immediate financial loss and net cost to appellant of 2¾ per cent. on $300,000 and 1¾ per cent. on $50,000. It is perfectly apparent from this recitation of the facts, as they appeared not only to the city and county assessor and the board of equalization of Los Angeles county, but also to the judge of the superior court who tried the case, that the purpose of this transaction was not a business transaction with a view to financial profits, such as usually actuate business men in such transactions, nor was the purpose a patriotic one such as was evidenced by loyal citizens during war time, nor was the purpose to bear its proportion of the burden of taxation in support of municipal and county government. We do not see any escape from the conclusion reached by these officers that this transaction was intended to be merely a temporary deal conceived and executed with the purpose and intent of evading its just tax responsibility. Appellant concedes that the assessor, board of equalization, and the trial court believed that this indebtedness was created with the motive of evading taxation. We are of the opinion that their belief is predicated upon and amply supported by a recital of the facts hereinabove set out.

[2] While in the New York case, supra, the view seems to be that neither the assessor, the board of equalization, nor the court can investigate an attempted patent fraud of this character, it nevertheless is not the rule in this state, nor have the courts in this or other jurisdictions felt that their eyes must remain closed and their powers to function stand helpless and paralyzed to render nugatory and ineffectual such fraudulent purposes as are evidenced by the manipulations in the instant case. In Holly Springs Savings & Insurance Co. v. Supervisors, 52 Miss. 281, 24 Am. Rep. 668, the court said: "The question presented is, therefore, whether a banking institution can avoid taxation by an investment of its means in the non-taxable securities of the government, where it is admitted and satisfactorily established that such investment was neither intended to be permanent nor to continue until the interest or the will of its managers should dictate a change, but with the sole intention of escaping taxation, and with the predetermined purpose of reconverting its means as soon as practicable after the day of assessment. * * * The court below did not err in holding the capital stock of plaintiff in error to be taxable under the state of facts disclosed by the record. * * * It is argued that the savings institution was only bound by law to make out and deliver a list 'of all taxable property of which it was possessed on the 1st day of January preceding,' and that if on said day it was possessed of no property taxable by law, it cannot be made to pay taxes, and that the state cannot inquire by what means it dispossessed itself of the property, or what are its intentions with regard to repossessing itself of it. There are, we think, two satisfactory answers to this reasoning. In the first place, it proceeds upon a too literal interpretation of the statute; and, in the second place, it overlooks the principle that fraud vitiates everything into which it enters, and nullifies the advantages which fair dealing would have conferred. When the state imposes the burden of taxation upon the property possessed by the citizen, it means both that of which he is the open holder and that which he has secreted and concealed. His cunning may in practice defeat the imposition upon the latter, but it is legally no less liable to the burden, and, when discovered, the duty will be exacted, no matter what the shifts and devices which may have been resorted to in order to escape."

In the case of Jones v. Seward County, 10 Neb. 154, 4 N. W. 946, 947, the court says: "The court below found that the plaintiff did not purchase the bonds in question in good faith. Is this finding sustained by the evidence? We think it is. The plaintiff does not claim that the money was intended by him to remain invested in bonds. On the contrary, it appears from his own testimony that the investment was merely temporary. It is evident that the investment, if such it can be called, was not made for profit, although there was a small profit. * * * But it is said fraud is never presumed, but must be proved. This is true. But in what manner is it to be proved? Judge Story says: 'Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.' Story's Eq. Jur. § 187. And, in speaking of the proof, it is said: 'On the other hand, neither of these courts insists upon positive and express proofs of fraud, but each deduces them from circumstances affording strong presumptions.' Id. § 190. In but few instances, comparatively, can fraudulent intent be shown by direct testimony, and, therefore, is generally established by circumstantial evidence, and in our opinion the testimony establishes the fact that the bonds in question were purchased by the plaintiff, not with the design of making a permanent investment, but for the sole purpose of evading taxation. * * * When a change is thus made for the sole purpose of defrauding the government of its just dues, and to enable a party to escape the payment of his just proportion of the taxes imposed by law, he cannot shelter himself behind such temporary change in the character of his funds to escape taxation."

To the same effect are the cases of In re People's Bank of Vermont, 203 Ill. 300, 67 N. E. 777; Poppleton v. Yamhill County, 8 Or. 337; Mitchell v. Leavenworth County Commissioners, 91 U. S. 206, 23 L. Ed. 302, in which case the Supreme Court of Kansas dismissed the appeal (9 Kan. 344) saying that "a court of justice, sitting as a court of equity, will not lend its aid for the accomplishment of any such purpose." Mitchell appealed to the United States Supreme Court, which said: "We think the decision in this case was correct. United States notes are exempt from taxation by or under state or municipal authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation." See, also, Dixon County v. Halstead, 23 Neb. 697, 37 N. W. 621; Senour v. Matchett, 140 Ind. 636, 40 N. E. 122.

[3] The trial court, so far as disclosed by the record, based its decision solely, and this is evidenced by the foregoing discussion and we believe correctly, upon the ground of fraudulent evasion of tax obligation to the municipality and county government in the city of Los Angeles and in the county of Los Angeles. Respondent discusses several other points in support of the conclusions reached by the trial court, all of which appellant contends were not presented to that tribunal. It is not clear from the record just what matters were called to the attention of the trial court. These points, briefly stated, are, first, that appellant did not entitle itself to the deductions which it herein claims by declaring in its property statements to the assessor its alleged deductible debts. Such a declaration by the property owner under oath in its property statement is a condition precedent to any right to a deduction of debts in the assessment of taxable credits. Pol. Code, § 3629, subd. 7; 3 Cooley on Taxation (4th Ed.) § 1159.

[4] Second, it does not appear that appellant's notes to the two banks were issued to residents of the state, such that if still held by the banks on the tax date, they would be legally deductible from appellant's taxable credits. Third, appellant did own taxable credits. The valuation of such credits, whether by the process originally fixing that value, or of fixing it after first crediting against the same the amount of deductible debts, was a question of valuation purely, and, as such, was for the assessor and the board of equalization. It was not a question open to judicial review. Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A. L. R. 1277; Southern California Hardwood etc. Co. v. County of Los Angeles, 49 Cal. App. 712, 194 P. 62; Globe Grain & Milling Co. v. County of Los Angeles, 62 Cal. App. 297, 216 P. 631. These are all cases in which the point involving this subdivision was practically passed upon adversely to the contentions of appellant by the appellate court of this state.

We do not deem it necessary to discuss extensively the questions raised in points 1, 2, and 3, just outlined, as we deem the conclusion of the trial court on the sole point mentioned in its findings and judgment to be so manifestly a correct legal solution of the problems involved in this litigation, that any further discussion would be superfluous.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

O'CONNELL et ux. v. UNION DRILLING & PETROLEUM CO. et al.*

Civ. 6874.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1931.

Rehearing Granted Sept. 4, 1931.

1. Mines and minerals 🔑79(7).

In action for return of moneys paid for certificates representing overriding royalty, evidence warranted finding that corporate director represented moneys paid would be held by corporation in trust for drilling well, and would be returned on failure to do so.

2. Mines and minerals 🔑73.

Interest of lessee under oil and gas lease is "property."

[Ed. Note.—For other definitions of "Property," see Words and Phrases.]

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*For subsequent opinion see 8 P.2d 867.

3. Licenses ⟹18½.

Certificates sold by corporate lessee under oil and gas lease representing interest known as overruling royalty *held* "securities" within Corporate Securities Act (St. 1925, p. 962, § 2, subds. 7 (b), 9).

The certificates conveyed right to participate and share in undeveloped oil, gas, or other hydro-carbon substances produced, saved, and sold from any part of realty under leasehold to corporation.

[Ed. Note.—For other definitions of "Security," see Words and Phrases.]

4. Trial ⟹398.

Finding that plaintiffs presented check to defendant corporation for $4,000, and that they paid defendant cash, *held* not contradictory.

5. Licenses ⟹39.

Money paid by purchaser for void sale of interests without permit from commissioner of corporations may be recovered in action in assumpsit (St. 1925, p. 962, § 2, subds. 7(b), 9).

6. Licenses ⟹39.

Corporation could be held liable where directors sold worthless certificates representing overriding royalty without permit, although corporation neither authorized nor ratified fraud (St. 1925, p. 962, § 2, subds. 7 (b), 9).

7. Corporations ⟹306.

Corporation's officers are liable if they commit tort, regardless of what liability attaches to corporation.

8. Mines and minerals ⟹79(7).

In action to recover moneys paid for certificates representing overriding royalty where no drilling was done, evidence regarding conversations and occurrences showing money wás paid to another for purpose of drilling *held* properly excluded because immaterial.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Groover O'Connell and wife against the Union Drilling & Petroleum Company and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Newby & Newby and Dee Holder, all of Los Angeles, for appellants.

Neil S. McCarthy, Earl L. Banta, Harmel L. Pratt, and Howard P. Hall, all of Los Angeles, for respondents.

CRAIG, J.

Certain real property in Los Angeles county held under lease by the appellant corporation, of which the individual appellants were directors, was acquired by them for the drilling of an oil well. The respondents purchased certificates representing interests known as overriding royalties therein. The well was not completed, demand for a return of the moneys paid for said certificates was refused, and in an action therefor judgment was rendered in favor of the plaintiffs, from which the defendants appealed.

Following negotiations between appellant McCaslin and respondent O'Connell, in the presence of one Charles A. Draper, during which the former offered to sell certificates, each representing "a gross overriding royalty interest equal to one per cent (1%) of the gross proceeds received from the sale of any and all oil, gas or other hydrocarbon substances produced, saved or sold," to quote from the testimony, McCaslin agreed. "O'Connell if you won't mention a price and take five per centages, I will let you have them for $800 a per cent. * * * The money is going to be put in trust and can be spent only for drilling this well for the protection of investors, and in the event the well is not drilled the money will be returned to the investors. * * * I kept the lease in my own hands. * * * You don't need to worry about this well going down. It is up to me to put down the well."

Thereupon, respondent O'Connell made and delivered to McCaslin his check: "Pay to the order of Union Drilling and Petroleum Co. $4,000.00 Four Thousand and no/100 Dollars. (Signed) G. O'Connell." Which was thereafter indorsed: "Pay to the order of H. E. MacAdams Union Drilling & Petroleum Co. W. E. McCaslin, Pres. E. B. Kenney, Secty. H. E. MacAdams." Respondent at the same time received from McCaslin five documents, each reciting that the "Union Drilling & Petroleum Company, a corporation, assignor herein, for and in consideration of the sum of ten dollars ($10.00) and other good and valuable consideration to it in hand paid by the assignee herein, Groover O'Connell and Maybel O'Connell, joint tenants, the assignee herein, a gross over-riding royalty interest equal to one per cent (1%) of the gross proceeds received from the sale of any and all oil, gas or other hydro-carbon substances produced, saved and sold from [lands described] * * * to be produced and saved under the terms of a certain oil and gas lease, executed by W. W. Bucknam, et al., as lessor, to Union Drilling & Petroleum Company, a California corporation, as lessee. * * * The assignor hereby warrants and declares that it is the owner of the royalty interest hereby assigned, and that it has not heretofore sold, mortgaged or otherwise encumbered same. In

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

witness whereof, the said Union Drilling & Petroleum Company has hereunto affixed its corporate name and seal by its proper officers thereunto duly authorized, this 10th day of April, 1927, at Los Angeles, California. [Signed] Union Drilling & Petroleum Company, By W. E. McCaslin, President. E. B. Kenney, Secretary." The names of the assignees were then and there inserted by O'Connell, and it is not denied that said assignments had previously been in possession of one F. S. N. Parkinson. Respondent testified that Parkinson was present at the time of the assignments to respondent, and asked the latter's reason for inserting the names, to which O'Connell replied: "I am going to record them * * * tomorrow. * * * If they are as good as that check, they are worth recording." He further swore positively that MacAdams was at no time present, that he had no part in the transaction, and was not mentioned at any time, by any of the parties. In response to repeated inquiries by respondent, McCaslin about three months thereafter admitted: "We decided not to drill it. * * * It don't look good over on that side now. * * * Don't worry about your money. You will get your money back. I will attend to it right away. * * * I want to get this cleared up. The money is just as good as if you had it in your mind." However, respondent thereafter received a letter from the appellant corporation as follows: "We wish to inform you that this company received none of the money you paid for your interests. They were originally issued by us to H. E. McAdam pursuant to a contract between us for the drilling of the well and in consideration of work done by him thereunder. Mr. McAdam sold you these percents and we therefore suggest that you take the matter up with him."

[1] Notwithstanding the foregoing facts in the case, appellants advance the somewhat novel argument that "said certificates were not sold by the corporation, but on the contrary it delivered the same to MacAdams in compliance with its working agreement with him; * * * under this agreement it had agreed to execute and deliver to MacAdams assignments of per cents in the well as the work under the contract progressed. * * * It needs no legal authority to sustain the proposition that the title to these assignments became and was vested in MacAdams upon their delivery to Parkinson for him. In short, at the time of the sale to the plaintiffs, MacAdams was the owner of the certificates." Aside from an evasion of the consequences of admitted failure to obtain a permit from the commissioner of corporations, we are not advised as to the theory upon which appellants might escape responsibility for a sale of interests which they did not own. Whether the consideration was obtained through a violation of law or by misrepresentation to O'Connell as to ownership, respondents alleged both grounds for recovery of their money, and a judgment based upon either must be upheld if supported by substantial evidence. The trial court found that said defendant McCaslin represented and agreed that all moneys paid for said interests would be held by the company in trust for the sole purpose of drilling a well, and that, in the event of a failure to drill, said sum of $4,000 would be returned to respondents upon demand. The evidence herein recited was sufficient to warrant such findings, and the failure to drill or to refund the consideration is admitted.

[2, 3] Upon the same premise it is insisted that the transaction did not constitute a sale of an interest in securities within the purview of the Corporate Securities Act, Stats. 1925, p. 962, § 2, subds. 7 (b), 9. The act provides:

"Any instrument offered to the public by a 'company' evidencing or representing any right to participate or share in oil, gas or other hydrocarbon substances or other minerals of any sort, as yet undeveloped, or in the proceeds of sale thereof" is the legal definition of a "security."

"A 'sale,' within the meaning of this act, includes every contract, by which, for a pecuniary consideration, called a price, one transfers to another an interest in property. * * *"

It is argued that the working agreement between MacAdams and the corporation under which said certificates were delivered to MacAdams and the latter became the owner thereof was a contract for labor, and was not a sale. It is not apparent from the record why MacAdams did not retain the interests if in fact he had had them, but the evidence and findings that McCaslin and the corporation sold them to O'Connell and insisted that he make his check to the company refutes the asserted sale by MacAdams to O'Connell. That the interest held by the corporation was "property" is settled law. Terry v. Humphreys, 27 N. M. 564, 203 P. 539; Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211; Parker v. Riley, 250 U. S. 66, 39 S. Ct. 405, 63 L. Ed. 847. And the interest evidenced by the instruments sold by the company to O'Connell conveying the right to participate and share in undeveloped "oil, gas or other hydrocarbon substances produced, saved and sold" from any part of the realty under leasehold to said company, was no more nor less than a security within the specific definition of our statutes.

[4] Appellants assign as contradictory and irreconcilable findings of fact that the plaintiffs presented to the defendant company a check for $4,000, that they paid to the defendant company cash, lawful money of the United States, and that the moneys were had and received by the defendants from the plaintiffs.

It appears that by means of a check respondent converted $4,000 of the cash in his account at the bank into securities which proved to be of no value. The argument that a check is not cash is therefore inapplicable to the facts of the instant case. The corporation and its officers received the check and indorsed it. Its indorsement by MacAdams was not an incident of the transaction, nor was it known to O'Connell or material to the agreement of the parties.

[5-7] Error is assigned to the rendition of judgment against all of the defendants, but the argument and citation of authorities holding that where there are two or more joint tort-feasors and the tort is waived, or that, in an action for specific personal property, a different result is attained, are here untenable. The present action is based upon separate causes arising from the sale of interests without a permit from the commissioner of corporations, and for money had and received. Money paid by a purchaser for an interest under such void sale may be recovered in an action in assumpsit, as for money had and received. Smith v. Bach, 183 Cal. 259, 191 P. 14; Barrett v. Gore, 88 Cal. App. 372, 263 P. 564. And the corporation may be liable, although it neither authorized nor ratified the fraud. Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 P. 25; Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 255 P. 225. As to officers of a corporation, it has been held generally that they do not incur liability simply by reason of their official character, but that if they commit a tort they are liable therefor; and it matters not what liability may attach to the corporation for the tort. It is said that this principle exists both in England and in this country as one founded upon the soundest legal analogies and the wisest public policy. Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 So. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88; Goodspeed v. E. Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439; Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176; Ward v. Pullman Car Corp., 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343; Wines v. Crosby & Co., 169 Mich. 210, 135 N. W. 96, 39 L. R. A. (N. S.) 901, Ann. Cas. 1913D, 1055; Cameron v. Kenyon-Connell Comm. Co., 22 Mont. 312, 56 P. 358, 44 L. R. A. 508, 74 Am. St. Rep. 602; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Nunnelly v. Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 366, 28 L. R. A. 421; Smith v. Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620; Karns v. Allen, 135 Wis. 48, 115 N. W. 357, 15 Ann. Cas. 543; Hoffman v. Toft, 70 Or. 488, 142 P. 365, 52 L. R. A. (N. S.) 944. "To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations. It would serve to stimulate the zeal of responsible and solvent agents of irresponsible and insolvent corporations in their efforts to repair the shattered fortunes of their failing principals upon the ruins of the rights of others." Nunnelly v. Southern Iron Co., supra. The authorities are uniform in holding nonparticipants immune from liability, but the directors herein named who were respectively president and secretary of the appellant corporation are shown to have actively participated in the issuance of securities which were void from their inception. They bound their corporation to refund, in the event of a contingency, which transpired, the amount of respondents' outlay, by acts which they were individually bound to know were prohibited; and in the name of and for said corporation they obtained a valuable consideration for void evidences of a purported investment through which they hoped to profit at respondents' expense.

[8] It is contended that the trial court erred in sustaining objections to questions propounded by appellants as to conversations and occurrences tending to show that the money was paid to MacAdams for the purpose of drilling. It appears, however, that he was not present at the time of the purchase and payment by respondent to McCaslin, and that no drilling was done. Hence it is self-evident that the funds were not applied under the contract for the purposes contemplated by such purpose, and that the offered evidence was immaterial.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

115 Cal.App. 709

DWYER et al. v. LOS ANGELES RY. CORPORATION.

Civ. 6481.

District Court of Appeal, Second District, Division 1, California.

July 30, 1931.

Rehearing Denied Aug. 27, 1931.

1. Carriers ⚷318(8).

In action by intending passenger struck by "rear overhang" of street car rounding curve, evidence supported verdict for railroad.

2. Appeal and error ⚷1040(9).

Where case was presented to jury on theories of both first and second amended complaints, sustaining demurrer to first amended complaint *held* not prejudicial.

3. Carriers ⚷287(3).

Motorman rounding curve need not warn adult standing near track against danger of collision with rear of street car.

4. Carriers ⚷287(3).

Loader stationed on street to receive fares had no duty to warn intending passenger standing near track of danger of collision with rear of street car rounding curve.

5. Carriers ⚷316(1).

That intending passenger was struck by "rear overhang" of street car rounding curve did not raise presumption of railroad's negligence.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Mary Lois Dwyer and another against the Los Angeles Railway Corporation. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Ed. Fitzpatrick and Culver & Nourse, all of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

CONREY, P. J.

Plaintiff Mrs. Dwyer was injured by collision with a street car of respondent under circumstances which may be described in general terms, as follows: At the corner of Seventh and Mateo streets, in the city of Los Angeles, the route of travel for the street cars of respondent makes a turn whereby north-bound cars on Mateo street, when they reach said intersection, turn to the left and then travel westward on Seventh street. From this, it results that persons intending to travel westward on Seventh street as passengers on respondent's cars are required to enter the cars at their stopping point at the southeast corner of the intersection, and at or near the point where the cars make their left turn. At the time of the accident in which Mrs. Dwyer (hereinafter called appellant) was injured, there were two lines of cars, one designated J cars and the other designated R cars (according to their respective routings), which regularly came to this intersection from the south. On the occasion of this accident, appellant had come to this corner for the purpose of becoming a passenger on a J car. The principal place of entry for passengers on these cars was at the rear end of the car, where the conductor has his principal station, but there is also a door at the front. For the purpose of more rapid disposal of the movement of passengers seeking to enter these cars during busy hours, respondent at such times kept at this corner an employee of the description commonly known as a "loader." It seems to be the particular business of this loader to stand near the front door of the car, at the place where the car stops, and there receive the fares of passengers who are then permitted to enter by the front door.

At the particular time of the accident in question, an R car had stopped at the intersection, and the loader was standing nearby, receiving fares. At the same time the J car, upon which appellant intended to become a passenger, was approaching from the south, but was distant "a block or so," probably less than the entire block, from the point where the R car had stopped. While the traffic situation was in the condition thus described, appellant stepped out to a place near the R car and near to the loader, for the purpose of handing to him her fare so that she would be ready to step into the J car upon its arrival. Manifestly this could not take place until the R car had moved forward on its way around the corner into Seventh street. At this instant, the R car did move forward, and in so moving the rear end of the car swung out to the east. In so doing, the side of the car, aptly described as the "rear overhang" thereof, struck appellant and knocked her down upon the street, and thereby caused the injuries of which she complains. The case went to trial on the second amended complaint and respondent's answer thereto. In said complaint, it was alleged that at the stated time and place the plaintiff "was holding herself in readiness and was about to become a passenger on one of defendant's street cars; that at that time and place the defendant carelessly, negligently and recklessly managed and operated one of its said street cars, and as a result," etc. Defendant in its answer denied that the plaintiff was holding herself in readiness or was about to become a passenger, and denied the allegations of negligence. Defendant also pleaded contributory negligence of the plaintiff. The judgment from which the plaintiff appeals was entered in accordance with the jury's verdict in favor of defendant.

[1] The evidence shows without dispute that appellant was not, and was not intending to be, a passenger on the car which hit her. There is no evidence of negligence in the operating of said car by either the conductor or motorman thereof, unless the mere happening of the accident would be such evidence. If there was any negligence with which respondent could be chargeable (unless with the exception above noted), it must have been negligence of the employee called the loader, and this must have consisted in his failure to perform some duty which his position imposed upon him with respect to appellant. If his duties were such that he was under obligation to look out for intending passengers and see that they did not stand too close to the cars as they swung out at the curb, and if he failed to use reasonable care in respect to that duty, and if as a result of such failure injury occurred to the intending passenger, then respondent would be chargeable with negligence in the transaction, and the jury was, in effect, so instructed. Appellant testified that she was employed in that neighborhood and had been taking this same car regularly for nearly a year before the accident; that she was watching the street car before she got out into the street, and that she knew that the rear overhang of the street car would jut out as it would go around the curve. This was evidence directly tending to support the plea of contributory negligence of the plaintiff in standing too near to the car. Without reviewing the evidence at length, it will suffice to say that the evidence is sufficient to support the verdict of the jury. If there is any reason for reversing the judgment, such reason or ground must be found in some error in the rulings of the court, or in its instructions to the jury. This brings us to the principal points relied upon in support of the appeal.

[2] Appellant's first point is that the court erred in sustaining defendant's demurrer to the amended complaint preceding the filing of the second amended complaint. The amended complaint in its first count was substantially like the second amended complaint, in that it proceeded upon the theory that the plaintiff was a passenger of the defendant, whereas the second count alleged the same facts of negligence, but omitted any statement concerning plaintiff's situation as a passenger. Assuming that the court erred in sustaining the demurrer to the amended complaint, it is sufficient to note that plaintiffs' case was presented to the jury on both theories, and the jury was instructed not only concerning respondent's duty to appellant as a passenger, if they should find she was a passenger, but also instructed concerning the rule of negligence applicable to the case, if appellant was not a passenger at the time of the accident. Therefore, the error was not prejudicial in its effect.

Next we have a group of points relied upon by appellant, concerned with the doctrine known as "res ipsa loquitur." The court in reading its instructions to the jury told them, among other things, that if they should find from the evidence that the relation of carrier and passenger existed between appellant and respondent at the time of the accident, "and that Mrs. Dwyer was injured by the operation of one of the defendant's cars while such relationship existed, the burden is cast upon the defendant to explain the manner in which the accident happened, that is, to show that the injury was occasioned by an inevitable casualty or some other cause which common care or foresight could not prevent or by the contributory negligence of the plaintiff herself." The court took an overnight recess before completing the announcement of its instructions to the jury, and, after the recess, withdrew the instruction last above mentioned. In that connection, the court then said to the jury: "You are instructed that the doctrine of res ipsa loquitur does not apply to this case. Res ipsa loquitur means, 'the thing speaks for itself'; and where applicable it would be sufficient for the plaintiff to show by a preponderance of the evidence the relationship of passenger and carrier and the injury to plaintiff while a passenger. In such case an inference of negligence on the part of the defendant would arise and defendant would be required to meet this inference. But here the plaintiff pleaded and offered proof as to the manner in which defendant was alleged to be negligent, therefore the doctrine of res ipsa loquitur cannot apply. Therefore, unless you find from the evidence that defendant's negligence was the sole proximate cause of injury to the plaintiff, your verdict should be for the defendant. If you find from the evidence that defendant's negligence was the proximate cause of injury to the plaintiff and the plaintiff was not guilty of contributory negligence, your verdict shall be for the plaintiff. Therefore the following instruction heretofore read to you is withdrawn, cancelled and obliterated, and you are to disregard it entirely as though you had never heard it: (quoting the cancelled instruction)."

[3-5] I think that the record does not satisfactorily support the suggestion made by the trial court in its later instruction that the stated doctrine did not apply to the case because the plaintiff pleaded and offered proof of the manner in which the defendant was alleged to be negligent. Seney v. Pickwick Stages, 82 Cal. App. 226, 229, 255 P. 279. But this does not settle the question. We still have to consider whether (assuming that the relation of carrier and passenger existed) the

mere happening of the accident and injury was sufficient to raise an inference of negligence on the part of the defendant. The precise question before us does not appear to have been determined in this state, in relation to passengers preparing to enter street cars, although the rule as between street railways and pedestrians in general has been settled. In Wood v. Los Angeles Railway Corp., 172 Cal. 15, 155 P. 68, the court quoted with approval a decision wherein the Supreme Court of Kentucky (Louisville Ry. Co. v. Ray [Ky.] 124 S. W. 313) said that, although it is the duty of those in charge of a street car to keep a lookout so as to avoid injuring those who may be crossing or upon the street in front of the moving car, this rule has never been so extended as to require the employees in charge of the car to keep a lookout at corners and curves so as to prevent others using the street from colliding with the rear end of the car. But the plaintiff in the Wood Case was not a passenger, and the question whether the same rule would apply as against a passenger was not suggested. In a note found in Ann. Cas. 1916E, page 680, a number of decisions are cited to the effect that the rule that a street railway company is under no duty to keep a lookout to prevent persons from coming in contact with the rear end of a car rounding a curve applies to those leaving a car and to those intending to become passengers. In Miller v. Public Service R. Co., 86 N. J. Law, 631, 92 A. 343, L. R. A. 1915C, 605, the court said: "The rule approved by the weight of authority is that, in view of the well-known fact that in rounding a curve the rear end of a street car will swing beyond the track, and overlap the street to a greater extent than the front, the motorman may rightfully assume that an adult person, standing near the track, who is apparently able to see, hear, and move, and, having notice of the approach of a street car, and of the existence of the curve, will draw back far enough to avoid being struck by the rear of the car as it swings around the curve in the usual and expected manner, and therefore no legal duty is imposed upon the motorman to warn such a person against the possible danger of a collision with the rear, because of the swing, if he remains in the same position"—citing authorities.

I think that the foregoing is a correct statement of the law as applied to the duties of a motorman. I see no reason why the same rule should not apply with respect to the duties of an employee stationed on the street for the mere purpose of receiving fares and permitting passengers to enter the cars after the fares have been paid. In this case, there is no direct evidence that the so-called "loader" had any other duty. It may be assumed that if there had been evidence tending to prove that the so-called loader saw that the plaintiff was standing in a position where the car in its turning would hit her, and if, so seeing, he had failed to use reasonable care to give the plaintiff warning of her danger, the defendant would have been chargeable with his negligence in that particular. But this would be direct evidence of negligence and would not come within the scope of the rule of res ipsa loquitur. I am of the opinion that there was no error in the instructions of the court upon the subject here in question. The evidence fails to show even the general fact that the accident was caused by some fault in the operation of the car. In a somewhat analogous case in respect to the condition of the evidence, it was held that the court erred in giving an instruction which applied the res ipsa loquitur rule to the case. Ginochio v. San Francisco, 57 Cal. App. 150, 206 P. 763.

We have examined the additional criticisms made by appellant to certain instructions to the jury, and find that no prejudicial error in said instructions has been shown. We are further of the opinion that the point that there was a conflict between two of the instructions is not well taken; and that the instruction beginning at line 20, page 111, reporter's transcript, fully and fairly states the conditions under which the plaintiff would be entitled to recover, if the jury should find that the relation of carrier and passenger existed. Other instructions properly stated the rule of negligence applicable to the case, if the relation of passenger and carrier did not exist.

The judgment is affirmed.

HOUSER, J.

I concur. Although I am in accord with the judgment indicated in the opinion prepared and signed by Presiding Justice CONREY, reasoning from the authorities and general principles applicable to the facts of the case, I am unable to unreservedly subscribe to the "ratiocination" by which he is led to his conclusion.

Since it is possible that within the admitted facts of this case the jury might have determined that at the time when plaintiff sustained the injury of which she here complains she was a passenger of the defendant (Hart v. Fresno Traction Co., 175 Cal. 489, 167 P. 885; Nilson v. Oakland Traction Co., 10 Cal. App. 103, 101 P. 413), and assuming that such a conclusion had been so reached, inevitably it would follow that plaintiff was then entitled to such care on the part of the defendant to prevent her from being injured as is ordinarily legally required of a carrier toward its passengers. In other words, according to the statutory provisions of this state (section 2100, Civ. Code), the carrier was obliged to use the "utmost care and diligence" for the safe carriage of the passenger. In that connection, if after having reached the conclusion that as between plaintiff and the defendant the relationship of carrier and passenger existed, in the absence of any showing that the accident occurred by reason of inevitable casualty or some other cause which human care and foresight could not have prevented, or by the contributory negligence of plaintiff, it then became the further duty of the jury to determine whether "the utmost care and diligence" for the safe carriage of plaintiff had been exercised by the defendant, which duty necessarily included a consideration by the jury not only of the particular acts and conduct shown to have been performed by the motorman, the conductor, or the loader of the car of the defendant, but as well what particular act or thing (if any) omitted to be done by them, or by either of them, reasonably might have been performed by them or either of them, which would have constituted a compliance by the defendant with the statutory requirement that it use the utmost care and diligence to see that plaintiff sustained no injury during the time that the relationship of passenger and carrier existed between plaintiff and the defendant.

As is succinctly stated in 4 Cal. Jur. 980, where many authorities are cited in its support: "It has been long and continuously settled that, in an action by a passenger against a carrier for injuries received a prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. This rule has been announced by the cases again and again. The occurrence of the accident raises a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part; that is, that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff himself tends to show that the injury was occasioned by one of these causes. This rule is known as the doctrine of res ipsa loquitur."

Relying upon the accuracy of the foregoing statement of the law, to my mind it would seem inescapable that plaintiff was entitled to have given to the jury the instruction which was requested by her but refused by the trial court, and to which attention has been directed by Presiding Justice CONREY.

Neither "inevitable casualty" nor any cause "which human care and foresight could not prevent" was attempted to be shown by the defendant. For aught that appears, the "utmost care and diligence" required by the carrier for the safe carriage of the passenger was not exercised by the defendant, from which it would follow that at least a prima facie case of plain neglect of duty on the part of the defendant had been established, and that, in the absence of a showing from the entire evidence in the case that plaintiff had been guilty of contributory negligence, she would be entitled to be compensated by a judgment for whatever damages she sustained.

Considering such evidence as is set forth in the opinion of Presiding Justice CONREY, it unquestionably appears that for a long time preceding the happening of the accident plaintiff was most familiar with the entire situation; that is to say, she habitually boarded a street car at the place where the accident occurred; she knew that in following its regular route the R car turned the corner at that point, and that in so doing its rear end or "overhang" necessarily projected into the street considerably farther than it did when the car was not so engaged, and that if she maintained a position within the range of the "overhang," necessarily she would come into collision with the car, from which happening an injury might result to her. Nevertheless, with such knowledge on her part, at least partly because of the fact that she neglected to protect herself from being injured, the accident of which she here complains occurred. To my mind, it shows a clear case of contributory negligence on the part of plaintiff, which has the legal effect of precluding the recovery of a judgment for damages against the defendant. Townsend v. Houston Electric Co. (Tex. Civ. App.) 154 S. W. 629.

My ultimate conclusion is that although error was committed by the trial court in its refusal to give to the jury the instruction to which attention has been directed, because of the fact that such error did not result in a miscarriage of justice, the judgment should be affirmed. Section 4½, art. 6, Const.

MERCHANTS NAT. BANK OF LOS ANGELES v. CLARK-PARKER CO. et al.*

Civ. 6449.

District Court of Appeal, Second District, Division 2, California.

July 28, 1931.

Rehearing Denied Aug. 27, 1931. Hearing Granted by Supreme Court Sept. 24, 1931.

1. Set-off and counterclaim 🔑44(1).

Individual demand of one defendant could not be interposed as counterclaim, where defendants were sued jointly on note (Code Civ. Proc. § 438).

2. Pleading 🔑138.

Where complaint in joint action on note against two defendants did not present issues susceptible to counterclaim of one defendant, defense could not reconstruct or alter by answer issues presented by plaintiff.

3. Courts 🔑37(2).

Jurisdictional questions are not waived by delay in making motion.

4. Pleading 🔑411.

In joint action on note against two defendants, plaintiff's delay in making motion to strike out counterclaim of individual defendant did not estop plaintiff from attacking counterclaim.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by the Merchants' National Bank of Los Angeles against the Clark-Parker Company, S. N. Clark, and another, doing business under the name and style of Clark-Parker Company. From a judgment for plaintiff, defendant S. N. Clark appeals.

Affirmed.

William C. Ring, of Los Angeles, for appellant.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondent.

CRAIG, J.

The defendant S. N. Clark appealed from a judgment in favor of the plaintiff, respondent here, in an action upon a promissory note executed in the name of Clark-Parker Company by S. N. Clark.

The subject-matter of this action consisted of a promissory note in the sum of $10,000, due 180 days from its date, and signed in the firm name by appellant. To the complaint based thereon Clark filed an individual answer and counterclaim, denying liability and demanding, as a "further, separate and distinct defense thereto," compensation for work, labor, and services alleged to have been performed by him for the plaintiff about three years prior to the date of the note. An answer to the defendant's affirmative defense was entered at the instance of the plaintiff, who thereafter moved to strike out the counterclaim of S. N. Clark upon the ground that an individual claim did not constitute a legal set-off against a suit upon a joint obligation. Said motion was granted, and a motion by the defendant Clark to file an amended answer setting forth the same counter charges by more specific allegations was denied. Error is assigned to the rulings last mentioned.

[1] It appears that defendants were sued jointly, but that the promissory note as pleaded bore the individual signatures of the company and of appellant. It is contended that, as originally pleaded, the note sued upon created a joint and several liability, entitling one of the defendants to interpose a counterclaim. But, if none existed in fact, the individual defendant must concededly still be relegated to his proper legal recourse as if no suit were pending. No action against him in which to counterplead existed. The note in question could not have been executed by a fictitious firm. It was signed in the name of the company by S. N. Clark, and upon discovery of such fact the trial judge authorized an insertion of the insignia of agency to conform thereto, by amendment of the complaint. Hence it is plain that by no method of pleading could the plaintiff have maintained a cause of action upon a several liability of Clark, and that the counterclaim was groundless. That an individual demand may not properly be interposed to a joint action against two defendants is settled law. Code Civ. Proc. § 438; Roberts v. Donovan, 70 Cal. 108, 9 P. 180, 11 P. 599; McDonald v. Poole, 113 Cal. 437, 45 P. 702; Kales v. Houghton, 190 Cal. 294, 212 P. 21.

[2-4] It is further argued that the plaintiff delayed in moving to strike out such counterclaim, rendering it guilty of laches tantamount to an estoppel; and also that an amended answer, and a counterclaim showing that appellant's liability was several, should have been accepted by the court and filed. For the reasons herein stated, the complaint as framed, in accordance with the facts, did not present issues susceptible to a counterclaim. And it does not lie with the defense to reconstruct or alter by answer issues presented by the plaintiff. Jurisdictional questions are not waived by delay in making the motion. Bulkley v. Bulkley, 6 Abb. Prac. (N. Y.) 307; Twine v. Carey, 2 Okl. 249, 37 P. 1096. Nor is the vacating of void proceedings governed by the rule relating to motions of a dilatory nature. Peterson v. Metrop. Nat. Bank, 88 Ill. App. 190. Since

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*For subsequent opinion see 9 P.2d 826.

the counterclaim could be afforded no jurisdictional cognizance in such a case, its exclusion before trial was timely.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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116 Cal.App. 1

FISHMAN v. SILVA et al.

ETTLING v. SAME.

Civ. 7285.

District Court of Appeal, First District, Division 1, California.

August 4, 1931.

Rehearing Denied Sept. 3, 1931. Hearing Denied by Supreme Court Oct. 1, 1931.

1. Evidence 🔑588.

Court trying case must weigh and consider all testimony, and, discarding that unworthy of credence, attempt to reconcile whatever conflict remains.

2. Negligence 🔑97.

Comparative negligence principle is not recognized in California.

3. Automobiles 🔑244(36).

In action by passengers in one of two automobiles colliding when meeting on highway, evidence supported judgment that proximate cause of collision was concurrent negligence of both drivers.

4. Appeal and error 🔑1010(1).

Trial court's finding of whether negligence of two defendants is concurrent is conclusive if supported by evidence.

5. Negligence 🔑56(1).

Independent negligence of one defendant constitutes "sole proximate cause of injuries" if such negligence was so disconnected as to make it plain that damage was in no way natural consequence of negligence of person urging nonliability.

[Ed. Note.—For other definitions of "Sole Proximate Cause," see Words and Phrases.]

6. Negligence 🔑15, 61(1).

Where one is injured by concurring negligence of two persons, each is "proximate cause" of injuries, and injured party may recover from either or both.

[Ed. Note.—For other definitions of "Proximate Cause," see Words and Phrases.]

7. Negligence 🔑61(1).

Where injury results from two separate and distinct acts of negligence by different parties, operating and concurring simultaneously, both are "proximate cause."

8. Damages 🔑42.

Court properly awarded plaintiff special damages on account of loss of glasses in accident, though in securing new glasses plaintiff got stronger lens.

9. Evidence 🔑544.

That witness had dragged in wrecks off highway did not qualify him as expert to testify concerning probable course automobiles would take after impact.

10. Evidence 🔑527.

Question regarding probable course automobiles would take after impact *held* not proper subject of expert testimony.

Appeal from Superior Court, City and County of San Francisco; Thomas H. Selvage, Judge.

Actions by Ralph E. Fishman and by Leone Ettling against Tony Silva and another. The cases were tried together, and, from a judgment for plaintiffs, defendants appeal.

Affirmed.

See, also, 291 P. 430.

O'Connor, Fitzgerald & Moran, of San Francisco, for appellant Jules Harris.

Kirkbride, Wilson & Brooks, of San Mateo, for appellant Tony Silva.

Jesse H. Miller, of San Francisco, for respondent.

PARKER, Justice pro tem.

The above actions grew out of an automobile accident which occurred in San Mateo county. Inasmuch as both cases involved the same accident and the witnesses were the same in each, there was an order of consolidation in the court below. The cases were tried together and the appeals are presented through one bill of exceptions, under stipulation.

The accident referred to was a collision between the Ford car driven by defendant Silva and a Studebaker car driven by the defendant Harris. The plaintiffs were passengers in the Harris car. The cases were tried by the court, sitting without a jury. There is no serious question involving claimed errors in the admission or rejection of testimony; no claim of contributory negligence, nor any point raised as to the amount of damages awarded. The fact of the collision is conceded and appellants practically admit that one of the two defendants was guilty of negligence proximately causing the accident. As is quite frequently the case, each defendant attempts to absolve himself and fasten the entire blame upon the other. It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the simple reason that in partisan presentation there is an ever-present temptation to forget essential facts which do not fit in. For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors of each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact. Therefore we deem it unimportant to catalog the contentions of the respective parties or to detail the arguments of each.

[1] The trial court found that the accident, with its resultant injuries and damage to plaintiffs, was proximately caused by the concurrent negligence of both defendants. If there is sufficient evidence, competent and free from legal objection, to support this conclusion, our inquiry on this subject ends. We may repeat that the Silva car was a Ford and the Harris car a Studebaker. Throughout the entire case these cars were referred to by name, and hereinafter we will follow the same plan. The accident occurred on the morning of January 1st at or about the hour of 2 a. m., and all of the parties had been observing the time-honored custom of greeting the arrival of the New Year. The scene of the accident was the state highway between San Mateo and San Francisco. The highway at this point is quite wide and is divided into four lanes of traffic—the outer two lanes being eight and one-half feet in width and designated as slow traffic lanes, and the inner two lanes, one on each side of the center of the highway, being nine and one-half feet in width and designated fast traffic lanes. The Studebaker was going in a southerly direction and the Ford was traveling in a northerly direction. There had been a rain in the evening, and at the time of the accident there was still a light downfall. The highway was wet. In this connection we may note that the slow lanes were concrete surface and the fast lanes asphalt. The record further indicates that in wet weather the asphalt was very slippery. As to the foregoing, all parties seem to be in harmony, but from this point they at once enter the field of controversy. It is argued that, inasmuch as the testimony of the parties to the accident is so in conflict, it follows one must be deliberately falsifying, and that, after determining which one is guilty, his testimony should be entirely disregarded and count for naught. This is not necessarily true. Without attempting any extended analysis, it may be safely said that we often meet with witnesses honestly stating as true facts which are not in accord with the actual happening. It would take us through all of the ramifications of metaphysics and psychiatry were we to go further into the discussion on this point. And even where it is shown that a witness willfully testifies falsely as to a material fact, it does not follow that his entire testimony must be distrusted, though the court has the discretion so to do. The true theory is that it is the duty of the court to weigh and consider all of the testimony adduced, and, discarding that which in its opinion is unworthy of credence, attempt to reconcile whatever conflict remains. In the instant case the defendant Silva and the person who was with him in the Ford at the time of the accident both claim that the Ford was on the extreme east side of the highway, in the slow lane, going north at a speed of not more than fifteen miles per hour; that suddenly out of the darkness, coming apparently from nowhere, without warning signal or lights apparent, the Studebaker collided with the Ford. The defendant Harris claims that he was driving the Studebaker on the west side of the center line, in the fast lane, going south; that his speed was approximately thirty miles per hour, and that suddenly in front of him, proceeding directly toward him and in the same lane, the Ford appeared; that he did not see the lights of the Ford until it was within twenty-five feet or less and he was unable to escape.

However, the trial court had other testimony and other evidence before it which did tend, in a measure, to explain this conflict, and, without detailing the testimony of each witness, the record as a whole supports a finding of the following facts, in addition to those facts already stated on which there is no disagreement: That the Studebaker was driving south on a wet and slippery pavement at a speed between thirty-two and thirty-five miles per hour; that there was another car, referred to as a Chevrolet, proceeding in the same direction and some short distance ahead of the Studebaker; that the Studebaker followed along behind the Chevrolet for a little distance and then attempted to pass; that before such attempt both cars were traveling in the slow lane. In attempting to pass, the Studebaker was turned into the fast lane and had proceeded to a point where the hood of the Studebaker had reached the front part of the Chevrolet when the impact occurred. The falling mist and the wet condition of the pavement had obscured the painted lines marking off the center of the highway and the lanes, and the testimony of one member of the party in the Studebaker left it doubtful whether this car remained on the right side of the center line or traveled astride the line. The Ford car traveling north was, for a considerable or at least some distance, in the fast lane east of the center line. At a point a short distance from the point of collision the driver of the Ford turned his car in a westerly direction straddling the center line and continued this course up to the time of the accident. When a head-on collision seemed imminent, the driver of the Studebaker swerved to the right in an effort to avoid it. He had succeeded in getting the front part of his car over, but the left rear and the Ford came together. The point of impact was on the east side of the center.

[2] As the record discloses sufficient evidence to support the foregoing findings implied in the judgment, there is little room for argument as to the negligence of both parties. Primarily, and in the absence of other specifications of negligence, the court was warranted in finding lack of ordinary care manifested in an attempt to pass another vehicle on a rainy night at a speed of thirty-two miles per hour on a wet and slippery pavement, on a highway of traffic such as the record discloses was present on the night in question, it being shown that many cars were passing in both directions. And this becomes more apparent from the testimony of Harris, driver of the Studebaker, that he did not see the lights of the Ford until within twenty-five feet of it. And, the evidence supporting the conclusion that in thus making the turn to pass the Chevrolet the Studebaker did cross the center line, the negligence becomes definitely established. We find then the Studebaker proceeding on the highway partly on its right portion of the pavement and partly on the portion reserved for traffic approaching, the driver thereof charged with a knowledge that the portion wrongfully usurped was for the use of and then being used by cars coming in an opposite direction. At the same time we find the Ford in exactly the same situation. Manifestly, as a result of the combined negligence of both, the collision occurred. It is the common argument of each defendant that, if the other had not been negligent, no accident would have happened, and therefore each assigns the negligence of the other as the proximate cause. We can see no merit in these respective contentions. The question of comparative negligence is suggested, but deserves no further comment than to note the fact of its being presented. Conceding the negligence of one to have been greater negligence, still in this state the courts do not recognize the principle of law relating to comparative negligence that obtains in some of our sister states. Tucker v. United Railroads, 171 Cal. 702, 705, 154 P. 835, and cases therein cited.

[3-6] We are satisfied that the facts as disclosed warrant and support the judgment of the court below that the proximate cause of the collision was the concurrent negligence of both parties. The question of whether the negligence of two defendants is independent or concurrent is generally one for the trial court; and, if there be evidence to support it, the finding is conclusive on this court. Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951. In order that the independent negligence of one of the defendants might constitute the sole proximate cause of the injuries to plaintiff and displace the negligence of the other, it must appear from the evidence that such negligence was so disconnected in time and nature as to make it plain that the damage occasioned was in no way the natural or probable consequence of the negligence of him thus urging his nonliability. Springer v. Pacific Fruit Exchange, supra, 92 Cal. App. page 739, 268 P. 951. It is the unquestioned law of this state that, where one is injured by the concurring negligence of two persons, each is and both are the proximate cause of the injuries, and the injured party may recover from either or both at his election. And in the case just cited will be found a collection of authorities announcing this rule.

[7] "Whether or not the negligence of either driver was a proximate cause of the collision and resultant injuries and whether or not the negligence of each concurred with that of the other is a question of fact to be decided by the jury" or by the court where no jury is present, and where there is evidence to support the determination so made it cannot be disturbed, even though the facts would warrant a different conclusion. Dougherty v. Ellingson, 97 Cal. App. 87, 93, 275 P. 456. The law was enacted to prevent the kind of catastrophe which here happened. "Who may say, but the triers of fact, that if the law had been observed the injury would nevertheless have happened, or that the failure to comply with the law did not contribute proximately to the injury." Rabe v. Western Union Tel. Co., 198 Cal. 290, 296, 244 P. 1077, 1079. "It is the well-established law that the original wrongful act may be so continuous that the act of a third person precipitating the disaster will, in law be regarded, not as independent, but as conjoining with the original act to produce the accident." Rauch v. Southern Cal. Gas Co., 96 Cal. App. 250, 255, 273 P. 1111, 1113; Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Carroll v. Central Counties Gas Co.,

74 Cal. App. 303, 240 P. 53. And finally, where an injury results from two separate and distinct acts of negligence by different parties, operating and concurring simultaneously, both are proximate cause, and recovery may be had against either or both of the responsible parties.

[8-10] Appellant Silva complains of the action of the trial court in awarding plaintiff Fishman the sum of $20 as special damages on account of the loss of his glasses in the accident. The ground of complaint seems to be that in securing the new glasses Fishman did not exactly duplicate the old ones, but got a little stronger lens. Appellant seems content with merely stating his objection, urging no grounds in support thereof. Under the facts we think the award was properly made. Appellant Silva next contends that the trial court erred to his serious prejudice in excluding certain proffered testimony. This appellant at the trial produced a witness named Frey who testified that he was a garage man and mechanic; that he had much experience in repairing wrecked cars and particularly in towing in wrecks from this highway, having brought in as many as twenty a week; that this experience ran over a period of nine years in that locality. With this background it was sought by this appellant to qualify the witness as an expert to testify as to his opinion concerning the probable course the respective cars would take after the impact. The court sustained the objections of all other parties to the action on the grounds that it was not a proper subject for expert testimony; that no proper foundation had been laid; and that the hypothetical question sought to be propounded did not embrace an accurate statement either of the facts as adduced or any appropriate or possible theory that might be sustained from the facts in evidence. The fact that the witness had dragged in wrecks off the highway in no way qualified him. The questions under investigation were not the subject of expert testimony, as it is obvious that no expert outside of the so-called psychiatrist can even venture an opinion as to what two different people might do in the management of a car in an emergency. Having before it all of the evidence as to the location of the cars after the accident and before, and having likewise before it photographic exhibits showing the condition of each car after the accident, it would seem strange if the power or duty of the court to determine the issues presented must be supplanted by the opinion of some gentleman whose sole qualification appears to be that he had towed wrecks off the highway for nine years. We do not feel that this claim of error deserves citation to support our conclusion.

Other minor errors are complained of which in no way could have affected the determination reached. These claimed errors are few in number and urged more or less perfunctorily, and, even if it be conceded that these errors occurred at the trial, no possible miscarriage of justice could have resulted therefrom, nor, indeed, would anything prejudicial to the right of complaining party ensue.

The judgment against each appellant is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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115 Cal.App. 600

WIECK v. HOCKETT et al.

Civ. 4323.

District Court of Appeal, Third District, California.

July 23, 1931.

1. Appeal and error 🔑**1002.**

Where evidence below is conflicting, reviewing court cannot disturb verdict if there is substantial evidence to support jury's conclusion.

2. Trial 🔑**133(6).**

Minor plaintiff's testimony in action for injuries, that she went to insurance company's doctor, *held* not to require reversal, where there was no indication of bad faith of plaintiff's counsel, and court instructed jury to disregard such testimony.

3. Damages 🔑**96.**

Amount of damages for injuries is committed first to sound discretion of jury, and then to trial court (Code Civ. Proc. § 657, subd. 5).

4. Appeal and error 🔑**1004(1).**

On appeal, decision on amount of damages cannot be set aside unless verdict suggests, at first blush, passion, prejudice, or corruption of jury (Code Civ. Proc. § 657, subd. 5).

5. Damages 🔑**132(8).**

$3,750 to 15 year old girl for fracture of neck of humerus and permanent limitation of motion in arm and shoulder and for pain and suffering *held* not excessive.

6. Trial 🔑**295(1).**

Instructions must be considered as a whole on appeal.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Birdene Wieck, a minor, by W. A. Wieck, guardian ad litem, against William Hockett and H. Hamaguchi. From an adverse judgment, defendant last named appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco (M. Tellefson, of Los Angeles, of counsel), for appellant.

F. M. Ostrander, of Merced, for respondents.

PRESTON, P. J.

This is an appeal by the defendant H. Hamaguchi from a judgment entered against him upon a verdict of the jury in the sum of $3,750 in a case for personal injuries.

Plaintiffs Birdene Wieck, a minor, and W. A. Wieck, her father, brought this action for damages against defendants, William Hockett and H. Hamaguchi, charging that Birdene Wieck was severely and permanently injured by reason of the negligent operation by said defendants of their respective automobiles. No judgment was entered against William Hockett.

The answer of H. Hamaguchi denies any negligence on his part, and, as a separate defense, alleges negligence on the part of plaintiff, constituting the sole and proximate cause of her injuries.

The accident occurred on the 27th day of November, 1928, at about 11 o'clock in the morning at the intersection of Walnut avenue and Sultana drive situate about one mile east of the town of Livingston, in Merced county. Walnut avenue and Sultana drive, including the intersection thereof, are dirt roads about 40 feet in width between the property lines. Walnut avenue, which runs east and west, had been graded and smoothed off just before the accident, so that practically the entire width of the road could be traveled with an automobile. Sultana drive runs north and south.

The evidence is conflicting as to whether Sultana drive was only a one-way road or whether the entire width could be traveled. However, the whole of the intersection was traversable. There was also evidence that on two corners there were grapevines, and on the other corner there was a bamboo windbreak 7 or 8 feet high.

The defendant Hamaguchi drove his Essex touring car in a northerly direction on Sultana drive. William Hockett, with whom plaintiff was riding as a guest, was driving his Chevrolet car in a westerly direction on Walnut avenue. The two machines collided in the intersection and just northwest of the center thereof. The Chevrolet turned upside down at a point about 20 feet westerly from the point of impact, pinning the plaintiff underneath the car, and inflicting the injuries of which she complains.

The Essex car came to a stop in approximately the same distance, and was about three feet south of the other car.

[1] Hamaguchi testified to facts, which, if believed by the jury, would show that the collision was due solely to the negligence of Hockett, the driver of the Chevrolet, and Hockett, on the other hand, testified to facts showing that H. Hamaguchi was entirely responsible for the collision. Under such circumstances, and when the verdict is attacked for insufficiency of evidence, as it is in this case, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury.

We must assume that the jury resolved the conflict against H. Hamaguchi. We have examined the entire testimony with care, and after such examination feel fully satisfied that the record contains ample competent evidence to support the verdict of the jury. The jury, however, might well have found from the entire evidence that both Hockett and Hamaguchi were guilty of actionable negligence.

[2] Appellant contends that plaintiff and her counsel were guilty of prejudicial misconduct at the trial in asserting that plaintiff had been examined by a doctor at the request of the defendant's insurance company This contention is based upon the following proceedings which took place during the direct examination of plaintiff by her own counsel:

"Q. And where did you go when you got to Livingston? A. Dr. Rookledge's office.

"Q. What was done there, if anything? A. Well, he put my arm in a sling, he did not do hardly anything, he did take X-rays and then he put my arm in a sling, and then I was taken to Merced.

"Q. What doctor took care of you there? A. Dr. Kylberg.

"Q. Now, you saw Dr. Rookledge immediately after the accident, and then Dr. Kylberg set your arm at the hospital, did you see any other doctor? A. Yes, Dr. Zirker and Mr. Hamaguchi's Insurance Company's doctor.

"Mr. Hale (attorney for defendant Hamaguchi): Now, one moment, we move that be stricken out, how did she know that?

"Witness answering: A. Well, it was at your request that I went to this doctor, and you stated in your office that it was for the insurance company that you were having the examination.

'Mr. Hale: I move that be stricken out, your Honor, that has nothing to do with this defendant, and we move the jury be instructed to disregard it, that statement, that was purely an interpolation on the part of this witness, no doubt by the instructions of someone.

"Mr. Ostrander, attorney for plaintiff: Now, if the Court please, she states that she went to see the Insurance Company doctor at Mr. Hale's request.

"Mr. Hale: Now, I move that any further discussion of this point cease right here, and that the jury be instructed to disregard that part of her testimony, and that that part be stricken out. * * *"

After some further colloquy between the court and counsel, Mr. Ostrander said: "I have no objection if the court desires to strike that portion of the answer, that that is a conclusion that the insurance company doctor, at Mr. Hale's suggestion; that she went to this doctor, I think though, that is material and relevant.

"Mr. Hale: At Mr. Hamaguchi's suggestion, I was his attorney, acting for him and requested her to go to the doctor.

"The Court: All right, that is before the Court. Let the rest of it go out. Any statement in reference to an insurance company, let that be stricken from the record and the jury will not regard any testimony that is ordered stricken out by the Court. * * *

"Mr. Hale: The title of the case is 'Birdene Wieck, a minor, by W. A. Wieck, guardian ad litem, and W. A. Wieck, versus William Hockett and H. Hamaguchi.'

"The Court: Call it to the attention of the jury, the parties who are before the Court.

"Mr. Ostrander: Birdene Wieck, a minor, by W. A. Wieck, guardian ad litem; and W. A. Wieck, versus William Hockett and H. Hamaguchi.

"The Court: Ladies and gentlemen of the jury, now, those are the parties before this court, and no others, Birdene Wieck, a minor, by W. A. Wieck, her guardian ad litem, and W. A. Wieck, they are the plaintiffs in the case, against William Hockett and H. Hamaguchi, those two parties are the defendants, and there are no others, and any reference that may be made to any other parties here, you are not to take into consideration at all in your verdict whatever. You are to determine who is responsible for this accident at the time, as between these parties that are before the Court here now, and nobody else, and on stipulation of counsel, this reference that was made by the witness here, to the statement of Mr. Hale, counsel for the defendant, that he wanted her to be examined by a doctor for the insurance company—is that it—I have forgotten the exact language—

"Mr. Ostrander: Yes.

"The Court: Let that go out, forget that such statement was ever made."

The question that brought from the witness the answer complained of was entirely proper, and the answer was an attempt by a fifteen year old girl, who was not at all familiar with court procedure, to identify the other doctor who had examined her and whose name she could not recall. Counsel for defendant brought from the witness the further objectionable remark. The witness undoubtedly thought that counsel was addressing her. The judge struck all remarks from the record, and at the same time admonished the jury in the plain and unequivocal language above set forth. There is absolutely nothing in the record from which it could be inferred or insinuated that plaintiff's counsel did not ask said question in the utmost good faith, or that he attempted in any way to get before the jury the fact, if it be a fact, that the defendant was insured. His entire conduct appears to have been eminently fair and proper. The trial court denied a motion for a new trial based, among other things, upon this same alleged misconduct, and in so doing must have concluded that the witness' remarks were not prejudicial.

In Lafargue v. United Railroads of S. F., 183 Cal. 720, 192 P. 538, 540, the Supreme Court said: "The trial court denied a motion for a new trial based upon the ground, among others, of misconduct of plaintiff's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. * * * The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong." See Mangino v. Bonslett (Cal. App.) 292 P. 1006.

The remarks of plaintiff were improper, but we cannot assume that a jury will deliberately disregard their oaths and an instruction of the court so plain and explicit as the one given by the learned trial court in this case and assume prejudicial error from the mere fact that the plaintiff, a child, while a witness in her own behalf, in an attempt to identify one of the physicians who had examined her, stated that "he was H. Hamaguchi's Insurance doctor," etc. There is no showing or even a suspicion that she had been prompted to make the remarks complained of, or that there was any intention on her part or that of her counsel to intentionally get the question of H. Hamaguchi's insurance before the jury.

[3-5] Appellant next contends that the verdict was excessive. The motion for a new

trial was also made upon the following grounds:

"10. Excessive damages appearing to have been given under the influence of prejudice;

"11. Excessive damages appearing to have been given under the influence of passion." Subdivision 5, § 657, Code Civ. Proc.

"The rule is well established that the amount of damages in this kind of an action is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and the jury on the subject cannot be set aside unless the verdict is so plainly 'and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury.'" Reneau v. Hirsch, 88 Cal. App. 1, 262 P. 1100, 1102, and cases there cited; Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480; Sundberg v. Ringel, 100 Cal. App. 545, 280 P. 557; and Levy v. Berner (Cal. App.) 293 P. 896.

We have carefully examined the entire record, including the evidence, and there is nothing in the record to show or suggest that the verdict was not the result of the fair and honest judgment of the jury. At the time of the accident, plaintiff was a girl 15 years of age, in good health. She was pinned underneath the Chevrolet car, and, when extricated, was unconscious. She received a fracture of the neck of the humerus and suffered a permanent limitation of motion in her right arm and shoulder. This injury was attended with excruciating pain and suffering which lasted several months. At the time of the trial, one shoulder was larger than the other. The arm was in what is known as an airplane cast for more than two months. We think when the extent and character of the injuries received by the plaintiff and the pain and suffering endured by her are all considered, the award of damages made by the jury and sustained by the trial court is not at all disproportionate to the compensation really warranted by the facts.

[6] Appellant also complains of certain instructions given by the court to the jury. We have examined all of the instructions complained of and find no merit whatever in any of the points urged. It is certainly a well-settled rule of law, which needs no citation of authority, that all instructions must be taken as a whole, and, when that rule is applied in the case at bar, there is no error in the instructions. They are full and complete, and state the law applicable to the case clearly and concisely.

Other contentions made by appellant need no special consideration. We have examined the entire record with care, and find no merit whatever in the appeal.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

116 Cal.App. 219

BYERS v. SPICER.

Civ. 469.

District Court of Appeal, Fourth District, California.

Aug. 20, 1931.

Automobiles 🔑210.

Motorcycle officer traveling 50 miles per hour while chasing hit-and-run driver *held* not contributorily negligent on colliding with motorist making left-hand turn at 15-mile intersection (St. 1923, pp. 556, 560, §§ 120, 132, 133).

Appeal from Superior Court, San Diego County; John F. Pullen, Judge.

Action by J. J. Byers against L. E. Spicer. Judgment for plaintiff, and defendant appeals.

Affirmed.

Titus & Macomber, of San Diego, for appellant.

M. W. Conkling, of San Diego, and Vernon Day, of Los Angeles, for respondent.

ALLEN, Justice pro tem.

Plaintiff sustained injuries by reason of a collision between a motorcycle driven by him and an automobile operated by defendant. The case was tried by the court sitting without a jury, and plaintiff had judgment. Defendant appeals.

Plaintiff was a traffic officer and deputy sheriff; was on duty and chasing a hit-and-run driver whose car had struck another automobile and injured the occupants. The motorcycle was equipped with a siren and both headlights and tail-light, which were all burning. The siren was being sounded at the time of the accident and had been for several minutes previous thereto. Plaintiff was traveling north and defendant south on Highland avenue in National City, and when defendant arrived at Sixth street he attempted to make a left-hand turn when the collision occurred. Plaintiff was traveling at a speed of 50 miles per hour or more. The crossing where the accident happened was in a 20-mile zone, as well as a 15-mile intersection. The accident happened on a Sunday afternoon on the main road between Tia Juana and San Diego, where traffic was exceptionally heavy.

The only question raised on appeal is whether the plaintiff was guilty of contributory negligence as a matter of law. The sections of the California Vehicle Act (Acts 1923, p. 517), in force at the time of the accident and which are the law of the case, are:

"Sec. 120. When speed limit not applicable. The provisions of this act prescribing the speed for vehicles shall not apply to vehicles of any city, city and county, or county or of the State of California when such vehicles are being operated in the chase or apprehension of violators of the law, or of persons charged with or suspected of any such violation, nor to fire department vehicles when traveling in response to a fire alarm nor to ambulances or the vehicles of licensed physicians when actually traveling in response to emergency calls. * * *

"Sec. 132. Police and fire vehicles have right of way. Police and fire department vehicles shall have the right of way over all other vehicles but must be operated with due regard for the safety of all persons using the public highway. This provision shall not protect the driver of any such vehicle or his employer or principal from the consequence of the arbitrary exercise of such right of way.

"Sec. 133. What to do on approach of police or fire vehicle. Upon the approach of any police or fire department vehicle, it shall be the duty of the operator of any street car, upon the sounding of a signal by such police or fire department vehicle, to stop such street car forthwith, unless at the time such street car is crossing an intersection of the public highways, in which event it shall be operated so as to clear the intersection of the highways and then stopped, and every other vehicle shall immediately be moved to a position as near as possible and parallel to the right-hand curb, and shall remain there until the police or fire department apparatus has passed such vehicle."

These sections, read together, leave little doubt as to the rights of the parties. Balthasar v. Pac. Electric Ry. Co., 187 Cal. 302, 202 P. 37, 19 A. L. R. 452. Plaintiff had the right of way and was of a class of persons to whom the provisions as to speed were not applicable. The only duty left for the plaintiff to perform was to operate his motorcycle with due regard for the safety of the public, which means the exercise of reasonable care by him for the public safety.

In order to charge appellant with contributory negligence under the sections above quoted, defendant must show that plaintiff did not operate his motorcycle with reasonable care for the public safety. There is nothing in the evidence which would sustain this contention. Appellant cites no authorities, and we fail to find any which are in conflict herewith.

The only point relied upon for a reversal is the evidence that the plaintiff was traveling faster than 15 miles per hour in the intersection. Section 120 of the California Vehicle Act is decisive on this point. Having concluded that the provisions as to speed do not apply to those designated in section 120 of the act, it might be well to mention the absurdity of requiring peace officers to observe the arbitrary rules as to speed contained in the California Vehicle Act when pursuing criminals, who may be fleeing in high-powered cars at twice the permissible speed. The judgment of the trial court was correct.

Judgment affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

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116 Cal.App. 189

CRONKRIGHT v. MOSS.

Civ. 901.

District Court of Appeal, Fourth District, California.

Aug. 19, 1931.

1. Automobiles ⚷244(50).

Evidence sustained finding that pedestrian was contributorily negligent in leaving place of safety and running into path of automobile crossing intersection.

2. Appeal and error ⚷1011(1).

Trial court is judge of weight and sufficiency of evidence, and its findings on contradictory evidence are conclusive.

Appeal from Superior Court, San Diego County; James A. Allen, Judge.

Action by W. G. Cronkright against Thelma L. Moss. Judgment for defendant, and plaintiff appeals.

Affirmed.

Crail, Shutt, Penprase & Miller, of Los Angeles, for appellant.

Sweet & Plank, of San Diego, for respondent.

MARKS, J.

This is an action brought by appellant for damages for personal injuries. He was struck by an automobile being driven by respondent at the intersection of Fifth and Robinson streets in the city of San Diego, at about 7:30 o'clock on the evening of Friday, May 13, 1927.

Fifth street runs north and south. It is fifty feet in width between curb lines, and has parallel street car tracks on each side of its center line. Robinson street intersects Fifth street at right angles, and is thirty-five feet in width between curb lines. Lanes for the use of pedestrians in crossing the intersection are established and painted on its four sides. An ordinance of the city of San Diego gives pedestrians in these lanes the right of way over vehicles crossing the intersections.

The trial court rendered judgment for respondent holding that appellant was guilty of contributory negligence. The finding of the trial court on this issue is as follows: "That the said plaintiff at the time and place of said accident failed to exercise due care and caution for his own safety and without regard for the safety of himself placed himself directly in the path of the automobile operated by the said defendant, Thelma L. Moss, and negligently ran in front of said approaching automobile; that the said recklessness, carelessness and negligence of said plaintiff then and there proximately caused and contributed to each and all of said injuries sustained by him." Appellant attacks this finding as not being supported by the evidence. No other question is presented on this appeal.

[1, 2] In determining whether or not this finding is supported by the evidence, it will be necessary to consider only that portion of the evidence tending to support it. This evidence discloses that the intersection was brightly illuminated with street lights, and that the lights of respondent's automobile were illuminated at the time of, and before, the accident. Appellant, a pedestrian, was walking east on the northerly sidewalk on Robinson street. Before stepping from the sidewalk, he looked toward the south and saw the headlights of respondent's car half a block or more south of the intersection. He went on his way across the intersection, and did not again look for approaching vehicular traffic until immediately before the collision. According to respondent's testimony, appellant stopped his progress across the street and stood at about the center of Fifth street between the inner rails of the street car tracks. She proceeded on her way into Robinson street, and, when she reached a point about halfway between the center of Robinson street and its northerly curb line, appellant, from the place where he had been standing between the tracks, started to run in a northeasterly direction across the easterly side of Fifth street. Respondent sounded her horn, applied her brakes, and swerved her car to her right. The impact occurred north of the northerly pedestrian lane line at a point about two-thirds of the way from the east street car track to the east curb line. The left front light of respondent's car came into contract with appellant, pushing him to the pavement and breaking his leg. Respondent had so reduced the speed of her car that it was almost at a standstill at the time of the impact. It was brought to a complete stop between one and five feet beyond the point of the collision.

We have concluded that the foregoing evidence is sufficient to support the finding that appellant was guilty of contributory negligence. It justifies a conclusion that without due care he left his position of safety between the street car tracks where he was standing when respondent was approaching the pedestrian lane used by him and ran in a northeasterly direction across the easterly half of Fifth street into a place of danger directly in the path of respondent's automobile. With this evidence before him the trial judge was justified in concluding that appellant was guilty of contributory negligence. Of course, appellant's evidence sharply contradicts that of respondent. The law makes the trial court the judge of the weight and the sufficiency of the evidence. It having adopted that of respondent as true, its conclusions are final and binding upon this court.

Judgment affirmed.

We concur: JENNINGS, Acting P. J.; FINNEY, Justice pro tem.

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115 Cal.App. 634

In re NORDGREN'S ESTATE.

OUR LADY OF MERCY CONVENT v. STONE et al.

Civ. 4391.

District Court of Appeal, Third District, California.

July 25, 1931.

Rehearing Denied Aug. 24, 1931. Hearing Denied by Supreme Court Sept. 21, 1931.

1. Wills ⟹439.

In construing wills, courts must ascertain testatrix' intention.

2. Wills ⟹440, 441.

Testatrix' intention must be gathered from words of will, considering circumstances under which it was made, if there is any uncertainty in language used.

3. Wills ⟹570.

Where testatrix bequeathed building and loan stock to legatee, legatee *held* not entitled

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to money on deposit with building and loan company evidenced by fully paid investment certificates (Civ. Code, § 1327).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Accounting of Lydia A. Stone and O. A. Turner, executrix and executor of the last will of Emma L. Nordgren, deceased. From an order settling the account and decreeing distribution, Our Lady of Mercy Convent, contestant and legatee, appeals.

Affirmed.

S. P. Galvin, of Merced, for appellant.

Conley, Conley & Conley, of Fresno, for respondents.

JAMISON, Justice pro tem.

On the 25th day of June, 1929, deceased executed an olographic will, naming respondents as executors thereof. Her death occurred on November 3, 1929. Thereafter her will was duly probated. On August 20, 1930, respondents filed their first and final account.

On the 8th day of September, 1930, the court made an order settling the said account and decreed distribution of the estate. From the order settling the final account, and from the decree of distribution, the contestant, Our Lady of Mercy Convent, has appealed.

The testatrix by her will bequeathed to a number of her friends various sums of money, articles of jewelry, and personal effects, and made ten of her friends her residuary legatees. Among other bequests that she made was the following: "5000.00 (Five Thousand Dollars) also Building and Loan stock to our Lady of Mercy Convent."

It was stipulated that at the date of her death she was the owner of five shares of the capital stock of the Merced Mutual Building & Loan Association. It was further stipulated that deceased, at the date of her death, was the owner of $13,000 on deposit with the following named building and loan associations, namely, the Pacific States Savings & Loan Company, the United States Building & Loan Association, the Mutual Building & Loan Association of Fresno, Cal., and the Fresno Guarantee Building & Loan Association, the said sum being evidenced by fully paid investment certificates; that the Pacific States Savings & Loan Company was a building and loan association; that each of said four last-named associations had issued and outstanding a guaranteed capital stock, but that deceased at the date of her death did not own any capital stock of said last-named four associations.

By its decree of distribution the trial court distributed the five shares of the capital stock of the Merced Mutual Building & Loan Association to appellant, but over the objections of appellant distributed the $13,000 evidenced by the said investment certificates to the legatees to whom were willed legacies in specified sums with remainder to the residuary legatees.

Appellant contends that by the use of the words, "also building and loan stock," the testator intended to will to it, not only the five shares of the stock of the Merced Mutual Building & Loan Association, but also the said investment certificates.

[1, 2] The matter presented for determination is, therefore, what was the intention of the deceased in using these words. This intention must be gathered from that which is expressed in the language of the will. Estate of Young, 123 Cal. 337, 55 P. 1011; In re Estate of Sessions, 171 Cal. 346, 153 P. 231.

The cardinal rule for the construction of wills is to ascertain the intention of the testator, and this is determined from the words of the will, considering the circumstances under which it was made, if there is any uncertainty in its language. In re Estate of Franck, 190 Cal. 28, 210 P. 417. In this case the court used the following language: "The will and its entire scheme, the property disposed of, the persons named as devisees and legatees, the words and the context should be considered together, and the words used in the will should be construed according to their surroundings."

[3] Appellant's main reliance in its contention that the testatrix intended, not only to will it the five shares of stock of the Merced Mutual Building & Loan Association, but also the investment securities, is based upon section 1327 of the Civil Code, which is as follows: "Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense."

Conceding that the word "stock" is a technical word as used in this will, there is nothing in the evidence indicating that the testatrix did not know the meaning of this word. On the contrary, it appears from a consideration of the entire will that she was a woman of intelligence and knew exactly what disposition she wished to make of her property. The fact that she also used the word "devise" in bequeathing her personal estate as indicating her ignorance of technical words is of little evidentiary value and does not destroy the prima facie presumption that she understood the technical meaning of the word "stock" as used by her in her said will.

The facts in the cases of Tomlinson v. Bury, 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464, and Clark v. Atkins, 90 N. C. 629, 47 Am. Rep. 538, cited by appellant in support of its contention that stock should be construed as including investment certificates, are not similar to those in the instant case. In the first of these cases the testator willed all of his bank stock to his wife. He had, in fact, no bank stock, but did have deposits in various banks. Under these circumstances it was held that the intention of the testator was to bequeath the deposits to his wife.

In the other case the testatrix willed bank stock in the Citizens' National Bank. She had never owned shares of stock in that bank, but did have on deposit therein certain bonds. In this case it was held that, as the testatrix had no stock in the bank, she intended to will the bonds, but through inadvertence or mistake used the word "stock."

The case of Connecticut Trust & Savings Deposit Co. v. Chase et al., 75 Conn. 683, 55 A. 171, cited by respondents, is more nearly in point. The will in that case bequeathed all of the stock of testatrix in any and all corporations to certain persons. At the date of death of testatrix she owned, in addition to stocks, debenture certificates of a corporation issued for money borrowed, and convertible after ten years into shares of stock. It was held in this case that the debenture certificates were not stocks, and that the bequest of stocks did not include these certificates.

The only evidence offered by appellant tending to establish the fact that testatrix was unacquainted with the meaning of the word "stock" was the testimony of a bank official who testified that the patrons of his bank commonly referred to investment certificates, when speaking of them, as stock, and the testimony of a secretary of a building and loan association that his clients commonly referred to them as stock, but neither of them testified that testatrix was a patron or client of the bank or association of which he was an official, nor did either of them testify that he ever heard the testatrix speak of her investment certificates as stock.

The testatrix bequeathed by her will $20,500 in specific cash legacies. There is left for distribution, after deducting the expenses of administration, the sum of $30,064.70. If appellant's claim is upheld and the $13,000 investment certificates are ordered to be distributed to it, there would be left for distribution the sum of $18,429.70.

If the testatrix intended to bequeath the $13,000 investment certificates to appellant, then she performed an idle act in naming ten of her friends her residuary legatees, and, if the construction for which appellant contends is placed upon the will, the specific legacies will have to be reduced. On the other hand, by adopting the trial court's construction of the will, the specific legacies will be paid in full and the charitable provisions of the will carried out.

We are satisfied that the construction placed upon the will by the trial court should be upheld.

The order settling and allowing the first and final account and the decree of distribution are affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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115 Cal.App. 664

In re JONES' ESTATE.

INDEPENDENCE INDEMNITY CO. v. McDOUGALL et al.

Civ. 4390.

District Court of Appeal, Third District, California.

July 27, 1931.

Rehearing Denied Aug. 26, 1931. Hearing Denied by Supreme Court Sept. 24, 1931.

1. Executors and administrators ⚷88.

Executor's debt to estate is conclusively presumed to have been paid, so as to render him liable for amount thereof as money of estate in his hands (Code Civ. Proc. § 1447).

2. Executors and administrators ⚷528(5).

Surety on executor's bond is liable for amount of principal's debt to estate, though he is insolvent (Code Civ. Proc. § 1447).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

In the matter of the estate of Sarah Mildred Jones, deceased. From an order settling the second annual account and report of D. W. Carmichael as executor of deceased's last will, the Independence Indemnity Company appeals; Donald McDougall, administrator with the will annexed, and others being respondents.

Affirmed.

John Ralph Wilson, of San Francisco, for appellant.

White, Miller, Needham & Harber, Clyde H. Brand, and Chauncey H. Dunn, all of Sacramento, for respondents.

PRESTON, P. J.

This is an appeal from an order of the Superior Court settling the second annual account and report of D. W. Carmichael, as executor of the last will of Sarah Mildred Jones, deceased.

The appeal is by the Independence Indemnity Company, the surety upon the official bond of Carmichael, as executor of the last will of decedent.

The facts are briefly these: Sarah Mildred Jones died testate on February 12, 1925. Her will named D. W. Carmichael as executor and Lulu E. Parsons as executrix, but did not waive bonds. The Superior Court of Sacramento county, after proper proceedings had, admitted the will to probate, and named the said D. W. Carmichael as sole executor, and required that he give a bond in the sum of $50,000. Carmichael duly qualified as such executor, and the said appellant, Independence Indemnity Company, gave bond to the state of California, as provided by law, in the sum of $50,000, which bond was approved by the judge of the Superior Court, and letters testamentary were thereupon issued to Carmichael, and he proceeded to administer said estate. Notice to creditors was given, an inventory and appraisement filed, and such other steps as are usual in administering estates in California were taken. Among the assets of said estate were two promissory notes, each executed and delivered by Carmichael to said Sarah Mildred Jones in her lifetime—one in the sum of $2,500, dated February 5, 1925, due 90 days after date, with interest at the rate of 7 per cent. per annum, and the second note, dated January 2, 1924, executed and delivered by Carmichael and his wife, Myrtie R. Carmichael, for $50,000, due on or before three years after date, with interest at 6½ per cent. per annum, payable annually, upon the principal sum of which $12,000 had been paid prior to the death of Mrs. Jones.

Thus it will be seen that both notes became due after the death of Mrs. Jones. These notes were inventoried and appraised at their face value.

On July 24, 1926, Carmichael returned and filed his first report and account of his administration of said estate, which, after proper proceedings, was approved by the court on August 9, 1926. On March 10, 1930, appellant, Independence Indemnity Company, filed a petition in the Superior Court asking to be released from the bond of Carmichael as executor, and, in response to the citation issued on this petition, Carmichael filed his second account, which shows both notes above mentioned charged as property of the estate of decedent, in his hands as executor. Thereafter, on April 2, 1930, Carmichael tendered his resignation as executor. On May 16, 1930, the court made an order settling the said second account and revoking Carmichael's letters testamentary. Thereafter Donald McDougall, the public administrator of Sacramento county, was appointed administrator with the will annexed of said estate. No appeal was taken by Carmichael from the order settling said second account, and the appeal is as above stated by the surety on Carmichael's official bond.

Respondents contend, and the trial court held, that under section 1447 of the Code of Civil Procedure the appellant, who is Carmichael's surety, is liable to the estate for the payment of said notes.

Appellant, on the contrary, contends that it has shown that Carmichael was insolvent at the time he became executor, and continued to be insolvent during the entire term of his administration of said estate, and could not have paid said notes, and therefore his surety is not liable for the payment thereof.

[1] Under the early common law the naming of a debtor as an executor of the will of the creditor operated as a discharge of the debt, except when necessary to pay demands of creditors of the estate. The reason for this rule was that the testator, by making the debtor an executor, voluntarily destroyed the only remedy or means by which the debt could be collected. In the course of time the opposite of this rule became recognized as the common law in the United States, and placed an executor, who was a debtor of the testator, in a position almost as excessively burdensome as formerly it had been advantageous. Under this last rule, not only was the debt to the estate not considered waived or discharged, but it was taken as actually paid in cash, due at once on the appointment of the executor, so that he was held accountable for the money equivalent of his debt irrespective of whether it had in fact been paid or whether the executor was insolvent and could not pay it.

The theory underlying this doctrine is that, since the executor cannot demand payment of himself, nor sue himself, and since he is bound to account for his own debts, the conclusion is inevitable that the debt must be considered as assets in his hands as executor. 11 R. C. L. pp. 115 to 119.

Much controversy formerly existed in California and elsewhere as to the applicability and extent of these two common-law rules, and therefore the Legislature of this state in 1872, supposedly for the purpose of setting all such questions at rest, enacted section 1447, Code of Civil Procedure, which reads as follows: "The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due."

Thus it will be seen that this section of the Code treats a debt or demand due from the executor from the time it becomes due as so much money in his hands as executor belonging to said estate.

In the early case of Treweek v. Howard, 105 Cal. 434, 39 P. 20, 23, the facts are very similar to those in the case at bar, and there the court, in discussing the meaning and extent of the surety's liability under section 1447 of the Code of Civil Procedure, said:

"Thus, it will be seen the law treats a debt or demand due from the executor, from the time it becomes due, as so much money in his hands.

"This debt was due, as is shown by the pleading, long before the death of the testator, and hence was properly included in the inventory as money in the hands of the executor.

"The law required him to so report it, and, had he failed to do so, and taken the oath required of him by section 1449, he would have been guilty of perjury.

"The sureties are presumed to have signed the bond in view of the law as it existed, and are as liable as they would have been had section 1447 been incorporated in the bond.

"This debt was as money in the hands of the executor, and as such was a part of the estate for the due administration of which the sureties became liable, just as they did for the residue thereof.

"The poverty or riches of their principal—the condition of the estate, where and how invested—were proper subjects of inquiry for the sureties in determining whether or not to become responsible, but cannot be urged as reasons to excuse them from the liability which they assumed.

"Nor can the representations of their principal as to his financial position, or his failure so to do, avail the sureties. Should such circumstances prevail to release sureties, it is apprehended few would be bound.

"The executor was liable, under the law, as for money in his hands, and the sureties must be presumed to have known it. Beyond this, and stripped of verbiage and accessories which cannot control in the decision, the simple fact remains that Bowman was insolvent, and the sureties were not aware of that fact nor of his indebtedness to the estate.

"The case serves to illustrate the wisdom of Solomon, where he says (Prov. xi, 15): 'He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure.' "

The statute is considered again in the case of Minifie v. Rowley, 187 Cal. 481, 486, 202 P. 673, 675, and there the court said: "On June 3, 1915, defendant Forrest S. Rowley was appointed an executor of the will of Samuel Jones, the last surviving partner of the firm to which the debt herein sued upon is alleged to have been due. 'The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.' Code Civ. Proc., § 1447. As a necessary consequence, if defendant Forrest S. Rowley owed the $10,000 here in controversy on June 3, 1915, when he became executor, he became chargeable with that sum as for so much money in his hands and continued liable therefor, irrespective of the running of the period of the statute of limitations against the debt itself, by reason of the change in the character of his obligation due to his intervening fiduciary capacity. Treweek v. Howard, 105 Cal. 434, 39 P. 20."

Again, in the Estate of Clary, 203 Cal. 335, 264 P. 242, 244, the Supreme Court adopted the opinion of this court, in which it is said: "The proceedings had in the first instance, leading to the first appeal and the proceedings had in the appeal now before us, were and are both based upon section 1447 of the Code of Civil Procedure, under the terms of which all moneys due from the executor to a testator at the time the executor qualifies as such become assets of the estate of the testator in the hands of the executor, and hence renders the executor liable for the same is if so much money was in his hands."

The law seems well settled that the special restrictions placed upon executors under section 1447 are not made applicable to administrators. Sanchez v. Forster, 133 Cal. 614, 65 P. 1077; Estate of Walker, 125 Cal. 242, 57 P. 991, 73 Am. St. Rep. 40.

The true rule governing the liability of sureties of administrators in such case is declared in Lyon v. Osgood, 58 Vt. 707, 7 A. 5, and that decision has been approved by the Supreme Court of this state in the two cases above cited. See, also, section 1615, Code Civ. Proc.

The Legislature had the power to make a distinction between an administrator and an executor in the matter of their obligations to the estate. In appointing his debtor as his executor, the testator has reposed in him a peculiar trust which the Legislature has seen fit to provide shall not be abused by the fiduciary. An executor so trusted has an even greater obligation to make payment than has an administrator, who receives his appointment usually because of kinship to the decedent. The Legislature undoubtedly thought that, the greater the trust, the more strict should be the accountability. Neither an executor nor an administrator can sue himself. All resort to legal process for the collection of a debt due from an executor or administrator to the estate was cut off by his assuming such office. In the case of an executor, the beneficiaries of an estate are powerless to prevent his appointment. He has deprived them of the ordinary processes of the law for enforcing the payment of his debt, having voluntarily taken upon himself the right and duty to demand and receive and the corresponding duty of paying, the legal consequence of this position is that his own debt to the estate should be conclusively presumed to have been paid and discharged.

[2] It is argued on behalf of appellant that section 1447 merely makes the executor personally liable for the debt and not liable in his official capacity, and therefore his surety, being only for the purpose of indemnifying him in his official capacity, is not liable in this case because Carmichael was insolvent at all times during his administration of said estate. We are unable to agree with this interpretation.

It will be noted that this section refers first to the naming of a person as executor, and then says the executor (not the person named as executor) is liable for so much money in his hands. Therefore under section 1447, Code of Civil Procedure, the debt of the executor to his testator being deemed and considered "as for so much money in his hands, when the debt or demand becomes due," he is liable for the same as executor, and, if he fails to place the money in his hands as executor, he has not faithfully executed the duties of his trust according to law, and his sureties are liable, irrespective of whether he was solvent or insolvent.

We are not unmindful of the fact that a number of the courts of last resort, in other states, where a similar statute exists, have placed the same construction on their statute as that contended for in this case by appellant. Also that the highest courts of a great number of states, which have a like or similar statute to our own, have taken the Legislature at its word, and have held the executor for so much money in his hands as we have done in the case at bar, regardless of his solvency or insolvency, and have held bondsmen liable without any regard to the executor's ability to pay.

In states where the common law on the subject still obtains, the higher court's decisions are in hopeless conflict. We think our conclusion as to the intent and meaning of this statute is not only sustained by its plain and unambiguous language and by such cases as Treweek v. Howard, supra, and the other California cases above cited, but also by the fact that the Legislature of 1901 (St. 1901 p. 208) amended section 1447 by adding thereto the following: "Unless he proves that he had not, either at that time or at any time thereafter, any means wherewith to pay such debt or demand, or such part thereof as may remain unpaid, and that such inability did not arise from any fraud committed by him."

This amendment, along with others, was declared unconstitutional because of defective title and lack of publication, etc. See Lewis v. Dunne, 134 Cal. 291, 66 P. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257. Several other attempts have since been made to amend said section without success.

In conclusion, we might add that the evidence in the case at bar is insufficient to show that Carmichael was unable to pay the notes in question. He admitted that he had $33,000 worth of assets applicable in satisfaction of the notes, and no effort was made to collect from Mrs. Carmichael, and absolutely no testimony that she was insolvent.

A careful consideration of both the law and the facts leads us to the conclusion that appellant is liable on Carmichael's bond as executor of the last will of Sarah Mildred Jones for the payment of said notes.

The order appealed from is therefore affirmed.

We concur: JAMISON, Justice pro tem.; R. L. THOMPSON, J.

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116 Cal.App. 88

CLARK v. BOWERS et al.

Civ. 7883.

District Court of Appeal, First District, Division 2, California.

Aug. 10, 1931.

Rehearing Denied Sept. 8, 1931. Hearing Denied by Supreme Court Oct. 8, 1931.

1. Automobiles ⚷217(5).

Pedestrian struck by automobile when crossing street was not contributorily negligent because he did not look behind him.

2. Automobiles ⚷244(6).

Evidence that motorist drove into marked crosswalk which pedestrian was using in violation of ordinance, striking pedestrian, prima facie established motorist's liability.

3. Automobiles ⚷245(72).

Evidence failed to show as matter of law that pedestrian struck by automobile while crossing street was contributorily negligent.

4. Appeal and error ⚷933(4).

Reviewing court must assume, in absence of contrary showing, that trial court granting plaintiff new trial because evidence insufficiently sustained $1,000 verdict thought $1,000 inadequate damages.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Jonas Clark against William Bowers and another. From an order granting a new trial, defendants appeal.

Affirmed.

Bohnett, Hill & Campbell and L. H. Schellbach, all of San Jose, for appellants.

D. T. Jenkins, of San Jose, and E. D. Crawford, of Gilroy, for respondent.

STURTEVANT, J.

The plaintiff was injured by being struck by an automobile which was at the time being driven by one of the defendants but which was owned by the other defendant. The defendants answered and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff and fixed his damages in the sum of $1,000. The plaintiff made a motion for a new trial and thereafter the trial court granted the motion on the ground that the evidence was insufficient to sustain the verdict. From that order the defendants have appealed and have brought up typewritten transcripts.

The accident occurred in the city of Gilroy. Monterey street runs north and south and is a part of the highway leading from San Francisco to Los Angeles. Fifth street runs east and west. Its eastern end terminates in Monterey street. Fifth street is thirty feet wide and Monterey street is sixty feet wide. A button indicates the center of the intersection. The sidewalks of Fifth street if prolonged across Monterey street are indicated by lines marked on the pavement to indicate the crossings for pedestrians. On the night of December 26, 1929, at about 7:15 p. m., the plaintiff was in the act of crossing Monterey street and was walking toward the east. When he had passed the button the automobile came out of Fifth street, started to turn to the left into Monterey street, and, as it was doing so, it hit the plaintiff. During the trial the plaintiff took the stand as a witness in his own behalf. Among other things, he testified: "I had a little bundle in my hand (a little purchase that I had made) and I stepped off the curb, started to go across, and looked north and south as soon as I could see past the parked cars there and see that the pedestrian's way was clear. I looked frequently as I was passing along to see that the road was clear. I looked north and south and saw no one within approaching distance before I stepped into the pedestrian lane. I looked both ways north and south. As I started to go across on the pedestrian's crossing I slowed up a bit so that I could look past the parked cars both north and south. I didn't stop entirely. I simply slowed up and I looked north and south. There was no obstruction that interfered with my seeing to the south. Nor to the west. The west was behind me. I couldn't see out of the back of my head you know. I didn't look behind me." The plaintiff also called Raymond Taylor, one of the intimate friends of the plaintiff's son. That witness stood on the sidewalk on the west side of Monterey street talking to some acquaintance but with his eyes resting on the plaintiff as the plaintiff attempted to cross Monterey street. Among other things, he testified: "I saw the whole accident. Dr. Clark was about six feet past the button in the safety zone, where they turn at the intersection on a line with that button, six feet past it east, on the east side of Monterey street. When this car came around the corner it struck him on the right side, kind a from Dr. Clark's back. It must have struck him around the thigh from what I could see. When he got to the button in the center of the street he looked north and south to see if there were any cars coming. I noticed that. That was when he got there to the button, right in that little section where it is painted safety zone. * * * He stopped there right by the button and looked to see if there was any car coming south and north and there wasn't any car coming and he proceeded to cross, and this car came and struck Dr. Clark. It was the left side of the car that hit him—about one-third of the length of the bumper—from the left hand of the bumper. The doctor looked before he started to cross the intersection. I took particular notice and when he got to the button then he looked north and south. I guess I looked continuously while he was crossing because I saw him go right to here. I saw this car going around without stopping. There is an arterial sign there. I saw it coming this way. I could see it coming down here. The stop sign is even with the property line. I saw him coming down there, he didn't stop there." The plaintiff also called Oliver Baxter, who testified that he saw the plaintiff fall in the street. Among other things, he testified: "He was in the pedestrian's lane. He was on the east side of Monterey street. The impact was in the neighborhood of three or four feet east of the button."

[1, 2] The defendants make three points. In their first point they contend that the plaintiff failed to prove due care on his part and in their third point they contend that the plaintiff was guilty of contributory negligence as a matter of law. In support of these contentions they emphasize the testimony that the plaintiff did not look behind him. They cite White v. Davis, 103 Cal. App. 531, 542, 284 P. 1086, and California Jurisprudence, 1928 Supplement, page 186, § 82. Those authorities do not support their contention. It has been directly held that one lawfully passing over or along a street is not guilty of contributory negligence because he does not look behind him. Burk v. Extrafine Bread Bakery, 208 Cal. 105, 110, 280 P. 522. The second point made by the defendants is that there is no sound or legal basis for the jury to acquit the plaintiff of negligence and find the defendant guilty of negligence based on a fault common to both of them. In support of the point the defendants cite many statutory requirements that

do not seem to have been involved. As to each of those requirements they claim that they committed no violation. However, they do not excuse themselves as to the case as made by the plaintiff. The city of Gilroy has an ordinance regulating traffic on the streets of that city. That ordinance was introduced in evidence. Section 8 of article III provides: "It shall be unlawful for the operator of any vehicle to drive into any crosswalk which is marked as provided in section 5 of this ordinance while there is in such cross-walk upon the half of the roadway upon which such vehicle is traveling any pedestrian engaged in crossing the roadway until such pedestrian shall have passed beyond the path of said vehicle." The evidence introduced by the plaintiff made out a prima facie case by reason of the violation of that portion of the ordinance. It is therefore patent that a primary liability was established against the defendant.

[3, 4] From what we have said it is perfectly clear that the plaintiff introduced evidence showing that the defendants were guilty of negligence and that the case as it went to the jury did not show that the plaintiff was as a matter of law guilty of contributory negligence. There remains the question of damages. The jury awarded the plaintiff a verdict in the sum of $1,000. The defendants have quoted no evidence showing that said verdict was adequate. We must presume, in the absence of a showing to the contrary, that the order appealed from was properly made and therefore that the nature of the injuries suffered by the plaintiff was such that in the opinion of the trial court $1,000 was inadequate.

We find no error in the record. The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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116 Cal.App. 155

YOST-LINN LUMBER & FINANCE CO. v. BENNETT et al.

Civ. 6544.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1931.

Judgment ⚿877.

Evidence *held* to sustain court's finding that payee agreed to accept amount due on note in satisfaction of judgment for larger amount.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Yost-Linn Lumber & Finance Company, a corporation, against Arthur Bennett and others. Judgment for plaintiff, and from an order decreeing satisfaction thereof on payment of a stated sum, plaintiff appeals.

Affirmed.

D. Chase Rich, of Los Angeles, for appellant.

Henry O. Wackerbarth, of Los Angeles, for respondents.

YORK, J.

Plaintiff commenced an action against the defendants on a promissory note, claiming a balance due thereon of $606, together with interest at 12 per cent. per annum from March 16, 1926, attorneys' fees, and costs. On June 18, 1928, a default judgment against the defendants was entered in the sum of $839, together with costs. This judgment became final without any appeal therefrom. Thereafter, upon grounds not shown in the record here, defendant Bennett moved to vacate the judgment against him, which motion was denied on October 16, 1928.

On October 19, 1928, defendant Bennett, in conference with the president of the plaintiff corporation, offered to pay the sum of $606 in settlement of the judgment; that he would pay $500 within ten days and the balance of $106 at a later date. This offer was accepted, it being understood that in consideration of such payment plaintiff would satisfy the judgment and the defendant would not proceed further with a motion to rehear the motion to set aside the default, or take an appeal therefrom. At this time Bennett paid $25 on account, by check on the face of which was written, "In settlement of judgment, Balance due $581.00." Thereupon he sought to borrow the balance of the $500 payment which he had agreed to make. He was able to secure a loan of $425 only, which amount on November 3, 1928, he paid to the plaintiff corporation, taking a receipt therefor "to apply on loan No. 27. Principal balance $156." It was further agreed that the plaintiff should wait for one year for payment of the $156.

On January 10, 1929, after motion duly made by defendant Bennett for that purpose, the trial court entered its order decreeing the satisfaction in full of the judgment here involved, upon payment to plaintiff or its attorney of the sum of $156. Plaintiff now appeals from said order.

No question is made of the fact that the controversy was still pending to an extent which would furnish a sufficient consideration for such an agreement of settlement.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appellant maintains that the evidence does not disclose any agreement on the part of plaintiff to accept less than the full amount due; and that if such an agreement was made, it was conditional upon Bennett bringing in $475 on November 3d. We cannot agree with these contentions. From the evidence received at the hearing pursuant to which the court made the order from which plaintiff has appealed, the court was authorized to find that appellant agreed to accept the sum of $606 in satisfaction of the judgment. There was a conflict in this evidence, which the trial court resolved in favor of the defendants. We think that the evidence is sufficient to sustain the court's decision.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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116 Cal.App. 161

SCHATTE v. MAURICE et al.

Civ. 851.

District Court of Appeal, Fourth District, California.

Aug. 18, 1931.

1. Automobiles 🔑246(11).

Instruction defendant's driver was bound to anticipate he might overtake vehicles at any point and must keep proper lookout for them to avoid charge of negligence *held* not to place unwarranted burden upon defendants.

> Court instructed jury that driver of defendant's automobile bus which collided with rear wheel of automobile in which plaintiff was riding was bound to anticipate that he might overtake vehicles at any point on street, and was required, in order to avoid charge of negligence, to keep proper lookout for them and to keep his machine under such control as would enable him to avoid collision with another vehicle using proper care and caution, and if situation required it he must slow up and stop, and further that a failure on his part to use this care would be negligence, and if sole proximate cause of injury to plaintiff, plaintiff would be entitled to damages.

2. Trial 🔑253(7).

Generally, instruction directing verdict for plaintiff, if jury find certain facts, must embrace all factors necessary to show legal liability of defendant, and error therein is not cured by other instructions correctly stating law.

3. Appeal and error 🔑930(2).

Appellate court may assume jury followed instruction.

4. Appeal and error 🔑930(2).

Where words and phrases were used in instruction in customary and conventional sense, it must be presumed jury so understood them.

5. Trial 🔑253(4).

Instruction that if defendant's negligence in automobile collision was "sole" proximate cause of injury, plaintiff was entitled to damages, *held* not erroneous as directing verdict regardless of contributory negligence.

> Instruction complained of was not open to such criticism, since by it jury were in effect told that in order to find damages against defendants, it was necessary for them to find that negligence of defendant's driver was only proximate cause of plaintiff's injury, word "sole" being variously defined as being alone or the only one; existing or acting without another; only; individual; single; alone; isolated; without company; solitary.
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> [Ed. Note.—For other definitions of "Sole," see Words and Phrases.]

6. Automobiles 🔑246(48).

Giving instruction respecting rule in overtaking and passing another vehicle *held* proper under evidence (St. 1923, p. 557, § 125 (a).

7. Appeal and error 🔑1064(1).

Giving instruction respecting rule for overtaking and passing another vehicle, even if inapplicable *held* not prejudicial, hence not to warrant reversal (St. 1923, p. 557, § 125(a).

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by William Harvey, upon whose death Oscar Schatte, executor of his last will and testament, was substituted as plaintiff, against D. B. Maurice, doing business under the fictitious firm name of the West Coast Rapid Transit Company, and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

B. P. Gibbs, of Los Angeles, for appellants.

Paul Blackwood, of Los Angeles, for respondent.

JENNINGS, J.

This is an action to recover damages for personal injuries sustained by plaintiff, such injuries having been caused, so it is alleged,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by the negligence of the defendant McJimsey in the operation of a certain automobile bus which was the property of defendant D. B. Maurice, doing business under the fictitious firm name of West Coast Rapid Transit Company. During the trial of the action it was stipulated that defendant McJimsey was the agent and employee of defendant D. B. Maurice, and it appears beyond question that he was acting in the scope of his employment at the time of the accident.

The accident occurred on April 6, 1928, on Hermosa avenue in the city of Hermosa Beach, Cal. Plaintiff was in the employ of a company which was doing certain street grading work in said city and with two other employees of said company was being transferred from the location of one piece of grading work to another in a Ford automobile. The Ford automobile was the property of an employee of the company which was doing the street grading work, and was being operated by the owner, who appears to have had some arrangement with his employer to convey employees of the company from one location to another. Another employee of the company occupied the front seat of the automobile with the driver and plaintiff was seated alone in the rear seat.

Hermosa avenue is the principal street in the city of Hermosa Beach and runs in a general northerly and southerly direction. In the center of this avenue there is an unpaved portion occupied by the tracks of the Pacific Electric Railway, over which no vehicular traffic can pass. Vehicles traveling south generally use the west side of the street and vehicles traveling north use the east side. However, the evidence discloses that the west side of the street is occasionally used by both southbound and northbound traffic. At the time of the accident the west side of the avenue was in a torn-up condition. Five feet of the pavement had been taken up to permit street improvements, leaving a shallow, sandy ditch about eighteen inches deep. According to the testimony of plaintiff's witnesses, the width of the pavement upon which vehicles could travel after the five-foot strip had been cut off was approximately sixteen or seventeen feet, and there was sufficient space to enable one vehicle to pass another thereon. The testimony of defendants' witnesses indicates that the pavement was narrower and would permit the operation of but one vehicle thereon with safety. The Ford automobile in which plaintiff was riding had been proceeding south from Twenty-Fifth street about the middle of the pavement on the west side of Hermosa avenue and was closely followed by the bus in the same relative position in the street. At a point about midway between Nineteenth and Eighteenth streets the driver of the Ford automobile perceived by the reflection in a rear-view mirror with which the Ford was equipped, that the bus was immediately in the rear of his automobile and, for the purpose of enabling the bus to pass his car, turned to his right for a distance of two feet. This movement brought the Ford automobile as close to the west edge of the pavement as the driver felt that he could go with safety. Shortly thereafter the bus collided with the left rear wheel of the Ford automobile, forcing the latter car into the ditch. The evidence appears to be undisputed that both cars were traveling at a moderate rate of speed at the time of the collision. The speed of the Ford was variously estimated at from twelve to eighteen miles per hour and that of the bus somewhat greater, but not to exceed twenty miles per hour.

The case was tried before a jury and resulted in a verdict of $4,000 in favor of plaintiff. From the judgment based thereon defendants prosecute this appeal.

[1] It is the contention of appellants that the trial court erred in giving to the jury two instructions. The first instruction of which appellant complains is as follows: "You are instructed that it was the duty of the driver of defendants' automobile bus on the occasion involved here, and he was bound to anticipate that he might overtake vehicles at any point on the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision with another vehicle using proper care and caution, and if the situation requires it he must slow up and stop. A failure, if any, on his part to use this care was negligence, and if this negligence, if any, was the sole proximate cause of the injury to the plaintiff, then you will find damages in favor of the plaintiff and against the defendants."

It is urged that the foregoing instruction is defective in that it assumes that the driver of the Ford automobile in which respondent was riding was using proper care and caution at the time of the collision and that it entirely disregards the defense of contributory negligence which was pleaded by appellants in the answer filed by them and as to which evidence was produced during the trial of the action.

The argument is made that the instruction in effect advised the jury that the driver of the automobile bus was bound to keep his machine under such control as would enable him to avoid a collision with another vehicle using care and caution, regardless of whether the driver of the other car at the time of the accident was using ordinary care to avoid a collision. This is said to have imposed an unwarranted burden upon appellants, and it is urged that the logical effect of the instruction is to nullify the well-established rule that the rights and duties of all persons using a public street are reciprocal. The suggested criticism of the instruction is answered by the reasoning of the court in the case of Nichols v. Nelson, 80 Cal. App. 590, 596, 252 P. 739, 743, where an instruction containing language identical with that which is here criticized was under discussion. In the above-cited case the jury were told that it is not enough for the driver of an automobile which has collided with a pedestrian to show simply that at the time of the accident he was operating his automobile at a lawful rate of speed, but that he still remains bound to anticipate that he may meet persons at any point of the street and that he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid collision with other persons using proper care and caution, and if the situation requires it, he must slow up and stop. The court in approving the instruction said that the use of the word "proper" to indicate the care required of the defendant meant no more than the exercise of that degree of care which a prudent man should use under the circumstances. With respect to the phrase "bound to anticipate" the court said that its effect was not, as claimed, to enlarge the degree of care required of the defendant. It was pointed out that the trial court had fully and fairly in numerous instructions advised the jury concerning the relative rights and duties of pedestrians and drivers of vehicles upon the public highway, and it was said that "where a court has thus properly charged a jury a subsequent charge to find for one or the other if proper care had not been exercised is not prejudicially erroneous." It is to be noted that, in the instant case, the jury received numerous instructions which most fully and fairly advised them concerning the relative rights and duties of the operators of the two automobiles concerned in the collision. In Ballos v. Natural, 93 Cal. App. 601, 269 P. 972, an instruction which placed upon the operator of an automobile the duty to anticipate that he might meet persons at any point upon the highway and that he must, in order to avoid the charge of negligence, keep a proper lookout for them and keep his machine under such control as would enable him to avoid a collision with other persons using proper care and caution, and if the situation requires must slow up and stop, received the approval of the court. A similar instruction was held correct in Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471. In Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125, the requirement that the operator of an automobile is bound to anticipate that he may meet persons at any point on the street and must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid collision with another person using proper care and caution, and if the situation requires must slow up and stop, was unequivocally stated. The rule thus announced was approved in Potter v. Driver, 97 Cal. App. 311, 275 P. 526. Instructions embodying language similar to or identical with that which is here attacked were approved in the following decisions: Wright v. Salzberger & Sons, 81 Cal. App. 690, 254 P. 671; Putnam v. Pickwick Stages, Inc., 98 Cal. App. 268, 276 P. 1055.

[2-5] The instruction under discussion is further vigorously attacked as being an instruction directing a verdict for respondent without regard to the issue of contributory negligence on the part of respondent. It is the general rule that an instruction directing a verdict for a plaintiff in the event that the jury finds certain facts to be true must embrace all the factors necessary to show legal liability of the defendant and to warrant the direction contained therein that the plaintiff is entitled to a verdict. Nor is the error cured by the submission of other instructions which correctly state the law in the respects wherein the instruction attacked is defective. Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700. But it is to be noted that the instruction in the instant case directed the jury that if the negligence of appellant, McJimsey, was the sole, proximate cause of respondent's injury, the jury should find damages against appellants. The word "sole" is defined in the Standard Dictionary as follows: "Being alone or the only one; existing or acting without another; only; individual." Webster's New International Dictionary defines the word "sole" as: "Being or acting without another; single, individual; only, as a sole heir. Alone, isolated, without company, solitary." Under the above-quoted definitions it is clear that the jury were in effect told that in order to find damages against appellants, it was necessary for them to find that the negligence of appellant, McJimsey, was the only proximate cause of respondent's injury. If therefore the jury followed the court's instruction, as we are entitled to assume, it must have found that the alleged negligence of respondent did not in fact contribute to the injury which he sustained as a result of the collision. The words and phrases used by the court in the instruction under consideration were used in their customary and conventional sense and it must be presumed that the jury so understood them. Nichols v. Nelson, supra. In Wright v. Salzberger & Sons, supra, page 698 of 81 Cal. App., 254 P. 671, an instruction that the defendant while operating an automobile on a public street was under the duty to keep such a lookout for other traffic and for pedestrians and other persons using the street as an ordinarily careful and prudent person would have done and that if the defendant failed to perform the duty thus defined and if the jury should find that such failure was the proximate cause of the injury the jury should find

a verdict in plaintiff's favor was attacked as being a directed verdict against the defendant without a reservation regarding the defense of contributory negligence. It was held that the instruction was not subject to the complaint specified and that the giving of it was not erroneous. It is to be noted that the instruction in the case cited told the jury that if it should be found that defendants had failed to perform the duty described by the court and the jury should find that such failure was the proximate cause of the injury complained of the verdict should be for plaintiff. Obviously, the instruction was more susceptible of criticism than that of which complaint is here made, since in the former instruction the important limitation that the jury in order to return a verdict for plaintiff should find that defendant's negligence was the sole cause of the injury is lacking. In Hotel Ass'n v. Walter, 23 Neb. 280, 36 N. W. 561, 564, objection was made that an instruction wherein the jury was told that, if an accident occurred solely in consequence of defendant's negligence, defendant was liable for resulting injuries was misleading as failing to take into account the contributory negligence of plaintiff. The Supreme Court of Nebraska held that if the accident occurred solely in consequence of defendant's negligence, the plaintiff must have been free from contributory negligence and the jury must have so understood it. This we believe to be the proper construction of the language criticized in the instruction under consideration.

[6, 7] It is also contended that the trial court erred in giving the following instruction: "The Motor Vehicle Act, section 125 (a) provides: 'Any vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again be driven to the right side of the highway until reasonably clear of such overtaken vehicles.' The above section was in force at the time and place of the accident involved here, and if you find that the defendants violated the above section, or any provision thereof, then the violation of same was negligence as a matter of law, and if you find that this violation, if any, was the sole, proximate cause of any injury to plaintiff, then you will find damages in favor of the plaintiff and against defendants."

No complaint is made of the wording of this instruction or that it does not correctly state the rule with respect to the overtaking and passing of one vehicle on a highway by another vehicle, but it is contended that there is no evidence in the record which shows that the bus driven by appellant McJimsey ever attempted to pass the Ford automobile in which respondent was riding and it is therefore urged that the giving of the instruction was misleading and prejudicial to the rights of appellants. In Gregg v. McDonald, 73 Cal. App. 748, 239 P. 373, 376, the rule with respect to the giving of irrelevant instruction is stated as follows: "The trial court gave an instruction which was not warranted by the evidence. We agree with appellant that it was calculated to mislead the jurors and to affect their conclusion on the amount of damages to be awarded by them. We are satisfied, therefore, that the giving of it was prejudicial error necessitating a reversal of the judgment. The rule deducible from the authorities is this: Such instructions only should be given as are based upon legitimate evidence in the case. If an irrelevant instruction be given, and if it is unobjectionable as an abstract proposition of law, the giving of it is a mere technical, but not a reversible, error, if it is not calculated to mislead the jury. If, however, it is calculated to mislead the jury and to affect their conclusion upon the issue submitted to them, it is prejudicial and reversible error. Coughlin v. People, 18 Ill. 266, 68 Am. Dec. 541; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657; Perkins v. Eckert, 55 Cal. 400; People v. Roe, 189 Cal. 559, 209 P. 560."

Examination of the record discloses that the jury may fairly have drawn from the evidence presented to them the inference that the automobile bus was attempting to pass the Ford automobile at the time the collision occurred. It is therefore not open to doubt that the giving of the instruction was proper. Raymond v. Hill, 168 Cal. 473, 479, 143 P. 743; Waniorek v. United Railroads of San Francisco, 17 Cal. App. 121, 128, 118 P. 947.

Finally, even though it be conceded that the instruction complained of was entirely inapplicable, we are unable to discover from the record that the rights of appellants were in any way prejudiced thereby. Under such circumstances, the giving of the instruction does not constitute such error as to warrant reversal of the judgment. Wright v. Salzberger & Sons, supra; Lower v. Hughes, 80 Cal. App. 444, 448, 449, 251 P. 952; Marston v. Pickwick Stages, Inc., 78 Cal. App. 526, 532, 248 P. 930.

For the reasons herein set forth, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

116 Cal.App. 109

BAIRD v. OLSHESKI.

Civ. 7846.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1931.

1. Appeal and error 🔑1097(1).

Decision on former appeal of same case *held* law of case.

2. Corporations 🔑123(24).

Maker of note secured by pledge of corporate stock *held* entitled to notice of time and place of sale of stock (Civ. Code, § 3002).

3. Corporations 🔑123(24).

Holder of note could not avoid duty of giving maker notice of time and place of sale of pledged stock by obtaining judgment on principal obligation and obtaining sale of stock under execution (Civ. Code, § 3002).

4. Pledges 🔑55.

In absence of agreement to contrary, holder of note secured by pledge may bring independent action to collect note.

5. Pledges 🔑25.

Prosecution of action on note to judgment does not extinguish lien on pledged property nor terminate relationship of pledgor and pledgee (Civ. Code, § 3002).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by C. S. Baird against Joseph C. Olsheski. Judgment for defendant, and plaintiff appeals.

Reversed.

See, also, 102 Cal. App. 452, 283 P. 321.

Clarence E. Todd, of San Francisco, for appellant.

Otto G. Kuklinski, of San Francisco (Jack A. Seaman, of San Francisco, of counsel), for respondent.

SPENCE, J.

In this action for conversion of certain capital stock, judgment was entered in favor of defendant, from which judgment plaintiff appeals.

On the trial no evidence was offered by defendant. There is no dispute regarding the facts hereinafter set forth, which facts were proved either by the uncontradicted testimony introduced by plaintiff or by stipulation. Plaintiff borrowed the sum of $500 from defendant, and as security for a promissory note in that amount delivered to defendant a certificate duly indorsed for 100 shares of the capital stock of Baird-Bailhache Company. The note bore the notation "100 shares Baird-Bailhache Co. stock attached." The stock was of the approximate value of $1,000. At the time of the transaction it was orally agreed by the parties that defendant would not sell the stock or take any action to recover the debt without notifying plaintiff. The note matured, and defendant, without notice to plaintiff, commenced an action on the note, and recovered judgment by default. No mention of the pledged property was made in this action. Thereafter, and without notice to and without the knowledge of plaintiff, defendant caused execution to be levied, and said stock was sold. Defendant purchased the stock on the execution sale for the sum of $5. Thereafter the balance due on the judgment amounting to $531.15 was paid by plaintiff to defendant, and a demand was made by plaintiff for the return of the stock, which was refused.

[1] The present case was tried on plaintiff's second amended complaint. The sufficiency of that complaint was passed upon in Baird v. Olsheski, 102 Cal. App. 452, 283 P. 321, which decision has become the law of the case. In our opinion, the undisputed facts proved upon the trial sustained the material allegations of that complaint. The trial court, however, apparently adopted respondent's contention that "the agreement alleged by plaintiff as to forbearance and special notice must be in writing." The findings were therefore against the execution of such an agreement and against the existence of any violation of any alleged agreement.

[2-5] Appellant contends that without regard to the oral agreement of the parties he was entitled to notice of time and place of the sale of the pledge, and in our opinion this contention must be sustained. It is admitted that there was no waiver of notice, and we may disregard the oral agreement and treat the case as one of an ordinary promissory note secured by pledged property. In such case the pledgor is entitled to notice of sale under section 3002 of the Civil Code, which provides: "A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend." In the absence of any agreement to the contrary, the pledgee is within his rights in bringing an independent action to collect the note, but the prosecution of such action to judgment does not extinguish the lien upon the pledged property nor does it terminate the existing relationship of pledgor and pledgee. Commercial Savings Bank v. Hornberger, 140 Cal. 16, 73 P. 625; French v. McCarthy, 125 Cal. 508, 58 P. 154; Sonoma Valley Bank v. Hill, 59 Cal. 107. That rela-

tionship is in the nature of trust (English v. Culley, 85 Cal. App. 291, 259 P. 355), and, notwithstanding the judgment obtained upon the principal obligation, the rights and duties of the parties with respect to the pledged property remain the same. The pledgee is still entitled to notice of time and place of sale under section 3002 of the Civil Code, and the sale of the pledged property without compliance with the requirements of the law constitutes a conversion. 21 Cal. Jur. 343. In our opinion, the mere fact that the pledgee went through the formalities of a sale under execution does not relieve him of his duty to give to the pledgor the notice required by that section.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

116 Cal.App. 234

ULLMAN v. CALIFORNIA CAB CO. et al.

Civ. 6729.

District Court of Appeal, Second District, Division 1, California.

Aug. 21, 1931.

1. Damages 🔑132(1).

$2,500 *held* not excessive, where plaintiff received deep jagged laceration over right eye causing permanent scar, contusion of lower chest and forearm, and abrasions of ankle, resulting in plaintiff's becoming sick and disabled.

2. Appeal and error 🔑1004(1).

Reviewing court can grant new trial for excessive judgment for personal injuries only when judgment shocks sense of justice and raises presumption of prejudice or passion.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by A. M. Ullman against the California Cab Company and others, including H. R. Lane. From an adverse judgment, the last-named defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, for appellant.

Cooper & Collings, of Los Angeles, for respondent.

HOUSER, J.

Defendant Lane appeals from a judgment rendered against him in favor of plaintiff in an action for personal injuries.

[1] The sole question presented by appellant is whether the amount of damages awarded to plaintiff is excessive; and the reason urged by appellant for a reversal of the judgment is that the decision of the court and the judgment based thereon are not sustained by the evidence.

As stated in the findings of fact made by the trial court: "* * * Plaintiff received a deep, jagged laceration about one inch in length in his forehead over his right eye, contusion of the right lower chest and forearm, and abrasions of the right ankle, from all of which plaintiff became sick, sore and disabled and suffered a permanent scar on his right forehead, to his damage in the sum of twenty-five hundred ($2500) dollars."

An examination of the record herein discloses the details from which the trial court was justified in finding that, as a result of the injuries particularly mentioned in said finding, "plaintiff became sick, sore and disabled. * * *" Included within such record is evidence to the effect that prior to the accident which resulted in the injuries to plaintiff his general physical condition was good; that after the accident plaintiff suffered pain for a period of about five weeks—intense pains in his side; dull and constant pain in his right forearm; sharp pains in his forehead; that at the time of trial, which was several months after the accident occurred, "there remains a pain about the center of the spine"; that plaintiff was "very restless, nervous, sleeping in a disturbed fashion," with pain in his back which he did not have before the accident; that for about five weeks he had pain in the back, along with pain in his side, following which such pains continued intermittently, that is, for several days he would be without pain and then with it for a day or so at a time; that on occasions when plaintiff experienced nervousness the large muscles "in the rear of the neck" would contract to such an extent as to become quite painful, lasting during the duration of the particular nervous disturbance; that plaintiff's head was bandaged for about four weeks, and his chest was strapped with adhesive tape after the accident for about two and a half weeks; that after the accident plaintiff was "in a terribly nervous condition"; that for days at a time he was "unable to attend to anything pertaining to business"; that on a great many occasions plaintiff found that "discussions, controversies or arguments, ordinarily incumbent upon the average business man engaged in any line of business, would at once upset (his) nervous system to such an extent that (he) would have pains in (his) stomach and would have to immediately discontinue such discussion or controversy or argument in order to secure any relief from his nervous attack"; and that, in time of continuance, such pains varied from several minutes to several hours. A physician testified, in substance, that the "nervousness from normal reaction, * * * would be caused from a collision" such as produced plaintiff's other physical injuries.

It thus appears that the evidence was amply sufficient to sustain the finding of fact to which attention has been directed.

[2] Where the ground urged for a new trial is that the judgment rendered was excessive in amount, an appellate tribunal is authorized to reverse the judgment only when it appears that the judgment was "so disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise a presumption that it (was) based on prejudice or passion." 20 Cal. Jur. 101, and authorities there cited. On consideration of the facts, this court is unable to say that such required condition here obtains.

It is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 42

CASEY v. DOHERTY.

Civ. 470.

District Court of Appeal, Fourth District, California.

Aug. 6, 1931.

1. **Mortgages** 🔑199(1).

Mortgagee is not entitled to rents, issues, and profits of mortgaged premises, where mortgagor remains in possession.

2. **Mortgages** 🔑199(1).

Amount received for pasturage removed from premises in mortgagor's possession, prior to appointment of receiver, belonged to mortgagor and his right thereto could be assigned.

3. **Receivers** 🔑174(1).

In order to sue receiver, permission must first be obtained from court which made appointment.

4. **Receivers** 🔑168.

Third person may sue to recover property wrongfully taken or withheld by receiver.

5. **Pleading** 🔑48.

Plaintiff is required to allege ultimate facts of his cause of action, which facts, when proven, would entitle him to recover.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Ben S. Casey against W. J. Doherty, receiver. Judgment for the defendant, and the plaintiff appeals.

Reversed, with instructions.

Hickcox & Trude, of El Centro, for appellant.

R. D. McPherrin, of El Centro, for respondent.

ALLEN, Justice pro tem.

The plaintiff filed his second amended complaint in the court below alleging two causes of action, both in substance that in the month of October, 1929, one Edwin S. Pascoe was the owner of certain real property in Imperial county and entitled to the rents and profits thereof; that during the month of November, 1929, the defendant was appointed receiver in a certain mortgage foreclosure proceeding against the property; that during the month of October, 1929, one George Nowlin became indebted to Pascoe in the sum of $520 for pasturage removed from said premises during said month; that Nowlin paid said sum to the defendant receiver after his appointment; that thereafter about November 22, 1929, Pascoe assigned his rights in said sum to the plaintiff herein, who made demand for payment from said receiver, which was refused, whereupon plaintiff filed his complaint praying for judgment. To this complaint defendant filed a general and special demurrer which was by the court sustained without leave to amend. Thereupon judgment was entered for defendant, from which judgment plaintiff appeals.

The two points raised by the demurrer are: First, was the receiver in the mortgage action, and not plaintiff's assignor, entitled to the money set out in the complaint as part of the rents, issues, and profits of the real property therein involved?

[1] It is the law of this state that the mortgagee not in possession is not entitled to the rents, issues, and profits of the premises where the mortgagor remained in possession of the mortgaged premises. In the case of Simpson v. Ferguson, 112 Cal. 180, 188, 40 P. 104, 44 P. 484, 486, 53 Am. St. Rep. 201, it is stated: "The mortgagor being in possession of the land, and entitled as of right to the crops grown thereon, it was competent for him to sell or mortgage, or otherwise dispose of, them, and convey good title thereto, as against the mortgagee of the land or his assigns, at any time prior to the foreclosure of the latter's mortgage." In Binney v. San Dimas Lemon Association, 81 Cal. App. 213, 218, 253 P. 346, which case is similar to the one at bar, it is held that the receiver was not legally authorized to demand and receive the proceeds derived from the sale of fruit taken by the mortgagor from

the mortgaged premises prior to the appointment of a receiver. Cases holding otherwise are not only contrary to the general weight of authority but in direct conflict with two cases decided by the Supreme Court of this state. Simpson v. Ferguson, supra; Garretson Invest. Co. v. Arndt, 144 Cal. 65, 77 P. 770.

[2] The complaint alleges the taking and disposing of the pasturage prior to the appointment of a receiver, which was required to be so alleged by plaintiff in order to state a cause of action.

[3] The next question raised in the appeal is: Has the plaintiff capacity to sue? In order to sue a receiver, permission must be had from the court making the appointment. It is alleged in the complaint that the cause of action was assigned to plaintiff, and that permission to sue the receiver was, before the filing of the complaint, first had and obtained. This would seem to the court to be sufficient. Permission was all that was required, and once obtained, plaintiff was then permitted to proceed with his action.

[4] This court fails to see any reason why a third person cannot sue for property wrongfully taken by a receiver, or wrongfully withheld. See Fidelity Savings & Loan Association v. Citizens' Trust & Savings Bank, 186 Cal. 689, 200 P. 631; 22 Cal. Jur., p. 497, § 84; 22 Cal. Jur. p. 523, § 114.

[5] It was incumbent on plaintiff to allege the ultimate facts of his cause of action, which facts, when proven, would entitle him to recover. This we think plaintiff did.

From the foregoing it must be held that the trial court was in error in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to overrule the demurrer and proceed accordingly.

We concur: BARNARD, P. J.; JENNINGS, J.

THOMPSON v. BYERS.

Civ. 410.

District Court of Appeal, Fourth District, California.

Aug. 20, 1931.

1. Names 🔑10.

Word "transaction," in statute requiring one conducting business under fictitious name to file certificate before maintaining action, means something of mutual nature and does not extend to torts (Civ. Code, § 2468).

[Ed. Note.—For other definitions of "Transaction," see Words and Phrases.]

2. Names 🔑10.

That plaintiff failed to file certificate of carrying on business under fictitious name did not preclude her from maintaining action under individual name for conversion (Civ. Code, § 2468).

3. Husband and wife 🔑264.

Evidence in wife's conversion action against sheriff levying attachment in action against husband *held* sufficient to overcome presumption that attached property, acquired during marriage, was community property (Civ. Code, § 164).

4. Evidence 🔑584(3).

If believed by court, one witness, who is entitled to full credit, is sufficient to prove any fact.

5. Sheriffs and constables 🔑128.

Sheriff may be sued in his individual capacity for torts committed by him in course of his official duties.

6. Executors and administrators 🔑224.

Claim against deceased's estate arising in tort need not be presented to executrix (Code Civ. Proc. §§ 1493, 1502).

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Action by M. S. Thompson against Lillie W. Byers, as executrix of the estate of James C. Byers, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Liggett & Liggett and Glen H. Munkelt, all of San Diego, for appellant.

H. V. Richardson, of San Diego, for respondent.

ALLEN, Justice pro tem.

[1, 2] Plaintiff recovered judgment in conversion in the lower court. This action was originally commenced against James C. Byers, who was sheriff of San Diego county and who levied an attachment on the stock of goods in an action against C. X. Thompson. Plaintiff, who is the wife of C. X. Thompson, filed a third party claim. The attaching creditor filed with the sheriff an indemnifying bond and obtained judgment against C. X. Thompson. The sheriff sold the property under execution issued on the judgment. Subsequently James C. Byers died and appellant, who was appointed executrix of his estate, was substituted as party defendant in this action and appeals from the judgment. The first error relied upon is that the trial court erred in holding that plaintiff's failure to file and publish any certificate of carrying on business under a fictitious name was im-

material as to her right to maintain the action. It is admitted that plaintiff was conducting business under the name of Home Specialty Company, and was retailing goods under such name. The court found that plaintiff had not, prior to the trial, nor at any time, published any certificate as required under section 2468 of the Civil Code. In an early case our Supreme Court held that section 2468 of the Civil Code, relative to the filing and publishing of fictitious names, did not apply to actions of tort. Ralph v. Lockwood, 61 Cal. 155. This case is cited in Reeves v. First National Bank, 20 Cal. App. 508, at page 512, 129 P. 800, 801, where it expressly says: "This action was one for tort, and hence does not fall within section 2468 of the Civil Code." Appellant urges with some eagerness that this cannot be the law because this section of the code has been amended since the rendition of the opinion in those cases by inserting the words "or transactions had" and cites cases from other jurisdictions supporting his contention. The cases cited do not bear out this contention. The case of Farquharson v. Wadkins, 54 Okl. 450, 153 P. at page 1160, 1161, is one brought for damages sustained by the partnership. Quoting from the decision: "They instituted the suit to recover damages for an injury claimed to have been sustained by them as partners under this fictitious name of the 'Elite Theater.'" And the court held that it was necessary for them to have filed and published notice of such partnership before suit could be maintained. This, we think, would not have precluded them from suing in tort under the individual names. In this case the suit was filed under the name of M. S. Thompson and not the Home Specialty Company, the fictitious name under which she transacted business. In further construing the word "transaction" it cannot be safely said that the plaintiff in this case had any transaction or transactions in a business nature with the sheriff of San Diego county. All she did when he levied on the property claimed by her was to tell him so in writing. We do not understand the word "transaction" to mean that one can commit a tort and then claim he has had a transaction with such person. A transaction must be something of a mutual nature and would not extend to torts. Had the word "transaction" been inserted in the statute for such cases as this as claimed by appellant the Legislature could and properly would have added "in all cases" to what it did say, or had it meant to include torts when it so amended such section, could have made it plain by saying "transactions and torts." This it did not do, and we cannot presume that it meant anything more than it said. We do not read into the section anything not contained therein.

[3, 4] Appellant next contends that the evidence is insufficient to support the findings. The main contention of appellant is that plaintiff's only witness was C. X. Thompson, her husband, whose evidence was insufficient to overcome the presumption established by section 164 of the Civil Code that all property acquired by either spouse during marriage is community property. The testimony of C. X. Thompson is that plaintiff entered into the business in 1924 with her sole and separate property which she had before her marriage; that such property consisted of $1,200 in cash and a lot which she sold and put into the business; that she ordered the goods which were charged to her by the wholesalers; that she carried the bank account in her own name and drew checks thereon; that no community funds were invested in said business; that he never contributed any funds to the business; that an agreement was had between himself and his wife that it should be her sole and separate business; that at no time had he operated the same except at one time when his wife was called away by sickness; that he did not handle the funds of the business and had not worked for the Home Specialty Company. This uncontradicted evidence was sufficient to overcome the presumption of the statute. If believed by the court, one witness who is entitled to full credit is sufficient to prove any fact.

The complaint in this action was originally brought against James C. Byers and alleged that he was the sheriff of San Diego county and prayed for judgment against him individually. The answer justifies his acts on the ground that he acted in his official capacity by virtue of a valid writ of attachment. In the trial it was stipulated that he acted at all times in his official capacity.

[5] A sheriff may be sued in his individual capacity for torts committed by him in the course of his official duties, and defendant would be entitled to a finding on the fact unless such failure to so find would be prejudicial to the sheriff's rights. Finding No. 5 sets out that at the time of the levy of the attachment the defendant was acting as sheriff of San Diego county. In reading and construing the findings as a whole, we see nothing which would constitute such error as to warrant a reversal of the trial court.

[6] It is also contended that the judgment must be reversed because it does not appear that the claim against the Byers estate has ever been presented and disallowed by the executrix. Section 1502 of the Code of Civil Procedure is that: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk, or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of such filing or presentation." This section should be read

in connection with section 1493 of the Code of Civil Procedure, which is as follows: "All claims arising upon contracts, whether the same be due, not due, or contingent, and all claims for funeral expenses and expenses of the last sickness must be filed or presented within a time limited in the notice, and any claim not so filed or presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be filed or presented at any time before a decree of distribution is entered," etc.

The claim in this action was one arising in tort. It follows that it was not necessary to prepare and file with the executrix for allowance or otherwise, any claim. There is no statute requiring the presentation of such a claim to the executrix. The case of Millar v. Millar, 51 Cal. App. 718, 728, 197 P. 811, fully answers this contention and is determinative thereof.

Some objections are made to the rulings of the trial court on the admission of testimony, but a close examination of the record does not disclose such errors as would justify a reversal of the cause.

The judgment of the trial court is therefore affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

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115 Cal.App. 629

YANKELEWITCH et al. v. BEACH.

Civ. 4291.

District Court of Appeal, Third District. California.

July 24, 1931.

1. Guaranty 🔑72.

Guarantor signing statement that creditor did not waive any rights under guaranty by also signing agreement with other of principal's creditors to accept reimbursement out of creditors' committee funds, could not claim exoneration from guaranty.

2. Frauds, statute of 🔑23(4).

Services performed for third party's benefit, in reliance that defendant would pay therefor, defendant directly promising to pay, created original contract supported by sufficient consideration (Civ. Code, § 1605).

3. Frauds, statute of 🔑23(1).

"Guaranty" or "guarantee" do not always import guaranty contract, but may mean promise or agreement importing original obligation.

[Ed. Note.—For other definitions of "Guarantee" and "Guaranty," see Words and Phrases.]

4. Frauds, statute of 🔑23(2).

Facts showed that financing company's agent's "guaranty" of building contractor's obligations was original undertaking supported by sufficient consideration (Civ. Code, § 1605).

Facts were that plumbing contractors working upon the contractor's building were unwilling to continue work on the building unless some satisfactory arrangements were made by which they would be assured of payment, and they so notified the building contractor, who requested them to accompany him to the office of the agent of the company financing the building, where the agent told the plumbing contractors to go ahead with the work, and that he would pay them for it, and thereupon signed a "guaranty."

5. Set-off and counterclaim 🔑44(2).

In action on partnership demand, defendant could not counterclaim one partner's individual debt (Code Civ. Proc. § 438; Civ. Code, § 2442).

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Ben Yankelewitch and another, copartners doing business under the fictitious firm name and style of Star Plumbing & Hardware Company, against S. E. Beach, in which defendant filed a counterclaim. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Edward J. Queen and L. M. Cahill, both of Los Angeles, for appellant.

Joseph M. Wapner, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Respondents brought this action to recover from defendant $1,323.50 upon written guaranty of appellant to pay same. Judgment went for respondents, from which appellant has appealed.

It appears from the evidence that respondents were copartners doing business under the name of the Star Plumbing & Hardware Company, and on July 7, 1926, they entered into a contract with L. C. Adams to do the plumbing work and furnish plumbing material for the construction of an apartment building. The contract price was fixed at $15,400, to be paid for as the work progressed, and said contract provided that, in the event of failure in payments, said company, at its option had the right to refuse to further proceed with the work.

Appellant was engaged in business as a broker, and as such secured a loan of $100,000 from the Western Loan & Building Company. He was the special agent of this company and was made trustee for the purpose of distributing this money in the construction of the said building. On October 6, 1926, respondents refused to proceed with the plumbing unless satisfactory arrangements were made regarding their payment for same. Respondents made demand on Adams for the money, but he informed them that he could not pay them, and at his request they accompanied him to appellant's office and informed him that they would not proceed with the work unless satisfactory arrangements were made for its payment. Appellant thereupon executed his written guaranty to pay them $4,495.40, of which $3,471.90 was later paid, leaving a balance of $1,233.50. The said written guaranty being as follows: "Western Loan Building Co., Los Angeles, Calif., Oct. 5, 1926. Gentlemen: You are hereby authorized to pay to the order Star Plumbing and Hardware Co., the sum of $4,795.40 for finish material and labor furnished and used in the construction of building situated on Lot 20 and 22, Block —, tract, Southern District, Agricultural Park, and charge same to my account, deducting the amount from the proceeds of your loan No. 16275 made to Lester Adams out of ——— payment, the work having thus far been approved. This order is irrevocable. L. C. Adams, owner and builder. L. C. Adams, architect, contractor. Accepted, and payment to be made (date) after final inspection of plumbing inspector. I guarantee payment to Star Plumbing & Hardware Co. S. E. Beach."

Appellant contends that the words, "I guarantee payment to Star Plumbing & Hardware Co.," were placed in said writing after appellant signed. There is, on the contrary, substantial evidence to the effect that these words were written in said instrument in his presence and before he signed it.

[1] Appellant also claims that in December, 1926, respondents entered into an agreement with other creditors of Adams, by which they agreed to accept reimbursement for all money owing them by Adams, out of funds and property that had been turned over by Adams to a committee of the creditors. That by signing this agreement respondents exonerated him from any guaranty he may have made. However, it appears that prior to signing said agreement appellant had furnished respondents with a written statement signed by him, to the effect that, by signing the said agreement, respondents did not waive any right accruing to them from said guaranty.

From the committee to whom the funds and property of Adams was turned over, respondents received $500, which was credited upon said guaranteed claims.

[2, 3] The next contention of appellant is that the said guaranty was without consideration. It is not necessary to the existence of a good consideration that a benefit should be conferred upon the promisor. It is enough that prejudice be suffered, or agreed to be suffered by the promisee. Section 1605, Civ. Code; Bacon v. Grosse, 165 Cal. 481, 132 P. 1027. Where services were performed for the benefit of a third party, in reliance that defendant would pay therefor, and defendant directly promised to pay, an original contract was thereby constituted with a sufficient consideration for its support. Meyers v. McKillop, 37 Cal. App. 144, 173 P. 773. The words "guaranty" or "guarantee" do not always import a contract of guaranty. These words are often used in the sense of promise or agreement importing an original obligation on the part of a person executing such contract. Meyer v. Moore, 72 Cal. App. 367, 237 P. 550; Ackley v. Prime, 99 Cal. App. 534, 278 P. 932.

[4] Respondents were unwilling to continue work on the building unless some satisfactory arrangements were made by which they would be assured of payment for same. They so notified Adams. He informed them that he had no money with which he could pay them, and at his request they accompanied him to appellant's office, and laid the matter before appellant. He was the agent of the financing company that had furnished the funds for constructing the building, and had charge of these funds. He told respondents to go ahead with the work, and that he would pay them for it, and thereupon signed the guaranty. When the circumstances leading up to the making of this guaranty are considered, the conclusion follows that the so-called guaranty of the appellant was an original undertaking on his part, and is supported by a sufficient consideration.

[5] Appellant filed a counterclaim in which he alleged that Ben Yankelewitch, one of the respondents, entered into an agreement in writing with appellant, by the terms of which they mutually agreed that, for all sums paid out by appellant for and on behalf of L. C. Adams, said respondents would reimburse appellant to the extent of one-half thereof, and that appellant had paid out on said agreement in excess of $10,000, and therefore said respondents became and are indebted to him in the sum of $5,000.

In support of his counterclaim the appellant offered in evidence a bond executed by the said Adams as principal, with himself and the said Ben Yankelewitch as sureties. This bond set forth that the said Adams had applied to said company for a loan of $100,000 for the construction of the aforesaid apartment building, and provided that said Adams should keep said building free and clear of all liens of laborers, materialmen, and others. Appellant testified that as such surety he had paid over $10,000, and that therefore respondent Ben Yankelewitch, as his cosurety, owed him $5,000. Appellant is contradicted in this testimony by his son, W. E. Beach, who testified on cross-examination that appellant had never paid anything to the laborers, materialmen, or others who furnished labor or material in the construction of said building, from his personal funds. However, it appears that this is an attempt to set off the individual debt of a partner, against an action upon a claim owing to the partnership.

Section 438 of the Code of Civil Procedure provides: "The counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."

In this state the common-law rule has been expressly enacted by section 2442 of the Civil Code (1923) which declares the liability of a copartner to be joint. Under the facts of this case a separate judgment could not be had against only one of the partners. Miner v. Rickey, 5 Cal. App. 451, 90 P. 718; Harrison v. McCormick, 69 Cal. 616, 11 P. 456.

In an action on a partnership demand, the defendant cannot set off an individual debt from one of the partners. McNutt v. Hannon, 183 Cal. 537, 191 P. 1108; Flynn v. Seale, 2 Cal. App. 665, 84 P. 263; 24 R. C. L. 869. A claim against one partner is not a good counterclaim in an action upon a claim due the firm. 25 Am. and Eng. Enc. of Law, 578.

We find no errors justifying a reversal of this case.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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116 Cal.App. 170

TUFTS v. MANN.

Civ. 855.

District Court of Appeal, Fourth District, California.

Aug. 19, 1931.

Rehearing Denied Sept. 17, 1931. Hearing Denied by Supreme Court Oct. 15, 1931.

1. Joint adventures 🔑1.

Finding that plaintiff and defendant entered into joint adventure agreement to secure option on property and obtain purchaser therefor and divide profits *held* supported.

2. Appeal and error 🔑1011(1).

Finding made by trial court on conflicting evidence will not be disturbed on appeal.

3. Joint adventures 🔑5(2).

Although it was doubtful whether allegations constituted allegation of general partnership or joint adventure, evidence showing joint adventure in buying and selling realty *held* admissible.

4. Joint adventures 🔑1.

Partnership 🔑1.

"Partnership" ordinarily is formed for transaction of general business of particular kind, while "joint adventure" relates to single transaction of particular kind, although it may continue for years.

[Ed. Note.—For other definitions of "Joint Adventure" and "Partnership," see Words and Phrases.]

5. Partnership 🔑125.

Partner acts as principal for himself and as agent for copartners in transaction of partnership business.

6. Joint adventures 🔑7.

In joint adventure, no one of parties thereto can bind joint adventure.

7. Joint adventures 🔑5(1).

Joint adventurer has right to, and may, sue for accounting of profits.

8. Joint adventures 🔑4(1).

Obligations growing out of joint adventure agreement are governed by same rules of law applicable to partnerships.

9. Joint adventures 🔑5(2).

Finding, in joint adventurer's action for secret profit realized by coadventurer, that joint adventurer had obtained "option" to purchase property and not mere exclusive listing agreement, *held* supported.

An "option" is an agreement by which an owner invests another with the exclusive right to buy certain property at a stipulated price within a limited time.

[Ed. Note.—For other definitions of "Option," see Words and Phrases.]

10. Joint adventures 🔑4(1).

Where joint adventurer obtained option to purchase property and exercised option in favor of another purchaser, joint adventurer *held* not "broker" within meaning of statute requiring license, as regards right to recover secret profit realized by coadventurer (St.

1919, pp. 1252, 1259, §§ 1, 20, and §§ 2, 17, as amended by St. 1925, pp. 600, 601, §§ 1, 2).

[Ed. Note.—For other definitions of "Broker," see Words and Phrases.]

11. Joint adventures ⚷4(1).

Joint adventurers in purchase and sale of property must act in highest good faith toward each other.

12. Joint adventures ⚷4(1).

Joint adventurers in purchase and sale of property may not make any secret profit out of transaction not shared by others.

13. Joint adventures ⚷4(1).

Each joint adventurer is agent and trustee of others.

14. Joint adventures ⚷5(1).

Joint adventurer may sue coadventurer for breach of contract or for share of profits, where adventure has been closed and joint adventurer is entitled to certain sum as his share.

15. Joint adventures ⚷4(1).

Where, without joint adventurer's knowledge or consent, coadventurer bought, through dummy, property held under option by joint adventurer, joint adventurer *held* entitled to his share of secret profit realized by coadventurer on resale.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Olin M. Tufts against Hugh L. Mann. Judgment for plaintiff, and defendant appeals.

Affirmed.

John J. Wilson and M. M. Holman, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Shirley E. Meserve and Timon E. Owens, both of Los Angeles, of counsel), for respondent.

FINNEY, Justice pro tem.

This is an action to recover a secret profit realized and retained by the defendant from a sale of real property negotiated by himself and the plaintiff. From a judgment in favor of the plaintiff, the defendant takes this appeal.

It is the theory of the plaintiff that he and the defendant were engaged in a joint adventure in negotiating the sale of certain real property which he held under option, which sale resulted in the profits retained by the defendant, and that he (the plaintiff) is entitled to recover one-half of such profits. Briefly the facts are these, as found by the court:

In the month of August, 1926, and during all the times in question, the plaintiff and defendant were licensed real estate salesmen, engaged in the real estate brokerage business and associated in the office of W. M. Garland & Co., in buying and selling real estate as salesmen; that on or about August 13, 1926, the plaintiff and defendant entered into an agreement to work together in handling and selling certain real property belonging to one Macklin and commonly known as the Fedora Hotel, Los Angeles; that it was agreed between them that the plaintiff would obtain an option in writing from said Macklin to purchase said property for the sum of $50,000 net to the seller, and that they would work together to procure a purchaser for the property during the life of the option, at a price in excess of the amount to be paid to said Macklin, and that they would share alike in whatever proceeds arose from the sale of the property over and above the price to be paid Macklin, and any amount necessary to be paid to W. M. Garland & Co. as a commission. Thereafter, on or about August 15, 1926, the plaintiff obtained, in the name of his aunt, an exclusive thirty-day option, in writing, to purchase the property from Macklin for the sum of $50,000, to be paid $15,000 in cash, on delivery of deed and certificate of title and $35,000 on time, to be evidenced by a note secured by deed of trust on said property. Thereafter, on or about September 13, 1926, the defendant reported to plaintiff that he had procured a bona fide purchaser for said property, to wit, one Evelyn Davies, who would be willing to pay therefor the sum of $50,000, and the further sum of $1,250 to apply on a brokerage commission, the seller to pay the balance of said commission, to wit, $1,250, thus making a brokerage commission of $2,500 on the sale. Believing these representations to be true, the plaintiff was thereby induced to and he did exercise his option to purchase the property, and the deal for the same was closed on the basis of this offer, during the life of the option, and J. H. Macklin, the owner of the property, delivered his deed therefor to the purchaser, Evelyn Davies. Thereupon the plaintiff and defendant divided the ostensible profit or commission so made on the transaction, to wit, the sum of $2,500, each receiving one-half the balance thereof after paying $833.33 to W. M. Garland & Co.

The court further finds that shortly thereafter the plaintiff discovered that Evelyn Davies was not the bona fide purchaser of said property, but was in fact acting as a dummy for the defendant and one M. E. Hutton, Jr., in the purchase of said property, and that one-half of the money paid for the purchase of said property, including the ostensible profit or commission aforesaid, belonged to the defendant and was actually paid by

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

him; that thereafter the property was sold in such a way that the defendant realized for himself a profit of $6,729.20 and secured a one-half beneficial interest in certain real property, commonly known as 422 South Alexandria avenue, Los Angeles, the title thereto being held by the Title Insurance & Trust Company, as legal owners, for the benefit of the defendant as to such interest. Thereafter, and on May 11, 1927, this suit was begun to recover one-half of said profits and beneficial interest and resulted in a judgment accordingly in favor of the plaintiff.

Appellant urges numerous reasons for a reversal of the judgment in this case, but all of such reasons relate to three principal objections which will be discussed in their order.

[1, 2] First, appellant contends that the evidence fails to support finding number II which, in effect, finds that the appellant and respondent entered into a joint adventure whereby they agreed, each with the other, to work together in securing an option from J. H. Macklin on the property commonly known as the Fedora Hotel in Los Angeles, for the sum of $50,000, and in selling the same to a purchaser who would buy the property at a price in excess of the net price to be paid the seller, and that they would share alike in whatever proceeds arose from the sale of the property over and above the price to be paid the seller therefor and any amount necessary to be paid W. M. Garland & Co. Appellant further contends that the evidence fails to show any relationship between appellant and respondent, except that of coemployees engaged in business as real estate salesmen in the office of W. M. Garland & Co. at the time the sale in question was negotiated and consummated.

We think this objection is not well founded. The finding is made upon conflicting evidence in which the respondent testified, in substance, that he first talked to Mann about the Macklin properties about August 1, 1926, in the Garland office; that Macklin was willing to give him the exclusive right to sell his property and he suggested that Mann make a trip around to look over the properties of which Macklin had given him a list; that after making the trip and examining the property Mann suggested that respondent "get an option" on two or three of the best properties and, following that suggestion, on August 13, 1926, respondent secured an option on the Fedora Hotel. Respondent further testified, in the language of the bill of exceptions: "I was working on the basis that I had an option on this property and if he would produce a buyer I would split with him the profit over the option price, after we had satisfied the office with half the Realty Board commission; Mann and I had several conversations; the first occurred about a week after the option was obtained, about August 20th; Mann and I were by ourselves in the Garland office and I said, 'I have the option on the Fedora signed up' and showed him the option, and I said 'Now, if you will assist me in getting a buyer, I will split the profits with you on this particular deal'; he said that would be satisfactory; I couldn't quote his exact words; he told me he considered that a very steep figure on the property and that he thought there were profitable possibilities at that figure and he would be perfectly willing to go out and work on it on that basis and cooperate with me." Later, "I said to Mann, 'I want to be positive that you are actually selling this property because if you are not actually selling it, I want to turn it over on this other deal that I have just been offered;' he said there was no question about his selling it; I should have faith in him; he was not attempting to keep me out of the profit in the deal; he was merely selling it as a broker and all he expected was the commission; that he had worked very hard on it at my suggestion, and so he had; that talk was had about September 13th, the day the matter went into escrow." There is other testimony in the record to the same general effect. However, it is not necessary to quote further, as it is apparent from the quotation already made that there is evidence in the record to sustain the finding in question. A finding made by the trial court on conflicting evidence will not be disturbed if, as in this case, there is evidence to sustain the same. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 P. 316; Keyes v. Nims, 43 Cal. App. 1, 184 P. 695.

[3] The appellant also contends, in this connection, that there is a fatal variance between the allegations of the complaint and the proof on which is based the finding that the appellant and respondent entered into a joint adventure for the purpose of handling and selling the Fedora Hotel. At the close of the plaintiff's case, a motion was made on behalf of the plaintiff to amend the complaint to conform to the evidence, but, so far as the record shows, no such amendment was ever made. The objection here made is directed to parts of paragraphs I and III of the second amended complaint, which read as follows:

Paragraph I. "That the plaintiff and defendant on the 15th day of August, 1926, and at all times thereafter until a date subsequent to the 15th day of September, 1926, were engaged in the real estate business and associated in the same office in buying and selling real estate as agents and brokers."

And Paragraph III. "That after obtaining the said option and on or about the 20th day of August, 1926, plaintiff advised defendant that he (plaintiff) had obtained the said option and was then the owner thereof and had the legal right then to buy said property within the thirty-day period of said option, at and for the purchase price of fifty thousand dollars ($50,000) net, and plaintiff thereupon offered to defendant that they, plaintiff and defendant, enter into a partnership agreement for the handling and sale of said property, plaintiff and defendant to work jointly and severally, each for the other, and as agent of the other, in the selling of said property for the best obtainable price, it being then and there agreed between them that if either obtained a bona fide buyer for said property at a price in excess of the option price thereof above named, and the proposed sale was approved by the other, that then and in that event plaintiff would exercise his said option and elect to buy said property and become the purchaser thereof and obligate himself to pay the said purchase price. It was then and there specially agreed that all profits received from the sale of said property, or the purchase thereof, from the said owner above named, to the amount of twenty-five hundred dollars ($2,500), should be treated and disposed of as commissions on the sale of said property, and that said commissions should be divided one-third thereof to plaintiff, one-third thereof to defendant, and one-third thereof to the owner and operator of the real estate office in which plaintiff and defendant were then operating, working and having their place of business as such licensed real estate agents and brokers. It was then and there further agreed between plaintiff and defendant that each should in all respects fully advise the other of all knowledge which either obtained, and in all respects would deal fairly with the other and would make known to the other the truth of the facts with reference to any sale of said property which might be made within the life of said option."

It is contended by appellant that the quoted parts of the amended complaint allege a general partnership between the plaintiff and defendant as real estate agents and brokers in the handling and selling of real estate, whereas the proof purports to show only a joint adventure in a single transaction in the buying and selling of real estate, and the court has so found.

It may be doubted whether the allegations referred to constitute an allegation of a general partnership. But, whether they do or not, it is clear that the evidence offered was admissible under the allegations of the amended complaint. We are satisfied that the court drew the proper conclusion therefrom, if he believed the testimony of respondent, in the finding that the appellant and respondent entered into a joint adventure for the purpose of handling and selling the real estate in question.

[4-8] It is sometimes a difficult question whether a transaction constitutes a partnership or just a joint adventure. One of the principal distinctions between a partnership and a joint adventure lies in the fact that a partnership, ordinarily, is formed for the transaction of a general business of a particular kind, while a joint adventure relates to a single transaction of a particular kind, although it may continue for years. There are other more important distinctions, viz., a partner acts as a principal for himself and as agent for his copartners in the transaction of the partnership business, whereas, in a joint adventure, no one of the parties thereto can bind the joint adventure. On the other hand, the resemblance between a partnership and a joint adventure is so close that the rights, as between the adventurers, are practically governed by the same rules that govern partnerships. Accordingly, a joint adventurer has a right to, and may, sue for an accounting of profits, in accordance with the agreement therefor, and the obligations growing out of the agreement between the parties are governed by the same rules of law applicable to partnerships. Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; Keyes v. Nims, 43 Cal. App. 1, 184 P. 695. It is therefore immaterial, in so far as the rights and obligations of the parties herein involved are concerned, whether the relation created between the appellant and respondent is a partnership or a joint adventure, which we are inclined to believe it to be.

[9] Second, the appellant contends that the instrument procured from Macklin by respondent and under which he claimed the right to purchase the property in question, while referred to as an option to purchase, was merely an exclusive listing or right to handle and sell the property, which gave respondent no right to purchase the same.

The original instrument executed by Macklin and delivered to respondent covering the Fedora Hotel was lost or destroyed and no copy thereof was produced at the trial or offered in evidence. The court, however, made the following finding, as No. II of its findings, to wit: "That plaintiff, on or about the 15th day of August, 1926, obtained from one J. H. Macklin, the owner of certain property known as the Fedora Hotel, located at 325 East Second Street, Los Angeles, California, an exclusive thirty-day good and valid option to purchase said property from said J. H. Macklin for the sum of fifty thousand ($50,000.00) dollars net to said J. H. Macklin."

We have carefully examined the record and are satisfied that this finding is supported by the evidence and should not be disturbed by this court under the familiar rule above referred to. An option is an agreement by which an owner invests another with the exclusive right to buy certain property at a stipulated price, within a limited time. 6 Cal. Jur., p. 48, § 27. It is apparent that respondent held an option and right to purchase the property in question, and that such option was not merely a listing with authorization to sell the property as agent for the owner.

[10] Third, appellant contends that the judgment in this case cannot stand because neither of the parties to this action is licensed either as an individual real estate broker or as a partner or joint adventurer to transact business as a real estate broker or real estate salesman, as required by the terms of the Real Estate Brokers' Act (Stats. 1919, p. 1252, as amended by Stats. 1921, p. 1294, and Stats. 1923, p. 93, and Stats. 1925, p. 600).

The Real Estate Brokers' Act, so far as it need be referred to here, provides as follows:

"Section 1. It shall be unlawful for any person, copartnership or corporation to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor.

"Sec. 2. A real estate broker within the meaning of this act is a person, copartnership or corporation who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate, * * * for others as a whole or partial vocation. A real estate salesman within the meaning of this act is one who for a compensation is employed by a licensed broker to sell, or offer for sale, or to list, or to buy, or to offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to solicit for prospective purchasers of real estate, * * * as a whole or partial vocation. The provisions of this act shall not apply to any person, copartnership or corporation who shall perform any of the acts aforesaid with reference to property owned by such person, copartnership or corporation. * * * One act, for a compensation of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, * * * shall constitute the person, copartnership or corporation making such offer, sale or purchase, * * * a real estate broker or salesman within the meaning of this act.

"Sec. 17. Any person or corporation acting as a real estate broker or real estate salesman within the meaning of this act without a license as herein provided shall, upon conviction thereof, if a person, be punished by a fine of not to exceed five hundred dollars, or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment in the discretion of the court; or if a corporation, be punished by a fine of not to exceed five thousand dollars.

"Sec. 20. No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two hereof without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

Appellant has cited a number of authorities in support of his contention to the effect that a person, copartnership, or corporation, engaged in buying or selling real estate, as agent for the owner, for a compensation, must be licensed under the terms of the Real Estate Brokers' Act at the time of the transaction, in order to be able to maintain an action against any one for a brokerage commission. We have no doubt as to the correctness of these decisions when applied to the facts of these particular cases, but they have no application to the case at bar. Respondent was not dealing with Macklin as an agent in the sale of his property, but rather as a purchaser and owner of the property, and therefore the act in question had no application to him, as will more fully appear hereafter.

Respondent secured, in the name of his aunt, from the owner, J. H. Macklin, an exclusive thirty-day option to purchase the Fedora Hotel, for the sum of $50,000 net to the seller, payable on the terms stated in the option. The option was taken in the name of the respondent's aunt, whose property he had under his control, in order to protect any profit which might result from a sale of the property over and above the $50,000 to be paid to Macklin and the commission to be paid to Garland & Co., in accordance with the suggestion of the appellant. So far as shown by the evidence, respondent secured the option without assistance or contribution from his aunt. Respondent was, therefore, the equitable owner of the option, while his aunt held the naked legal title thereto, subject to his direction. Respondent exercised the option in favor of Evelyn Davies, who became the purchaser of the property from Macklin under the terms of the option. This was the equivalent of a purchase of the property from Macklin by respondent and a sale thereof by him to Davies. Respondent stood, in relation to this property, both as purchaser and seller. He was not the agent of Macklin, either in buying or selling the property, under the terms of his option.

In the case of Robinson v. Easton, Eldridge & Co., 93 Cal. 80, 28 P. 796, 797, 27 Am. St. Rep. 167, the Supreme Court construed an instrument similar in effect to the option here under consideration. The instrument referred to read as follows: "We hereby authorize Easton & Eldridge for us, and within five days from date hereof, and until this authority is canceled in writing by us, to sell for the sum of $10,000—net dollars—the following described property, situated in the city and county of San Francisco, state of California, to-wit: All of block 935, outside lands,—and we will pay said Easton & Eldridge a commission of all over said sum of $10,000, net, for which they may sell said property with our consent."

In construing this instrument, the court used language which is equally apt to the opinion we are considering. The court said: "The relation of the defendant to the plaintiffs was not that of a mere agent. While its authority to sell the land was derived from the plaintiffs, yet the sale was to be made for its own account and benefit, as well as for that of the plaintiffs. Although the authority to sell was not so coupled with an interest as to create in the defendant an interest in the land, or to prevent the plaintiffs from revoking the authority, yet by the terms of the authorization the defendant acquired such a right to a portion of the proceeds of sale as to enable it to make a contract of sale upon terms of its own choosing. The plaintiffs, in effect, gave to the defendant an option for five days to endeavor to sell the block of land for whatever sum it could obtain, and upon whatever terms it might make, provided they should receive therefor the sum of $10,000, and agreed that defendant should have whatever sum it could realize therefor above that amount. The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent, and a sale by the defendant thereunder was in the capacity of a vendor upon its own account, and not for the account of the plaintiffs. Inasmuch as the defendant was entitled to all the proceeds of the sale in excess of $10,000, it had the right to make the sale upon such terms as in its judgment would enable it to realize the highest price for the land Upon a sale by it the plaintiffs were entitled to the immediate payment of the $10,000, but the defendant could sell the land either for cash or upon time, as it might choose, and its terms of sale did not require ratification by the plaintiffs." See, also, Smith v. Blodget, 187 Cal. 236, 201 P. 584.

For reasons above stated and upon these authorities, we hold that the relation between Macklin and respondent, created by the option in the case at bar, was that of vendor and purchaser, rather than that of principal and agent. It follows, therefore, that respondent was not required by the Real Estate Brokers' Act to be licensed, either as a broker or salesman, in negotiating the sale under his option, being specifically exempted therefrom by section 2, which exempts the owner of real property from a compliance with the provisions of said act, in case of sales made by himself. Moreover, there was nothing in the act which prohibited the appellant, who was a duly licensed real estate salesman, from assisting the respondent, as owner, in negotiating the sale of the property under option, in the manner in which he did assist in that purpose. Furthermore, the object of the joint adventure, between appellant and respondent, was not to engage in the business of buying and selling real estate nor to act in the capacity of real estate brokers or salesmen for third persons, or for any one other than the respondent, who was acting in the capacity of owner of the property to be sold. We are of the opinion, therefore, that the joint adventure in this case did not come within the provisions of the act referred to, and consequently respondent was not required to secure a license as broker or salesman in this transaction.

[11-15] Joint adventurers in the purchase and sale of property must act in the highest good faith toward each other and may not make any secret profit out of the transaction not shared by the others. In this respect, each of the parties is agent and trustee of the others and he must account in accordance with the terms of the agreement between them. Munson v. Fishburn, 183 Cal. 206, 190 P. 808; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L. R. A. (N. S.) 1106; Menefee v. Oxnam, 42 Cal. App. 81, 183 P. 379. One party to a joint adventure may sue another at law for a breach of contract or for a share of profits, where the adventure has been closed and he is entitled to a certain sum as his share. Keyes v. Nims, supra. The appellant in this case, without the knowledge or consent of his coadventurer, bought, through a dummy, the property held under option by the respondent, his coadventurer, the sale of which property was the subject-matter of their joint adventure. and appellant then sold the same at a profit to himself of $6,729.20 in cash and an undivided half interest in certain real property commonly known as No. 422 South Alexandria avenue, Los Angeles. The sale to the dummy realized a profit of $2,500, which was divided between the joint adventurers and W. M. Garland & Co., as a commission, in accordance with the joint adventure agreement, but appellant refuses to divide with his coadventurer the secret profit which he realized on the resale of the property.

It is found that appellant knew that the property had a market value in excess of the price named in the option, and that he paid, out of his own moneys, one-half of the purchase price paid therefor by the dummy; and it is a fair inference from the findings that appellant knew, at the time of the sale to the dummy, of a purchaser who would pay a higher price for the property than was obtained from the dummy. It was the duty of appellant to obtain for the property the highest possible price for the benefit of the joint adventure, and, according to his agreement, to divide the profits share and share alike with his coadventurer, after payment of the agreed amount to W. M. Garland & Co. This division, which the appellant refuses to make, is required by the judgment of the court in this case, and we see no reason for disturbing the same.

Accordingly, the judgment appealed from is affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

116 Cal.App. 370

WASHBURN et al. v. A. F. GILMORE CO. et al.

Civ. 6783.

District Court of Appeal, Second District, Division 1, California.

Aug. 28, 1931.

Rehearing Denied Sept. 25, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

1. Mines and minerals ⚷74.

In action against assignees of oil lease for breach of covenant to cover up sump holes on termination of lease, that holes were made by prior assignees of lease was no defense.

This was no defense, because the damage of which the lessors complained did not result as of the time when the sump holes were excavated, since manifestly they were necessary to the drilling and operation of an oil well, and therefore drilling the sump holes would be in compliance rather than violation of the implied terms of the lease, so that defendants could not claim that the damages sued for were sustained by the lessors by reason of acts of the prior assignees.

2. Mines and minerals ⚷74.

Assignees of oil lease *held* liable for breach of covenant to cover up sump holes "on expiration of lease," although not having expressly assumed covenant (Civ. Code, § 1462).

Assignees were liable because of privity of estate, since the obligation to cover up the sump holes "on the expiration of the lease" devolved upon the lessee or its assignees the instant the lease expired, or contemporaneously therewith, although the work could not be instantly executed. The covenant was made for the direct benefit of the property, and ran with the land, and upon assignees' acceptance of the assignment of the lease, there was an implied agreement created on the part of the assignees to be bound by the covenant.

[Ed. Note.—For other definitions of "Expire; Expiration," see Words and Phrases.]

3. Appeal and error ⚷719(6).

Reviewing court could not consider alleged failure of evidence to support findings specified for first time in opening brief, and not in bill of exceptions (Code Civ. Proc. § 648).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by I. B. Washburn and another against the A. F. Gilmore Company, J. & M. Oil Company, and others. From an adverse judgment, defendant last named and certain other defendants appeal.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

C. A. Lindeman, of Los Angeles, for respondents.

HOUSER, J.

It appears that plaintiffs, together with Stuart M. Salisbury and Lois C. Salisbury, were the owners of certain real property which, for the purpose of drilling and operating thereon for the production of petroleum, etc., they leased to the A. F. Gilmore Company, a corporation, and that thereafter, following several preceding assignments thereof, the said lease was assigned to defendants E. C. Joannes and Roy Maggart, doing business under the firm name of J. & M. Oil Company; that prior to such last-mentioned assignment, one of the former assignees had drilled an oil well on the leased property and in the course of production operations had excavated or constructed thereon several sump holes. It also appears that in pursuance of authority reserved to the lessors by the provisions of the lease, for a violation by the lessee or its assignee of some of its covenants, the lessors terminated the lease. With reference to the obligations of the lessee on the happening of such a contingency, the lease contained the following provision: "On the expiration of this lease, or sooner termination thereof, lessee shall quietly and peaceably surrender possession of the premises to the lessors, and shall, so far as possible, cover up all sump holes and excavations made by it, and restore the land as nearly as possible to the condition in which it was received."

For the failure of the last assignees of the lease, namely, Joannes and Maggart, doing business under the firm name of J. & M. Oil Company, to "cover up all sump holes," etc., the plaintiffs, who theretofore had become the sole owners of the leased property, brought an action for damages on account of such failure against the original lessee and each of the succeeding assignees of the lease, which action resulted in a money judgment being rendered against the defendants Joannes and Maggart, both individually and as copartners doing business under the firm name of J. & M. Oil Company; and from which judgment this appeal is prosecuted.

Since on the trial of the action no express assumption by the assignees of the lease of the covenants thereof, including the covenant to "cover up all sump holes," was shown to exist, appellants contend that on the expiration of the lease no duty devolved upon them to comply with the covenant in question. Considerable effort is expended by appellants in their attempt to establish as applicable herein the principle of law that in the situation presented by the facts no privity of contract existed between the lessors and the appellants as assignees of the lease, but that at most the legal relationship of such parties was represented by the connection known as privity of estate, and that the liability of the assignee attaches only as long as such relationship exists. In other words, as soon as the privity of estate ceased, contemporaneously therewith ceased the liability of the assignee for any damage which thereafter occurred to the lessor by virtue of the provisions contained in the lease. Appellants also produce authority to the effect that where the status known as privity of estate obtains between a lessor and an assignee of a lease, the latter incurs no liability arising from breaches of personal covenants of the lease, especially those breaches, if any, which occur prior to the assignment of the lease to the person whose liability is sought to be established. And in that connection appellants urge the point that since admittedly the excavations for the sump holes were made by assignees of the lease who in interest preceded the interest and ownership therein of appellants, the damage which resulted to plaintiffs by reason thereof was one for which appellants were in no wise liable.

[1] But assuming (if not conceding) the correctness of the abstract principles of law to which appellants have directed attention, it is apparent that neither of them exactly applies to the ultimate fact upon which the judgment herein depends; that is to say, on the expiration of the lease in question, failure of appellants to "cover up all sump holes." Unquestionably, it is true that the sump holes were excavated by an assignee of the lease who preceded appellants in interest in the lease; and if it could be said that the damage of which plaintiffs complain resulted as of the time when such sump holes were excavated, the legal principle that an assignee of a lease is liable for such damages only as were sustained by the lessor by reason of the acts and conduct of such assignee only, might well be worth serious consideration. But manifestly in the drilling and in the operation of an oil well, sump holes are as much a necessity as is a derrick or an engine; and considering the situation and intention of the parties in entering into a lease for the "drilling and operating for the production of petroleum," etc., at least in the construction itself of either a derrick, an engine, or a sump hole, no violation of the provisions of the lease would result, but to the contrary, either of such acts would be in compliance with the implied terms of the lease, and consequently no damage to the lessor would instantly occur; from which in the instant matter it would follow that no advantage may be taken by appellants of the fact that the sump holes in question were made by assignees of the lease who became such prior to the date of its assignment to appellants.

[2] Nor in point of either fact or law is the contention of appellants that the breach of the covenant of the lease occurred after its expiration, and consequently at a time when no privity of estate existed between the lessor and appellants, available as a defense of the latter. Strictly speaking, it is true that up to the time when the lease was terminated no breach of the covenant had occurred. The obligation on the part of the lessee and its assignees to "cover up all sump holes," etc., accrued only "on the expiration of the lease"; in other words, the duty to "cover up all sump holes" devolved upon the lessee or its assignees at the same instant of time that the lease expired, or contemporaneously therewith; and the fact that from a practical standpoint the work of filling the sump holes could not be instantly executed should not relieve appellants from performance. Concededly the relation of privity of estate existed between the lessor and appellants, and as the covenant in question was one which was "made for the direct benefit of the property" (section 1462, Civ. Code), it ran with the land. In such circumstances, even in the absence of an express assumption by appellants of the covenant "on the expiration of this lease, * * * to cover up all sump holes," etc., upon their acceptance of the assignment of the lease as made, an implied agreement was created on the part of such assignees to be bound by such covenant.

In the case of Washington Natural Gas Co. v. Johnson, 123 Pa. 576, 16 A. 799, 801, 10 Am. St. Rep. 553, it was held that an assignee of an oil lease who was in possession when the time for performance of the covenant contained in the lease arrived "was also liable because of the privity of estate which arose upon his acceptance of the assignment. Acquiring the leasehold estate by an assignment of the lease, he is fixed with notice of its covenants, and he takes the estate of his assignors cum onere." See, also, Hefner v. Light, Fuel & Power Co., 77 W. Va. 217, 87 S. E. 206.

[3] Appellants also urge that the trial court committed prejudicial error in that the evidence does not support certain findings of fact which for the first time are specified in their opening brief herein; but since the record on appeal is founded on a bill of exceptions in which no mention is made either of the asserted fact that any particular finding or findings made by the trial court was or were unsupported by the evidence, or of the particulars in which such evidence was lacking in that respect, the point presented by appellants may not be considered on this appeal. Section 648, Code Civ. Proc.; 2 Cal. Jur. 708, and authorities there cited.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

116 Cal.App. 222

WULBERN v. GILROY EXPRESS et al.

Civ. 7627.

District Court of Appeal, First District, Division 1, California.

Aug. 21, 1931.

1. New trial 🔑66, 70.

If court was convinced that evidence was insufficient to warrant verdict for plaintiff or that plaintiff was guilty of contributory negligence, court properly granted new trial (Code Civ. Proc. § 657, subd. 6).

2. New trial 🔑159.

On motion for new trial, court may draw inferences from evidence opposed to those drawn by it on trial, provided they are not unreasonable.

3. New trial 🔑72.

If there is absence of evidence, or if from evidence there is lacking probative force to establish proposition of fact necessary to sustain verdict, court must grant new trial.

4. Appeal and error 🔑977(3).

Unless there is manifest abuse of discretion in granting new trial, appellate court will not interfere.

5. New trial 🔑71.

In automobile collision case, in which under evidence jury might have found plaintiff guilty of contributory negligence, court properly granted new trial after verdict for plaintiff (Code Civ. Proc. § 657, subd. 6).

6. Appeal and error 🔑933(1).

Presumption on appeal is in favor of order granting new trial.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by John Kenneth Wulbern against the Gilroy Express and others. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals.

Affirmed.

Franklin Swart, of Redwood City, for appellant.

Ross & Ross, of Redwood City, Owen D. Richardson, of San Jose, and Ford & Johnson, of San Francisco, for respondents.

WARD, Justice pro tem.

This is an action for personal injuries. The defendant in his answer pleaded contributory negligence. A jury rendered a verdict in the sum of $2,000 in favor of the plaintiff. The trial court granted a motion for a new trial on the ground of the insufficiency of evidence to sustain the verdict. Plaintiff appealed from the order granting the motion for a new trial.

At about 11 o'clock p. m. on the night of the accident, a truck, with trailer attached, owned and operated by defendants, was proceeding in a southerly direction along the state highway near Belmont in San Mateo county. The highway at this point is an oiled macadam roadway of approximately twenty-five feet in width, with a two and a half foot shoulder on each side. Mechanical difficulty appearing, the driver parked the truck on the right side of the roadway. The tail-light on the trailer was burning. Plaintiff, operating a Ford coupé traveling at a speed of thirty-two miles an hour and in the same direction as the truck, saw the truck and trailer at least forty-five feet away. A traffic officer, experienced in operating Fords, who was well acquainted with the road and its condition on the night of the accident, testified that plaintiff's car at thirty-two miles an hour could be stopped in fifteen feet. The evidence is conflicting upon many essential facts: The exact spot the truck was parked; whether the driver was justified at all in parking under all the circumstances of what the defendants claimed inefficient mechanical condition of the truck; the number of lights on the truck; whether the Ford's right front headlight was out prior to the accident, etc.

[1-4] Assuming, but not deciding, that the defendant was negligent, there was ample evidence upon which the jury might have determined that the plaintiff was guilty of contributory negligence. The evidence was conflicting to such an extent that the jury could

have returned a verdict for the defendant. If the court was convinced that the evidence was not sufficient to warrant a verdict for the plaintiff or that the plaintiff was guilty of negligence which caused or contributed proximately to the accident, then the court properly granted the motion for a new trial. On a motion for a new trial the court "has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial, provided they are not unreasonable." Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co., 176 Cal. 451–456, 168 P. 1033, 1035. "Conflicting inferences, if reasonable, stand upon the same plane as conflicting evidence." Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co., 176 Cal. 451–456, 168 P. 1033, supra. If it was the contributory negligence of plaintiff which caused the trial court to grant the motion for a new trial, then there was a full compliance with the provision of subdivision 6 of section 657 of the Code of Civil Procedure, which provides that the former verdict or decision may be vacated and that a new trial may be granted upon the ground of "insufficiency of the evidence to justify the verdict." McNeely v. Hill, 52 Cal. App. 184, 185, 198 P. 427. If there be an absence of evidence, or if from the evidence received there is lacking probative force to establish a proposition of fact necessary to sustain a verdict of a jury, it is the duty of the court to grant a new trial. Estate of Bainbridge, 169 Cal. 166–169, 146 P. 427. Unless there is a manifest abuse of the discretion used by the trial court, appellate tribunals will not interfere. Campanella v. Campanella, 204 Cal. 515–522, 269 P. 433; Buck v. Borchers, 203 Cal. 211, 263 P. 226; Rosenberg v. Moore, 194 Cal. 393, 229 P. 34.

[5, 6] In the instant case there was no abuse of discretion. The trial court may well have concluded that the defendant was not negligent, or that, if plaintiff was driving with one front light out, it was negligence, or that, if both lights were on, plaintiff should have seen the truck and trailer ahead, and that in either instance plaintiff's negligence caused or contributed proximately to the accident. The cases cited by appellant and respondents reflect the view of the court upon the law and the facts of each case. The slightest variance in facts will sometimes necessitate a different opinion. A hard and fast rule cannot be made to fit the ever-changing facts and circumstances of each case. The only question here to be determined is whether or not there is manifest abuse of the discretion with which the trial court is empowered in ruling upon a motion for a new trial. In Scott v. Southern Pacific Co., 100 Cal. App. 634–637, 280 P. 996, 998, the court said: "And, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or the finding is against the weight of the evidence, and that there should be a new trial. 'When the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of evidence, it is its duty to grant a new trial.' Merralls v. Southern Pacific Co., 182 Cal. 19, 186 P. 778; Biaggi v. Ramont, 189 Cal. 675, 209 P. 892; Soto v. Globe Grain & Milling Co., 55 Cal. App. 532, 203 P. 830. In considering the question of the correctness of the order the presumption on appeal is in favor of the order and against the verdict. Marr v. Whistler, 49 Cal. App. 364, 193 P. 600; Roberts v. Southern Pac. Co., 54 Cal. App. 315, 201 P. 958." In this case appellant has failed to convince us of an abuse of discretion by the trial court. The order granting the motion for a new trial is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

116 Cal.App. 336

FOARD v. JOHNSON.

Civ. 7936.

District Court of Appeal, First District, Division 1, California.
Aug. 27, 1931.

Rehearing Denied Sept. 26, 1931.

Appeal and error ⚷1176(4).

Appellee's failure to take steps to have appellate court correct manifestly incorrect findings *held* to require reversal, with directions to correct findings (Code Civ. Proc. § 956a; Supreme Court and District Courts of Appeal, Rule 38).

> Transcript showed without conflict that dates in findings as to when property involved in action to quiet title was acquired, and as to defendant-appellant's first knowledge of outstanding deed, were incorrect, and findings with such dates uncorrected did not sustain judgment for plaintiff-appellant. Notwithstanding appellee's knowledge of such condition of the findings, and that, if said condition was not corrected, reversal would be required, appellee made no effort to avail himself of benefit of court rule authorizing appellate court to correct findings, other than to suggest in his brief that appellate court had authority to make findings contrary to trial court's findings.

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Martin Foard against J. M. C. Johnson. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

J. E. Light, of Los Angeles, for appellant.

George G. Bechtel, and Ernest L. English, both of Santa Monica, for respondent.

KNIGHT, J.

The defendant appeals from an adverse judgment in an action to quiet title to a lot situate in the city of Santa Monica. The appeal is taken on the judgment roll alone, the main ground urged for reversal being that the findings do not support the judgment, in that they show that plaintiff acquired the property with knowledge of the fact that defendant held an unrecorded deed thereto. The entire controversy on appeal arises over an apparent typographical error in the preparation of the findings, relating to the date of plaintiff's deed.

The complaint is in the usual form, alleging plaintiff's ownership in the lot, and that defendant claims an interest therein which is without legal right. The answer merely denies plaintiff's title, admits that defendant claims an interest in the lot, and denies that such interest is without right. The court found: (1) That prior to May 6, 1927, title to said lot was vested in one Marie Scherneckau. (2) That plaintiff acquired said lot "on the 6th day of May, *1928*, by deed to him from Marie Scherneckau, an unmarried woman." (3) That said deed from Marie Scherneckau to plaintiff was filed for record "on May 9th, *1927*," and recorded in Book 6890, etc. (4) That "on the 6th day of May, 1928, the plaintiff herein *had no* knowledge or notice of prior outstanding deed executed by Marie Scherneckau in favor of J. M. C. Johnson (defendant herein) bearing date March 5, 1926, and *the first knowledge or notice* of said outstanding deed was on the 8th day of March, 1928." (5) That plaintiff "gave a consideration for said deed from Marie Scherneckau to him, and that said consideration was a valuable one." (All italics ours.)

Manifestly the findings in their present form are legally insufficient to suport the judgment, for as will be seen, according to the dates set forth in findings 2 and 3, plaintiff acquired the property on May 6, *1928*, by virtue of a deed recorded on May 9, *1927*, a year prior to the date on which he acquired the property; and according to finding 4, on May 6, 1928, plaintiff had no knowledge of the existence of defendant's outstanding deed dated March 5, 1926, but did have knowledge of such deed on March 8, 1928. In other words, according to the dates set forth in the findings, plaintiff had knowledge of defendant's outstanding deed two months before he acquired the property. Obviously under such circumstances he was not entitled to judgment.

The appeal was not argued orally, and, after it was ordered submitted for decision, the clerk of the trial court, at our request, forwarded to the clerk of this court for inspection the reporter's transcript, duly certified by the phonographic reporter, but not signed by the trial judge; and it appears therefrom without conflict that plaintiff acquired the property on May 6, *1927*, by deed to him from Marie Scherneckau and not on May 6, *1928*, as set forth in the findings. In their brief counsel for plaintiff state that their stenographer was responsible for the erroneous dates in the findings, and that they were not aware of the errors until served with a copy of defendant's brief (June 3, 1929), and that it was then too late to have the same corrected by the trial judge who signed the findings because his term of office had expired.

Rule XXXVIII of the Supreme Court and District Courts of Appeal, adopted pursuant to section 956a of the Code of Civil Procedure, provided counsel for plaintiff with a complete and easy remedy to have the erroneous dates in the findings corrected by this court, without the necessity of remanding the cause to the trial court for such purpose; in which event the judgment would be affirmed. But despite the fact that they have been aware of the condition of the findings since June, 1929, and of the fact that such condition, if not corrected, would necessarily demand a reversal of the judgment, they have made no effort to avail themselves of the benefit of said rule, other than to suggest merely in their brief that under the provisions of said Code section the appellate court has the authority to make findings contrary to those made by the trial court. Under the circumstances above stated we do not feel called upon to assume such burden. The second and remaining point made against the findings by defendant is without merit.

Therefore, in accordance with the views above expressed, it is ordered that the judgment be, and the same is hereby, reversed, with directions to the trial court to correct findings numbered 2 and 4 so as to conform to the undisputed evidence, to-wit: By striking from finding No. 2 the year "1928" and inserting in lieu thereof the year "1927"; and by striking from finding No. 4 the date "6th day of May, 1928," and inserting in lieu thereof the date "6th day of May, 1927"; and thereupon to re-enter judgment in favor of plaintiff.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

116 Cal.App. 197

HOMER LAUGHLIN ENGINEERS CORPORATION v. J. W. LEAVITT & CO.

Civ. 7685.

District Court of Appeal, First District, Division 1, California.
Aug. 20, 1931.

1. Contracts ⚷176(1).

Construing contract from reading of whole thereof *held* within trial court's province.

2. Contracts ⚷152.

Where any word or phrase of contract is subject to different meanings, meaning which harmonizes with instrument in its entirety should be adopted.

3. Contracts ⚷169.

In arriving at true construction of contract, all of surrounding circumstances should be considered.

4. Sales ⚷72(5).

Contract provision that, if manufacturer should make tractors or proceed with work thereon to distributor's satisfaction, distributor should place orders for tractors, *held* to mean distributor's "satisfaction" regarding both making of tractors and progress of work.

> The term "satisfaction" means the absence of reasonable grounds for dissatisfaction.
>
> [Ed. Note.—For other definitions of "Satisfaction; Satisfy," see Words and Phrases.]

5. Contracts ⚷159.

Terms "and" and "or" may be construed as interchangeable when necessary to effect apparent meaning of parties to contract.

> [Ed. Note.—For other definitions of "And" and "Or," see Words and Phrases.]

6. Sales ⚷93.

Finding that manufacturer and distributor abandoned contract for manufacture, sale, and distribution of tractors by mutual consent *held* supported.

7. Appeal and error ⚷1011(1).

Question of truth of conflicting testimony held for determination of trial court sitting without jury.

8. Appeal and error ⚷1011(1).

Determination of trial judge sitting without jury on conflicting factual condition is final, if reasonably supported.

9. Appeal and error ⚷1029.

Where trial court found that plaintiff was not entitled to recover damages, and finding was supported, any error in computing damages *held* immaterial.

10. Appeal and error ⚷1041(5).

Any error, in refusing permission to file additional or supplemental pleadings on question of damages *held* immaterial, where finding that plaintiff was not entitled to damages was supported.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Homer Laughlin Engineers Corporation against J. W. Leavitt & Co. Judgment for defendant, and plaintiff appeals.

Affirmed.

Newby & Newby, Newby & Palmer, and Nathan Newby, Jr., all of Los Angeles, for appellant.

Ralph E. Jenney, of San Diego, and Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

PARKER, Justice pro tem.

This action was brought by plaintiff against defendant to recover damages for an alleged breach of contract. The cause was tried by the court, sitting without a jury, and from an adverse judgment plaintiff prosecutes this appeal. The record is voluminous, and comes to us through a bill of exceptions. The contentions advanced cover almost the entire law of contracts, and appellant urges that the most fundamental principles governing were ignored to its prejudice. There is one important fact, however, upon which both parties agree. It is conceded that the contract in question was never fully performed. Appellant contends that the failure of performance was on the part of respondent, which failure excused further performance on the part of appellant; respondent, on the other hand, argues that the failure was on the side of appellant. And added to this feature of the case is the claim of respondent that the contract was abandoned by mutual consent. The findings of the trial court, upon which rest the judgment, were in favor of respondent.

The contract involved was entered into between the parties on October 31, 1918. By the terms thereof appellant agreed to manufacture tractors as speedily as possible and to deliver to respondent, as the same should be ordered, at least 70 per cent. of the tractor output of the factory, not exceeding five hundred tractors in one year. Respondent agreed to immediately place an order for ten tractors then being manufactured by appellant and to pay down the sum of $21,200, which amount was paid and receipt acknowledged. If appellant should make said tractors or proceed with the work thereon to the satisfaction of respondent, then the latter should from month to month thereafter place orders for more tractors and make payment of a similar sum for each ten tractors ordered. After April 1, 1919, respondent should place orders for and pay for ten tractors or more, and thereafter each tractor should be paid for as ordered. Respondent agreed to distribute the said tractors throughout the territory, advertise the same in trade journals, carry parts for the tractors, and further agreed to advance to appellant, as might be required, sufficient funds for material and labor sufficient for the manufacture and completion of not less than ten tractors at any one time, provided that at all times the appellant should have, to the satisfaction of respondent, well and truly proceeded with all diligence to the manufacture and completion of any orders for tractors placed and should on demand furnish a satisfactory statement of assets and liabilities. The appellant in said contract agreed to manufacture the tractors, using the best of materials and workmanship, and embodying therein all new and improved features as might from time to time be invented by appellant or its designing engineer. Appellant further agreed to manufacture and keep on hand in its factory sufficient repair parts to supply the respondent or its agents with such repair parts as might be necessary. The respondent was given the exclusive agency for the territory for a term of five years. It was mutually agreed that, as prices were revised, the selling price to respondent should not exceed 20 per cent. above the cost of manufacture. The contract further provided for arbitration in case of dispute. Here it might be noted, while on the subject of the contract, that there was an apparent ambiguity or uncertainty in that portion thereof providing: "If said party of the first part (appellant) shall make said tractors *or* proceed with the work thereon to the satisfaction of the party of the second part (respondent), said party of the second part shall from month to month hereafter place with the party of the first part orders for tractors * * * and shall make payment," etc. (Italics ours.) The trial court construed this provision to mean and intended to mean: "If said party * * * shall make said tractors *and* proceed with the work thereon," etc. (Italics ours.)

[1-5] A specific finding was made to the effect that the contract should be read as the parties so intended. Appellant contends that such a finding is erroneous for two reasons: First, that the pleadings contain no prayer for reformation; and, second, that the evidence does not support the finding. We are of the opinion that it was within the province of the trial court to construe the contract from a reading of the whole thereof, and, where any word or phrase was subject to different meanings, then such meaning should be given as would harmonize with the provisions of the instrument in its entirety, and, in arriving at a true construction of the instrument, all of the surrounding circumstances should be considered. It is obvious that the subject of the particular section under present consideration was the satisfaction of the respondent, and it might be noted that the term "satisfaction," broadly yet sufficiently defined in similar cases, means the absence of reasonable grounds for dissatisfaction. A strict interpretation of the disputed clause in the disjunctive would result in a construction that would bind respondent in the event that tractors were not being made, if there were no grounds for reasonable dissatisfaction as to the progress of the work; and likewise would respondent be held if tractors were actually being made and yet no effort at all being made to insure output. As will more fully appear hereinafter, such a construction would do violence to the general intent and purpose of the entire transaction. And there is almost an unanimity of holding to the effect that the terms "and" and "or" may be construed as interchangeable when necessary to effect the apparent meaning of the parties. Arnold v. Hopkins, 203 Cal. 563, 265 P. 223; Willis v. Robinson, 291 Mo. 650, 237 S. W. 1030, 1033; Poehlman v. Leinweber, 288 Ill. 58, 122 N. E. 834; Kales v. Houghton, 190 Cal. 294-298, 212 P. 21. And the application of the rule announced will be apparent upon a review of the conditions surrounding the parties at the time the contract was executed.

The date of the contract is likewise significant, for many reasons. In October of 1918 the United States was at war, and the usual war-time conditions prevailed in every industry. Particularly was there an era of unprecedented prosperity in farming. All farm products were at the peak of price with the supply limited. Every acre of tillable land throughout the United States was being turned into productivity, with a constant and unsatisfied demand for farm machinery of every type. The appellant corporation was in the experimental stage of manufacturing a light farm tractor. The defendant was a distributor of automobiles, with branches throughout the state, and with a well-organized and successful outlet for distribution. A short time before the execution of the contract there had been a farm and tractor exhibition near Los Angeles. As a part of the exhibit was the tractor of appellant. One Bierlein, a visitor at the exhibition, noticed the tractor, and seemed pleased with its performance and hopeful of the possibilities offered in its promotion. Pursuing this interest, Bierlein made contract with the officials of appellant company, and obtained from it a contract and authority empowering him to secure capital for the manufacture and distribution of the tractors. Thereafter Bierlein began negotiations with defendant corporation, respondent herein, resulting in the contract before us.

The factory of appellant was hardly more than a workshop, experimental to a degree, poorly financed, and in no sense a going concern. The tractor itself was hardly more than a design, having given no definite evidence of its capability to perform satisfactorily under ordinary working conditions. The transaction on both sides, was really a venture, induced through then existing conditions and predicated upon expectancy rather than assurance. Respondent did advance the sum of $21,200 to start the factory, and appellant thereupon undertook the work of producing tractors. One tractor was delivered to respondent at its salesrooms in San Francisco and was put upon display. When a minor demonstration was had, the tractor not only failed to perform satisfactorily, but showed up defects in construction and material which destroyed confidence in its ability to ever perform, and which rendered more difficult any attempts at distribution. And here it might be further noted that, in all, four tractors were built before and after the alleged breach of the contract, and that the net achievement was the operation of two by using the other two as extra parts to make possible the unsatisfactory operation of the two which were used.

In the time intervening between the date of the contract and December 12th, there were many discussions between the principals to the contract. There was reasonable ground for respondent to believe that friction existed in the management of appellant corporation, hindering the output; and that the efficiency of the factory was thus impaired to an extent greatly impeding the output. Also the unsuitability of the tractor as a working machine had become more apparent. As a result, no orders were forthcoming from respondent, and the entire transaction seemed at a point where action of some sort appeared necessary.

On December 12, 1918, Homer Laughlin, Jr., president of appellant corporation, on behalf of said corporation, addressed and mailed to defendant corporation a letter. This letter reviews some of the difficulties encountered, and attempts explanation thereof. The following language is taken from this letter: "I, therefore, beg to assure you that we shall be pleased to continue the contract upon your placing immediately your order for the second batch of tractors together with the necessary funds therefor, or —we will mutually agree to cancel the contract delivering the remaining eight tractors of your first order before April 1st, 1919, and leaving you secured as before for their completion. In either case we need your immediate reply. If the contract is to be cancelled, new arrangements will have to be made immediately to continue our production. If by mutual consent we should cancel the contract I hope that it will be done with that respect and esteem and care for the interests of both parties with which we originally entered the contract. There is nothing herein contained that is for one minute to be construed as an acknowledgment that we are in any manner whatever at fault. Our offer to cancel is only for the purpose of an immediate conclusion. If for any reason our contract is not worth to you what it was at the time you signed it we shall find others who value it more highly." Appellant concedes this to be a direct and unequivocal offer of cancellation and abandonment. But, contends appellant, the offer was never accepted, and therefore no cancellation resulted.

[6] The trial court found that the offer was accepted, and that the contract was by mutual consent abandoned, rescinded, and canceled. The finding of the trial court, omitting that part thereof referring to the writing of the letter offering to cancel, is as follows: "That on receipt of said letter said offer to mutually cancel and abandon the contract was accepted by said defendant, and thereafter the said contract was mutually abandoned by both parties and the plaintiff made no further or other effort to furnish the said defendant any further or other tractors, and the said plaintiff and defendant did negotiate for the repayment to the said defendant of the said moneys advanced by it for the purchase of said original tractors, and said parties did reach an agreement to the effect that one of said tractors delivered to the defendant should be retained by it and that the proceeds of every other tractor which was thereafter manufactured and sold by the plaintiff should be paid to the defendant, and that the proceeds of the other tractors manufactured and sold by plaintiff be retained by the plaintiff until the defendant had been paid the amount advanced by it in the purchase of the said original ten tractors; that before this agreement was reached the San Francisco tractor had been returned by the defendant to the plaintiff's factory, and some time after the making of said agreement the said factory, without consulting said defendant, sold the said tractor and kept the proceeds thereof; that the Los Angeles tractor was retained by the said defendant; that the said defendant offered and tendered its return to the said plaintiff; that the said plaintiff never took possession of said tractor or received the same; that said plaintiff never carried out the said agreement to pay to the said defendant the purchase price of every other tractor sold by it; that plaintiff only manufactured two additional tractors be-

sides the two delivered to said defendant, and did not pay to the said defendant the proceeds of the sale of either of said tractors or pay anything at all to the defendant."

[7] This finding has abundant evidentiary support in the record. As would be inferred, there is conflict in some instances, but this was a question for the trial court to determine where the truth might be. There is evidence that, upon receipt of the letter, defendant communicated by telephone with Laughlin, and did accept the offer of cancellation, and that Laughlin in reply merely said, "Thanks," evidently glad to be through with the matter.

[8] There is further evidence that, in subsequent negotiations with other parties, appellant conceded the cancellation of the contract with respondent. It is in evidence that, at the time of the execution of the original contract and the payment of the money by defendant, the appellant, to secure the defendant in its payment of some $21,000, had executed and delivered to defendant a deed of trust upon certain real property. After the notice of cancellation and the acceptance as herein detailed, and the failure of other negotiations, and after April of 1919, the defendant sought the repayment of the moneys advanced. No claim was then made by appellant of any breach of contract, but the cancellation of the contract was admitted and terms of repayment of the moneys advanced were sought. The deed of trust was foreclosed and the property sold, and still no claim by appellant that the amounts claimed were not due. In the time between the cancellation and the sale under the deed of trust, appellant sought to secure the aid of defendant in a distribution plan after manufacture by an independent concern; and still no claim of breach. All in all, the conduct of the parties amply demonstrates that all concerned considered the contract at an end. The factory went into the list of nonproducers, and nothing further seems to have been done with the tractor thereafter. The venture was, manifestly, a complete failure. The tractor as made was an almost total loss; the materials used in the manufacture would not stand up, the design was more theoretical than practical, and the expense of upkeep was prohibitive. It is true, as appellant points out, that there are some isolated facts which might be construed as inconsistent with a finding of abandonment or cancellation; on the other hand, these same facts might be explained from the circumstances existing. But, if not explained, the effect would simply be to create a conflicting factual condition with the power to determine resting with the trial judge, whose determination, if reasonably supported, would be final.

While we feel that the holding of a cancellation sufficiently disposes of the issues here presented, we may add, however, that the trial court found, too, that even before cancellation the contract had been breached by the appellant, and that by reason thereof respondent was excused from further performance. This finding likewise finds ample support in the record. We do not feel compelled to analyze every word of conflicting testimony, but our conclusion from a reading of the entire transcript is that the appellant's cause in the court below was absolutely without foundation of fact, and that the appeal prosecuted from the judgment is frivolous and without merit of any kind.

Appellant has taken detached portions of the testimony favorable to its contentions and surrounded these with abundance of citation of elementary principles. Where conflict appears, it has argued its own testimony, regardless of the trial court's findings. It is demonstrated by an overwhelming mass of evidence that appellant has suffered no loss through any act of respondent. Appellant sought to recover $750,000 as damages claimed for the breach of a contract which, from its very inception, was hardly more than an experiment, and after the experiment had failed. It seeks these damages after it had, in almost every particular, as found by the trial court, breached the contract, while the defendant was not in default; and seeks these damages in the face of a mutual cancellation and abandonment. The contract as executed could never have been performed as the conditions existed, and, at the time of mutual cancellation, all parties were fully aware of that fact: If appellant could prevail, it would make a wonderful success of an admitted failure, reversing the old idea of a Pyrrhic victory. Appellant complains of other errors of the trial court. Each of these claims is predicated upon rulings or orders affecting appellant's claim of damage.

[9, 10] Inasmuch as the trial court found that plaintiff was entitled to no damage by reason of the fact that defendant had not breached the contract, and that the same had been canceled by mutual consent, any error in computing damage becomes immaterial, as does any error in the restriction of a pleading or the refusal of permission to file additional or supplemental pleadings on the question of damages. Such other specifications of error as are urged center about the controversy in the main, and the foregoing disposes thereof.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

PARRINO v. RALLIS et al.

Civ. 7755.

District Court of Appeal, First District, Division 1, California.

Aug. 28, 1931.

Rehearing Denied Sept. 26, 1931.

1. Bills and notes 🔑92(3).

Forbearance under agreement to forbear constitutes valid consideration for note, mere forbearance alone being insufficient.

2. Bills and notes 🔑96.

Principal and surety 🔑33.

Accommodation maker or surety need not derive any benefit from note so long as payee suffers detriment.

3. Contracts 🔑28(3).

Agreement to forbear might be implied from taking of note payable at future date.

4. Appeal and error 🔑1011(1).

Although evidence is conflicting, finding supported by substantial evidence will not be disturbed.

5. Bills and notes 🔑96.

Where payee's right of action on original indebtedness had been suspended by acceptance of note, subsequent promise to forbear furnished no consideration for execution of note by accommodation maker.

6. Contracts 🔑75(1).

Agreement to do that which one is already bound to do does not constitute consideration for new promise.

7. Bills and notes 🔑518(1).

Where payee's acceptance of note was not conditional on execution of note by maker's wife, finding that there was no consideration for wife's execution of note *held* supported.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Guiseppe Parrino against Theodore M. Rallis and L. Rallis. Judgment for plaintiff against Theodore M. Rallis. From judgment for L. Rallis, plaintiff appeals.

Affirmed.

Sylvester Andriano and William R. Lowery, both of San Francisco, for appellant.

Hugh K. McKevitt and Holloway Jones, both of San Francisco, for respondent.

PER CURIAM.

The above action was brought upon a promissory note executed to plaintiff by defendants T. M. Rallis and L. Rallis, his wife. The instrument, which was for $1,303, was dated August 2, 1926, and payable with interest on August 1, 1927. Some time before its date defendant T. M. Rallis became indebted for money loaned and services rendered by the plaintiff and others. The latter assigned their claims to the plaintiff, and the note was for the amount of the claims.

Defendant L. Rallis alleged "that neither at the time of the execution of said note nor at any other time was there any express agreement between the parties for a forbearance of the collection of the sum then owing to plaintiff; nor was there at any of said times any express agreement to extend the time of payment of said sum; nor was there any intention by the parties to make the forbearance of collection or the extension of time of payment any part of the consideration for the execution of said note by said defendant L. Rallis."

Defendant T. M. Rallis made no defense to the action.

The above allegations were found to be true, and judgment was accordingly entered against T. M. Rallis and in favor of L. Rallis, his wife. The plaintiff appealed from the latter portion of the judgment, and as grounds therefor it is contended that the court's finding, which followed the language of the above defense, is unsupported by the evidence.

[1-3] Forbearance is sufficient to constitute a valid consideration, although it must be under an agreement to forbear; mere forbearance alone being insufficient. In re Estate of Thomson, 165 Cal. 290, 131 P. 1045. And it is not necessary that one signing a note as an accommodation maker or as a surety derive any benefit therefrom so long as the payee of the note suffers a detriment. Westphal v. Nevills, 92 Cal. 545, 28 P. 678. While the record here discloses no evidence of an express agreement by the plaintiff to forbear, such an agreement might be implied from the taking of a note payable at a future time as this suspends action on the original debt. 8 Corp. Jur., Bills and Notes, p. 237; Gnarini v. Swiss American Bank, 162 Cal. 181, 121 P. 726. The court found, however, that there was no intention by the parties to make the forbearance of the collection, or the extension of time payment, any part of the consideration for the execution of said note by said L. Rallis, and concluded therefrom that there was no consideration for the execution of the note by her.

[4-7] A finding will not be disturbed if there is substantial evidence to support it (Treadwell v. Nickel, 194 Cal. 243, 228 P. 25), and this is true, though there be no conflict in the evidence, if different inferences may reasonably be drawn therefrom. Fanning v. Green, 156 Cal. 279, 104 P. 308; MacDermot v. Hayes,

175 Cal. 95, 170 P. 616. It is undisputed that Mrs. Rallis was not indebted for any part of the claims against her husband, and that there was no agreement by her other than that contained in the note to pay the same. Further, the testimony shows that T. M. Rallis signed the note at a bank during the forenoon of the day it bears date, and that during the afternoon of the same day it was taken by plaintiff and one Damino to the store conducted by the defendants, both of the latter being present, and by Damino handed to Mrs. Rallis, the plaintiff at the same time stating that he wished her signature thereon merely as a matter of form. These facts fairly support the conclusion that the note, after being signed by T. M. Rallis at the bank, was then and there delivered to the plaintiff and accepted by him as the sole consideration for his implied promise to forbear; and that such acceptance was not conditional upon the execution of the note by Mrs. Rallis. This being true, and plaintiff's right of action on the original debt having been suspended by the acceptance of the note by T. M. Rallis, a subsequent promise to forbear, express or implied, would furnish no consideration for a promise by L. Rallis to pay the same. An agreement to do that which one is already bound to do does not constitute a consideration for a new promise (Ellison v. Jackson Water Co., 12 Cal. 553; Marinovich v. Kilburn, 153 Cal. 638, 96 P. 303); and we are satisfied that the finding together with the court's conclusion that there was no consideration for Mrs. Rallis' promise are fully supported by the evidence.

The portion of the judgment appealed from is affirmed.

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116 Cal.App. 306

MAGGART v. BELL.

DEVANY v. SAME.

Civ. 7355.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1931.

1. Trial ⚷108½.

In absence of showing of bad faith in accident case, counsel's asking whether any juror had been employed by certain casualty association *held* proper.

2. Trial ⚷133(6).

Error in juror's asking defendant whether he had accident insurance *held* harmless, where court promptly admonished jury to disregard question, which remained unanswered.

3. Automobiles ⚷245(72).

Whether pedestrians who, having almost reached opposite side of street, were struck by motorist completing left turn, were contributorily negligent, *held* for jury.

Evidence showed that motorist and pedestrians were going in same direction and on reaching intersection they stopped to await change of traffic signals and then proceeded; that motorist, intending to make left turn, was delayed by other vehicles, and on finally completing turn struck pedestrians, who were then within two or three feet of curb; and that pedestrians had looked in both directions before starting across street, and also while in middle of street, but failed to see automobile in question, which may have been due to presence of other vehicles.

4. Automobiles ⚷245(6).

Whether motorist completing left turn and not seeing pedestrians until five feet away was negligent *held* for jury.

5. Automobiles ⚷160(1), 216.

In absence of contrary statute or ordinance, duties of pedestrian and driver to use ordinary care are equal and reciprocal.

6. Automobiles ⚷245(6, 72).

Whether either pedestrian or driver failed to exercise ordinary care is generally question of fact.

7. Automobiles ⚷216.

Duty of pedestrian to use ordinary care, although continuing duty, cannot in nature of things require him to look continuously in all directions at all times.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Separate actions by Sarah J. Maggart, and by Anna Devany, against Grant C. Bell were consolidated for trial and for appeal. From judgments for plaintiffs, defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, B. P. Gibbs, of Los Angeles, and Carroll B. Crawford, of San Francisco, for appellant.

Eugene J. Mooslin, of San Francisco, for respondents.

SPENCE, J.

The above-entitled cases were consolidated for the purpose of trial and pursuant to stipulation and order were consolidated for the purpose of appeal. In the trial court judgments were entered upon the verdicts in favor of plaintiffs Sarah J. Maggart and Anna Devany in the sums of $5,000 and $4,000, respectively, for personal injuries alleged to have been caused by the negligence of defendant. From these judgments defendant appeals.

[1, 2] Appellant first contends that he was prevented from having a fair trial by reason of prejudicial conduct on the part of respondents' counsel in intimating to the jury that appellant was insured. We find no merit in this contention. After the court had propounded certain questions to the jurors, respondents' counsel asked, "Has anyone of you been employed by the Pacific Casualty Automobile Association?" Appellant objected to the question and the objection was overruled. It is not contended that such questions are improper when asked in good faith for the purpose of securing a jury free from bias and prejudice (Girard v. Irvine, 97 Cal. App. 377, 275 P. 840), but it is contended that this question was not asked in good faith. There is nothing in the record to justify this conclusion. It may be, as stated by appellant in his brief, that there was no association known as the Pacific Casualty Automobile Association licensed to do business in this state; but even assuming this to be true, appellant may have been insured in some company or association bearing a similar name. We are not convinced that this point is seriously urged as counsel for appellant offered no evidence with respect thereto in support of the motion for new trial, nor was any appearance made for the purpose of arguing said motion. It is not claimed that appellant was not in fact insured and so far as the record discloses counsel for respondents may have honestly believed that appellant was insured in an association bearing the name used and may have acted in entire good faith in propounding the question. Our attention is further called to the fact that on the third day of the trial and while appellant was on the witness stand the following occurred:

"The Court: Any questions you would like to ask, ladies and gentlemen?

"A Juror: A. Are you fully covered against accident insurance?

"The Court: You will get into trouble there, that has not anything to do with it, absolutely not. It does not make any difference if he has or has not. You are not to consider that at all. You are to decide this case without any reference to any insurance company. That would be contrary to your oaths of office. That makes no difference at all. You are to decide this case simply between the parties to the record, between the plaintiffs and the defendant. That has not anything to do with it. You have no right to even think of such a thing."

The question asked by the juror was obviously improper and although there was no objection from counsel the question remained unanswered due to the prompt and effective admonition given by the court in which the jury was advised that the subject of inquiry was entirely irrelevant. Under the circumstances, we cannot say that the trial court erred in concluding on motion for new trial that appellant had been accorded a fair trial and that the verdicts were not induced by any improper considerations. Richmond v. Moore, 103 Cal. App. 173, 284 P. 681; Girard v. Irvine, supra.

[3] Appellant further contends that even if appellant's negligence be conceded, the evidence shows that respondents and each of them were guilty of contributory negligence as a matter of law. In our opinion this contention is likewise without merit. The accident occurred after dark at about 8 o'clock on the evening of January 18, 1930, at the intersection of Geary street and Van Ness avenue in San Francisco. Prior to the accident respondents were walking in a northerly direction along the sidewalk on the west side of Van Ness avenue, and appellant was driving in the same direction on the east side of the street. Respondents were intending to cross from the southwest to the northwest corner of the intersection. Appellant was intending to turn to the left to proceed in a westerly direction on Geary street. Traffic at the Geary street intersection was directed by automatic "Stop" and "Go" signals. The traffic signals were against the northbound traffic when respondents and appellant reached the intersection. All awaited the change of signals and then proceeded on their intended courses. As appellant made the turn he was delayed while automobiles passed going south on Van Ness avenue and then he proceeded westward striking respondents at a point within two or three feet of the curb on the northwest corner of the intersection. No horn was sounded by appellant as he came from behind the southbound traffic, and he testified that he did not see respondents until he was within five feet of them.

[4-7] Under the evidence we believe that the issues of negligence and contributory negligence were properly submitted to the jury. In the absence of statute or ordinance to the contrary, the duties of the pedestrian and the driver to use ordinary care while on the highway are equal and reciprocal and the question whether either had failed to exercise such care is ordinarily one of fact and not of law. Filson v. Balkins, 206 Cal. 209, 273 P. 578; Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649; Courviosier v. Burger, 61 Cal. App. 470, 215 P. 93. It is appellant's claim that respondents were guilty of contributory negligence as a matter of law in failing to see the automobile. One of respondents testified that she did not see the automobile before being struck, while the other testified that she saw the automobile just as she was struck. The

testimony showed that they had looked in both directions before starting to cross the street and also while in the middle of the street and their failure to see the automobile in question may well have been attributable to the southbound traffic which was between respondents and appellant during a portion of the time. The foregoing evidence clearly made the issues of contributory negligence a question of fact for the jury under the general rule, for although the pedestrian's duty to use ordinary care is a continuing duty, nevertheless that duty in the nature of things cannot be said to impose upon the pedestrian the duty to look continuously in all directions at all times. In commenting on Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125, the court said in Burgesser v. Bullock's, supra, at page 678 of 190 Cal., 214 P. 649, 652; "It is there pointed out that the question of whether or not a pedestrian is negligent is to be determined from all the facts and circumstances in evidence in the case, and whether or not it was the duty of the pedestrian to look in a given direction at a given time was a question for the jury."

We find no merit in the further contention that the damages were excessive. We do not deem it necessary to detail the evidence tending to show the amount of general and special damage sustained by respondents. We have reviewed this evidence, and if not incompetent as claimed by appellant, it is ample to sustain the awards. Appellant's attack is mainly based upon the claimed incompetency of the testimony of Dr. Waller, who expressed his opinion to the effect that respondents were unable to resume their work and probably would be permanently disabled to some extent. The circumstances giving rise to this contention are as follows: Dr. Nahman, who attended respondents for several weeks after the accident, was not called as a witness owing to his absence on an extended trip to Europe. In proof of the extent of their injuries, respondents offered their own testimony, including evidence of their condition before and after the accident, the evidence of Dr. Charmak, who treated them at the emergency hospital on the night of the accident, and the testimony of Dr. Waller, who examined them shortly before the trial. It is conceded that Dr. Waller's examination was made for the purpose of testifying at the trial and was not for the purpose of treatment. Appellant now contends that the opinion of Dr. Waller was based upon hearsay, in that it was based upon the records of Dr. Nahman as well as upon his own examination; but the record before us does not bear out this contention. It is apparent from a reading of the testimony that the trial court confined Dr. Waller to his own personal observation as a basis for his opinion and specifically advised the witness to eliminate from his consideration the report and findings of Dr. Nahman. It may be further noted that Dr. Waller answered no questions to which appellant interposed an objection, and that no motion was made by appellant to strike any portion of the alleged incompetent testimony. Going further, appellant argues that even if Dr. Waller's testimony was competent it was insufficient to prove that the ailments of which respondents complained were proximately caused by the injuries received in the accident. It appears that one of the main conditions common to both respondents and causing disability at the time of the trial was a dropsical condition or a condition similar thereto evidenced by pitting at the ankles, which condition appellant claims was not attributable to the accident. However, respondents testified as to their condition before the accident, and Dr. Waller testified that if this dropsical condition was present prior to the accident it would have manifested itself by a heart condition which was not present here. In answer to a further question he testified that even if respondents had been afflicted with dropsy prior to the accident the injuries would have aggravated that condition. There was ample evidence from which the jury could infer that this condition resulted from or at least was aggravated by the injuries sustained in the accident. In our opinion the entire attack upon the testimony relating to damages goes to the weight to be attached to the testimony and not to its competency or sufficiency.

The judgments appealed from are and each of them is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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116 Cal.App. 248

FISHER et al. v. PENNINGTON et al.

Civ. 7600.

District Court of Appeal, First District, Division 1, California.

Aug. 24, 1931.

Rehearing Denied Sept. 23, 1931. Hearing Denied by Supreme Court Oct. 22, 1931.

1. Fixtures 🔑7.

That screw or nail fastens article to realty is not determinative of its permanent attachment to realty (Civ. Code, § 660).

2. Fixtures 🔑1.

Bed, ordinarily, is not part of realty.

3. Fixtures 🔑2.

Bed may be made part of realty by permanent attachment to realty as by building it into wall so that it would be immovable, and its destruction injurious to realty.

4. Fixtures 🔑7.

Whether any article attached to realty is fixture is to be determined from facts and circumstances of particular case.

5. Fixtures 🔑7.

Bed attached to closet side of door of furnished apartment constituted "personalty," and not realty.

[Ed. Note.—For other definitions of "Personal Property," see Words and Phrases.]

6. Landlord and tenant 🔑164(1).

Landlord is liable to tenant of furnished apartment for all damages caused by defects or vices of furniture (Civ. Code, § 1833).

7. Landlord and tenant 🔑164(1).

Implied warranty exists that furniture of furnished apartment is fit for use or occupation.

8. Bailment 🔑9.

Where article furnished is connected to or attached with another article only incidental to use of article furnished, then lender warrants, not only article furnished, but incidental articles.

9. Landlord and tenant 🔑164(1).

Where tenant of furnished apartment was injured when door to which bed was attached fell over bed, landlord *held* responsible for defect of door (Civ. Code, §§ 1714, 1833, 1861a, 1862).

10. Action 🔑27(1).

Tort-feasor is liable ex delicto, notwithstanding existence of contract.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Aileen Fisher and husband against Thomas Pennington and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

Rothchild & Golden and M. Mitchell Bourquin, all of San Francisco, for respondents.

WARD, Justice pro tem.

Defendants and appellants Pennington owned and operated an apartment house in San Francisco. Plaintiff and respondent Aileen Fisher paid one month's rent in advance for a furnished apartment. On the morning of the 13th day of March, 1929, plaintiff was occupying a bed in the furnished apartment when the door to which the bed was attached fell inward over the top of the bed, causing injuries to plaintiff. A jury returned a verdict against the defendant.

[1-8] The door was used as a partition between a room and a closet and was attached to the floor and the overhead wall. Its removal would have marred the appearance of the apartment to its detriment, and therefore may be considered part of the realty. The bed was connected to the door by small plates fastened by a few screws that could easily be removed. Section 660, Civil Code, provides as follows: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." In this section "permanently attached to what is thus permanent" is the legal rule; "as by means of cement, plaster, nails, bolts, or screws" is merely illustrative. An article may be attached other than by the examples given. For instance, lumber may be attached by means of strips of hides; paper may be placed upon the walls by the use of some adhesive substance; mouldings may be made permanent by proper fittings without the use of nails or screws. The fact that a screw or nail fastens an article to the realty is not determinative of its permanent attachment to the realty. In Gosliner v. Briones, 187 Cal. 557, at page 559, 204 P. 19, 20, the court said: "This section of the code is simply a rule for general guidance, concerning itself more with ultimate than with probative facts. Whether or not in any case a building is 'permanently resting upon' the soil, so as to be deemed 'affixed to the land' within the meaning of the section, remains a question of fact to be determined upon the evidence of that case." The intent of the parties is the determining factor; the use made of the article is of importance in determining this intent. A bed ordinarily is not part of the realty, though it may be made such by permanently attaching it to the realty as by building it into the wall so that it would be immovable and its destruction would result in injury to the realty. The mere erection of a building upon land does not necessarily make it a fixture. Pennybecker v. McDougal, 48 Cal. 160. Whether any article attached to realty is a fixture is to be determined from the facts and circumstances of the particular case. Miller v. Waddingham, 91 Cal. 379, 27 P. 750, 13 L. R. A. 680. The bed in this case could have been removed without disfiguring the side of the door that ornamented the room. The marks resulting from the extraction of a few screws would have created but slight disfig-

urement to the closet side of the door. When all the attending circumstances and the intent of the parties is considered, there is no doubt that the bed was part of the furnishings of the apartment and therefore personalty. Respondents desired to contract for a furnished apartment. Appellant by acceptance of the rental contracted to supply the furniture. A necessary adjunct for living accommodations is a bed or some contrivance used in lieu thereof. Personal property, let to a hirer or renter, must be put into condition fit for its intended purpose or use. Civ. Code. § 1955.

Furniture supplied to the renter of a furnished apartment imposes on the owner a liability "for all damage caused to him by the defects or vices of the thing deposited." Civ. Code, § 1833. In the renting of a furnished apartment there is an implied warranty that the furniture is fit for use or occupation. The defendants had a superior knowledge of the operation of the door and bed. There is no evidence in this case from which a reasonable inference could be drawn that the collapse of the door was occasioned by the fault of the plaintiff or that the accident was the result of the wrongful use of the sleeping contrivance by the plaintiff. The case of Watwood v. Fosdick (Cal. Sup.) 297 P. 881, and the other cases cited by appellant are not in point. All of these cases cover the doctrine relative to realty disconnected with personalty. The renting of the bed, personal property, attached to the door, real property, presents a mixed contract of hiring of personalty and realty. If the article furnished or supplied is connected or attached with another article or contrivance only incidental to the use of the article furnished, then it is reasonable to conclude that the hirer or renter warrants, not only the article furnished, but the incidental articles connected therewith and necessary to its proper use.

[9, 10] Appellants could have furnished a bed disconnected with any part of the realty, but they chose to supply a bed attached to a door, and hence became responsible for the defects of the door. To the extent that the door was a necessary adjunct of the bed it may, so far as the facts of this case are concerned, be considered as personalty, that is, part of the furniture. A hotel keeper is required to keep the furniture in good repair and this irrespective whether the rental is for one day or one month. The same rule should and does apply to an apartment house keeper. 36 Cor. Jur. 48. Keepers of furnished apartments have the same lien upon baggage, etc., as the hotel keepers. See Civ. Code, §§ 1861a, 1862. Every person is responsible by his want of ordinary care in the management of his property for an injury sustained by the use of such property except in cases where the user has brought injury upon himself. See Civ. Code, § 1714. By the rental contract plaintiffs were conveyed an estate in the demised premises and they were entitled to the use and enjoyment of their habitation. A tort-feasor is liable notwithstanding the existence of a contract. If the cause of action arises from a breach of duty growing out of a contract it is ex delicto.

In omitting to perform a duty imposed under the law, namely, to supply a bed safe to sleep in, appellant was guilty of negligence. It is not necessary in this case to invoke the doctrine of res ipsa loquitur. What has been said herein answers appellants' criticisms of the court's instructions.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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116 Cal.App. 375

STONAKER v. BIG SISTERS HOSPITAL et al.

Civ. 6884.

District Court of Appeal, Second District, Division 2, California.

Aug. 28, 1931.

Rehearing Denied Sept. 26, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

1. Evidence 🔑91.

In action for damages, burden of proof rests upon plaintiff.

2. Appeal and error 🔑714(5).

Original answer of respondent, incorporated in appellant's opening brief, but not made part of record, must be disregarded on appeal.

3. Pleading 🔑236(1).

Permitting amendments of answer which did not set forth any further defense than that originally pleaded *held* not abuse of trial court's discretion.

4. Charities 🔑45(2).

Character of hospital as charitable or commercial institution is determinable, not alone by powers of corporation as defined in its charter, but also by manner of conducting hospital.

5. Charities 🔑45(2).

In patient's action against hospital for negligence, evidence that hospital may have procured insurance against similar casualties, offered to show that hospital authorities exhibited consciousness of commercial operation, *held* properly excluded.

6. Charities 🔑45(2).

One accepting benefit of charity, by implied contract exempts benefactor from liability for negligence of servants selected with due care.

7. Charities 🔑45(2).

In action against charity hospital, nurses, and surgeon for negligence in failing to examine ether machine, and removing patient's adenoids after discovery that excessive amount of ether had been administered, evidence authorized directing verdict for defendants.

8. Charities 🔑45(2).

That patient pays regular rates charged paying patients by charitable hospital does not take case out of rule that one accepting benefit of charity impliedly exempts benefactor from liability for negligence of servants selected with due care.

9. Trial 🔑143.

Trial court must direct verdict when there is no substantial conflict of evidence upon essentials.

10. Appeal and error 🔑973.

Order directing verdict will not warrant reversal of judgment unless trial court abused its discretion.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Roy Stonaker against the Big Sisters Hospital and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Pierce & Gould and Sheridan, Orr, Drapeau & Gardner, all of Ventura, for appellant.

S. J. Tillim, in pro. per.

Blackstock & Rogers, of Ventura, and George L. Greer, of Los Angeles, for other respondents.

CRAIG, J.

In an action for damages against a hospital, two nurses, and a surgeon, in Ventura county, the jury were directed to return a verdict in favor of the defendants, and the plaintiff appealed from the judgment.

From such argument in the briefs as is based upon evidence appearing in the record, as distinguished from statements of counsel, we assume that the contention as to its sufficiency to warrant submission of the case to the jury is founded principally upon negligence in failing to examine an ether machine used during an operation, and the fact that the patient's adenoids were removed after discovery that an excessive amount of ether had been administered.

It appears without contradiction that the hospital corporation was established and conducted as a charitable institution; that appellant employed the surgeon who performed the operation, and made independent arrangements for hospitalization. Witnesses for all of the parties were unanimous in their testimony that respondent Tillim did not furnish, assemble, inspect, or prepare the ether machine for use; that it was the duty of the anaesthetist to superintend such work and to test the machine before it was used; and that proper medical practice requires it of such attendant. Typical of the evidence in this respect is that of Dr. Thomas E. Cunnane, who swore: "I think the duties are completely separated. The surgeon is responsible for the operative work only,—the results of the operation; and the anaesthetist is responsible for the life of the patient so far as the anaesthetic is concerned."

[1] As soon as the respondent doctor approached the table and observed an excessive flow of anaesthetic he removed the tube, applied restorative methods, and removed the patient's adenoids. Appellant's own witness, an expert, when asked, "Dr. Bianchi, in your opinion, did the removal of the adenoids after this unfortunate incident assist the child or hurt the child at the time?" replied: "It may have assisted the child; * * * the removal of the adenoids might have helped to relieve the condition of the lungs." There is nothing in the record which is indicated nor which we have been able to find, to the contrary, or tending in any way to charge respondent Tillim with negligence or with the commission of any act detrimental to the best interests of the patient. The cardinal rule that in an action for damages the burden of proof rests upon the plaintiff, as in other cases, requires no citation of authority.

[2, 3] The original answer of the respondent corporation is incorporated in appellant's opening brief. It is not made a part of the record, and must be disregarded. Gallatin Irr. Co. v. Bristol, 163 Cal. 405, 126 P. 864, Ann. Cas. 1914A, 74. It is contended that it was error to permit the filing of an amended answer, that it was "irrelevant, incompetent and immaterial, and that it does not plead facts sufficient to constitute a defense." It joined issue upon the facts alleged by the plaintiff, and contrary to appellant's assertion, it was therein alleged "that said hospital was not conducted for profit." However, it is admitted that the amendments did not set forth any other or further defense than that originally pleaded, and we cannot say that the trial court abused its discretion in

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permitting the defendant to amend. Crosby v. Clark, 132 Cal. 1, 63 P. 1022.

[4, 5] It is also contended that evidence offered on behalf of the respondent corporation tending to show that it was a charitable institution, was contrary to the provisions of its general articles of incorporation, and was erroneously admitted. Authorities involving various commercial corporations are cited by appellant, but it is apparent from pertinent decisions that they have no application. This question was determined in Stewart v. California Medical Missionary & Benev. Ass'n, 178 Cal. 418, 176 P. 46, 47, wherein it was said: "The character of the institution is to be determined, not alone by the powers of the corporation as defined in its charter, but also by the manner of conducting the hospital." Objections to evidence offered by the plaintiff as tending to show that the hospital authorities exhibited a consciousness of commercial or profitable operation, in that it may have procured a policy of insurance against like casualties, were sustained. This evidence was properly excluded. Levy v. Superior Court, 74 Cal. App. 171, 239 P. 1100.

[6-8] It appears without contradiction that the hospital paid no compensation to its constituents for services, and that it paid no dividends; that it was conducted for the good of the community, by a charitable organization known as the Big Sisters League, with the intent and purpose that if there was a surplus over and above the expense of carrying it, such surplus would go to the said league. There is no evidence of a relaxation of reasonable diligence in the selection of attendants. As we have observed, the respondent physician employed by appellant was not employed by the corporation, and was not charged with supervision of its mechanical apparatus. We think the case is governed by rules announced in Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008, that: "Upon this showing the lower court was clearly correct in directing a verdict for defendant under the rule laid down in Thomas v. Germ. Gen., etc., Soc., 168 Cal. 183, 141 P. 1186, where it is said that: 'Where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants.' The fact that plaintiff paid the regular rates charged by the hospital for paying patients does not take the case out of the operation of this rule, for it is apparent that the rates were not charged with a view of making a profit from her, and the moneys received from paying patients were not in fact sufficient to meet even the ordinary operating expenses of the hospital, without considering any interest upon the amount invested in the buildings."

[9, 10] A trial court is invested with the authority and the duty to direct a verdict when there is no substantial conflict of evidence upon the essentials of the case. Estate of Sharon, 179 Cal. 447, 177 P. 283; Kohn v. National Film Corp., 60 Cal. App. 112, 212 P. 207. An order directing a verdict for either party will not warrant a reversal of the judgment unless it be made to appear that the court abused its discretion in such respect. In re Estate of Morey, 147 Cal. 495, 82 P. 57.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

MAYO v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7999.

District Court of Appeal, Second District, Division 1, California.

Aug. 26, 1931.

Rehearing Denied Sept. 24, 1931. Hearing Granted by Supreme Court Oct. 22, 1931.

1. Mandamus 🔑40.

Lower court, by writ of mandate, may be directed to require plaintiff to answer questions pertinent to issues which, theretofore, on taking of depositions, plaintiff had refused to answer.

2. Depositions 🔑71.

Defendant in divorce action *held* entitled to have plaintiff answer questions relating to source of plaintiff's information regarding defendant's alleged misconduct.

3. Witnesses 🔑16.

Affidavit on information and belief relative to materiality of books and papers without setting forth supporting facts *held* insufficient showing to justify subpœna duces tecum.

4. Discovery 🔑107.

Refusing to punish plaintiff for contempt for failing to produce books and papers for defendant's inspection *held* not abuse of discretion (Code Civ. Proc. § 1000).

Circumstances disclosed that defendant's application for order to obtain inspection was based solely on information and belief and contained no statement of facts showing either the basis for the belief or the materiality of the defense, and that defendant, through courtesy of plaintiff, had previously enjoyed ample opportunity to make full inspection of the identical books and papers which she again sought to inspect.

Application by Marguerite Maloney Mayo for writ of mandate prayed to be directed to the Superior Court of the State of California, in and for the County of Los Angeles, Honorable Douglas L. Edmonds, Judge, and others, to compel the respondent court to require a party plaintiff to answer certain questions on deposition.

Writ granted in part, and denied in part.

Fredericks, Hanna & Morton and George Acret, all of Los Angeles, for petitioner.

M. W. Crane and G. C. De Garmo, both of Los Angeles, for respondents.

HOUSER, J.

[1] In this matter the first question with which this court is concerned, namely, on the taking by a notary public of the deposition of a party plaintiff to an action for a divorce, on the refusal of such party to answer certain questions pertinent to the issues raised by the pleadings therein, and on proper application by the defendant to the superior court for an order requiring such party plaintiff to answer such specific questions, followed by the refusal of said court to make such order—whether by means of its writ of mandate this court has the power to direct said lower court to require such party plaintiff to answer the particular questions which theretofore on the taking of such deposition he had refused to answer—in principle, if not directly, is answered in the affirmative by the decision in each of the cases of Crocker v. Conrey, 140 Cal. 213, 73 P. 1006, and Wissman v. Cabaniss, 34 Cal. App. 487, 168 P. 150.

[2] The second inquiry, to wit, whether on the taking of such deposition the specific questions which were asked of but denied answer by the party whose deposition was being taken were pertinent to the issues in the action, depends primarily upon a consideration of the issues therein involved.

From the petition presented herein it may be gleaned not only that the ground upon which the plaintiff sought a divorce from the defendant was that of extreme cruelty practiced by the defendant on the plaintiff, but that specific instances thereof were set forth in the complaint, which allegedly had the effect of causing plaintiff "grievous mental suffering." It appears that with but one exception none of the particular acts of the defendant of which complaint was made by the plaintiff took place within the immediate presence of the latter, but that, according both to the allegations of the complaint as well as to the answers which were made by the plaintiff to preliminary questions which were propounded to him at the time when his deposition was being taken, information concerning the conduct of the defendant at the times in question was conveyed to the plaintiff by third persons. The particular questions which the plaintiff refused to answer all related to the source of his information; that is to say, on being appropriately and respectively asked by counsel for the defendant as to the time when, the place where, and from whom, he had acquired the information relative to the alleged misconduct of the defendant, the plaintiff unqualifiedly refused to answer.

It is apparent that on the grounds indicated, before the plaintiff would have cause for complaint against the defendant it would be necessary not only that the actual commission by the defendant of the alleged acts which constituted her misconduct be established, but also that information thereof be conveyed to the plaintiff. Manifestly, if the charges regarding the misconduct of the defendant were maliciously false, or it appeared that they were inadvertently or mistakenly made, although the plaintiff might grievously suffer because of the circulation of such a story regarding his wife, nevertheless by reason thereof he could have no real cause for complaint against the innocent victim of the slander. On the other hand, although as a matter of fact it might appear that the defendant had been guilty of great misconduct, unless information thereof actually was conveyed to the plaintiff, it is equally clear that such misconduct could not have caused him any "grievous mental suffering." From which latter consideration it becomes plain that a subissue, as it were, was injected into the case, to wit, whether in reality, as stated by the plaintiff, the necessary information was conveyed to him. It is clear that the defendant should not be concluded as to such so-called subissue in the case merely by the naked statement or testimony given by the plaintiff to the effect that, at no definite time or place, some unnamed and unidentified person had told him regarding the alleged misconduct of the defendant; that by reason thereof he had believed the same, and as a consequence had endured "grievous mental suffering." In other words, assuming that on the trial of the action testimony of the import herein indicated were to be given by the plaintiff, it is clear that the defendant should have the right to test the accuracy or the truthfulness of such testimony not only by a liberal cross-examination of the plaintiff in that regard, but as well by any possible rebuttal evidence. If perchance it should be developed either that as a matter of fact no one had made any statement whatsoever to the plaintiff regarding the misconduct of the defendant, or that, having been informed thereof at a specified date, the plaintiff was in no wise affected thereby, but, to the contrary, assuming that his information regarding such misconduct was correct and complete in detail, nevertheless he had condoned the offense, it is apparent that the effect upon the cause of action in which "grievous mental suffering" was the basis very probably would be disastrous.

Applying the principles of law hereinbefore indicated to the facts, and on examination of the record herein, wherein are set forth the particular questions propounded to the plaintiff and which he refused to answer, this court is of the opinion that the plaintiff should be required to answer each of the questions which appear in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16, 17, 19, 22, and 25 of the "Affidavit supporting motion for show-cause order," as the same appears at page 20, et seq., of the instrument filed in this court on July 15, 1931, and indorsed, "Alternative Writ of Mandamus * * * Supplement to Petition for Writ of Mandamus"; but that, relating thereto, as to each and all of the other questions propounded to plaintiff, as the same appear in the instrument to which reference has been had, the plaintiff should not be required to answer.

[3] The third question which has been submitted to this court for its determination involves a point of law which affects the asserted right of the defendant to have produced by the plaintiff at the taking of his deposition certain books, papers, etc., which purportedly relate to the conduct of the private business of the plaintiff during the period of time which elapsed after the plaintiff and the defendant intermarried and preceding the time when the cross-complaint of the defendant was filed in the action.

An allegation contained in the complaint filed by the plaintiff is "that there is no community property belonging to the plaintiff and the defendant." The defendant filed a cross-complaint in the action in which is set forth an allegation "that there are large amounts of community property belonging to the parties * * * that much of said community property, as cross-plaintiff is advised and believes and therefore alleges, has been and is being fraudulently concealed from cross-plaintiff, with the intent to defraud her and deprive her of every right therein; and in this behalf cross-plaintiff alleges that cross-defendant has threatened and declared that he would place his property beyond the reach of cross-plaintiff and would so contrive and convey it that she could obtain nothing."

At the time when the order was made by the superior court for the taking of the deposition of the plaintiff, said court also caused to issue its subpœna duces tecum, addressed to the plaintiff, by which he was commanded to produce at the taking of his said deposition:

"The day book, cash book, journal and ledger for each of the years 1923 to 1931, inclusive;

"The stubs of plaintiff's and said corporation's check books for the years 1923 to 1931, inclusive, connected with checks drawn upon plaintiff's and said corporation's bank accounts in the following named banks: * * *

"The bank statements for each and every month, commencing January 1st, 1923, to the present time, covering plaintiff's and said corporation's accounts in each of said banks;

"The cancelled checks for each month commencing January 1st, 1923, to the present time, covering plaintiff's and said corporation's accounts in each of said banks;

"A certain audit dated about February, 1926, made by Gordon Robb, a certified public accountant, purporting to relate to plaintiff's and said corporation's said papers and books of account."

Preceding the issuance of such subpœna, and as a basis therefor, the defendant filed with the superior court her affidavit in which she set forth certain alleged facts which apparently were by her considered sufficient for the purpose of constituting a showing of the materiality of the books, papers, etc., which she desired the plaintiff to produce at the taking of his deposition. As far as concerns the question here involved, such affidavit was to the effect that, following the marriage of the plaintiff and the defendant, the plaintiff had engaged in various business activities and had realized therefrom a large profit which constituted community property of the plaintiff and the defendant; that according to the *information and belief* of the defendant, in connection with such business of the plaintiff, for the purpose of defrauding the defendant, the plaintiff installed and maintained a set of inaccurate, incorrect, false, and fraudulent books of account, and that as incidents thereof the plaintiff had executed a large number of checks on each of several different banks, which respective checks in the regular course of business were returned to the plaintiff by the bank on which they were drawn, together with a statement of the account between the plaintiff and such bank. Also, that at the instance of the plaintiff a certain named certified public accountant had prepared an audit of the business of the plaintiff "based upon said fraudulent entries, statements, cancelled checks and books of account, in so far as the same had accumulated up to the date of the making of such audit. * * *"

As has been hereinbefore indicated, on the taking of the deposition of the plaintiff he failed and refused to produce thereat any of the books or papers or other instruments specified in the subpœna duces tecum; whereupon the defendant caused the plaintiff to be cited as for contempt of court, which citation resulted in the discharge of the plaintiff. By the petition herein the defendant seeks to have issued out of this court its mandate "commanding the said Superior Court to require the said plaintiff, and requiring the said plaintiff, to produce said books and documents under said subpœna duces tecum and to answer said material questions at the continued taking of his said deposition, and to permit the said defendant, Marguerite Maloney Mayo, to have an inspection and audit of all of said books and papers. * * *"

The direct question presented to this court is whether on the showing made by the affidavit of the defendant, the plaintiff was legally required to produce the books, papers, etc., specified in the subpœna duces tecum.

Without consideration of any other possible defect in any part of the proceedings leading up to the order of the discharge of the plaintiff, attention is again directed to the fact that the allegation of the defendant, as contained in her affidavit relative to the materiality of the books, papers, etc., of which she apparently desired an inspection at the taking of the deposition of the plaintiff, was made by her on her *information and belief.* No facts were set forth in support of such belief. as a matter of fact, the statement in said affidavit does not constitute an allegation of any alleged fact. It is:

"That defendant is *informed and believes* that on or about January 1st, 1926, and prior thereto, the plaintiff conceived of the possibility of his desiring to secure a divorce from the defendant, and the plaintiff thereupon undertook to commence a system of concealment of all of said property, and a system of falsifying his books of account for the purpose of furthering said concealment and that plaintiff established, on or about said date, a system of books of account consisting of a day book, cash book, journal and ledger for each of the years commencing, and dating back to and prior to January 1st, 1923; that defendant is *informed and believes* that said books of account contain only entries concerning plaintiff's earnings, profits, rents, and income from said community property aforesaid, and that said entries are fraudulent; * * * that defendant is *informed and believes* that each of said books of account are in the plaintiff's possession.

"That the defendant is *informed and believes* that said books of account are made up from stubs of plaintiff's check books for each of the years 1923 to 1931, inclusive. * * *

"That defendant is *informed and believes* that each of said stub entries in each of said check books relate to the plaintiff's costs and disbursements. * * *

"That defendant is *informed and believes* that plaintiff has in his possession bank statements covering each and every month commencing January 1st, 1923, from each of said banks. * * *

"That defendant is *informed and believes* that the plaintiff has cancelled checks in his possession. * * *

"That the defendant is further *informed and believes* that the plaintiff in furtherance of said plan of concealment caused to be made by Gordon Robb, a certified public accountant, a certain audit. * * *"

In the case of Ex parte Clarke, 126 Cal. 235, 240, 58 P. 546, 548, 46 L. R. A. 835, 77 Am. St. Rep. 176, where the court was considering a situation similar to that presented to this court, it is said: "* * * In Morrison v. Sturgcs, 26 How. Prac. [N. Y.] 179, the court say: 'It is not enough that the party believes or is advised that the paper contains material evidence. *Facts must be shown to support such belief.*'" And in connection with its criticism of a general order for the production of documents, the court also said: "Moreover, it was, in effect, a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized; for, while it named certain books, yet those constituted all of defendant's books, as appears from plaintiff's examination of petitioner as to what books the defendant had. Again, the order was in the nature of what Lord Chancellor Hardwicke, over a century ago, called 'a mere fishing bill,' and such bills have been universally condemned. It is quite evident that these books were not required to be produced for the direct purpose of introducing them in evidence. Plaintiff would not have offered them, or any part of them, in evidence, unless he found something in the part offered that was relevant and material in support of his side of the case; and, indeed, they would not have been otherwise admissible. He merely intended to draw his dragnet of inspection through all these books under the ostensible motive of trying to catch something which his witness had testified was not there. In the meantime all the private business of the defendant—all its dealings with persons other than plaintiff, its methods of conducting its affairs, perhaps its financial condition, and other matters vitally important to its welfare —would have been exposed. There is no warrant in the law for such a forcible wholesale violation of a person's privacy upon such a showing as was made in this case. A man does not lose all his civil rights because he is brought into court as a party to a suit. As was said by Lord Hatherley: 'A court is bound to protect the defendant against undue inquisition into its affairs' (7 Ch. App. 97, and notes); and it would be difficult to imagine a more striking instance of such 'undue inquisition' than an order compelling a defendant to produce for inspection all his books upon the mere suspicion—against positive evidence to the contrary—that they might possibly contain some evidence favorable to the plaintiff, and without pointing to any particular part of all these books over which this suspicion was supposed to hover."

In principle, to the same effect, see Kullman, Salz & Co. v. Superior Court, 15 Cal. App. 276, 114 P. 589; Hupp v. Superior Court, 22 Cal. App. 162, 133 P. 987; Funkenstein v. Superior

Court, 23 Cal. App. 663, 139 P. 101; Shell Oil Co. v. Superior Court (Cal. App.) 292 P. 531.

It therefore becomes clear that, if for no reason other than that the defendant failed to make a sufficient or proper showing regarding the materiality of the books, papers, etc., which she desired the plaintiff to produce at the taking of his deposition, the petition presented herein should be denied in that particular.

[4] In addition to the issuance of the subpœna duces tecum, to which attention has hereinbefore been directed, by means of which the defendant sought to obtain an inspection of the books, papers, etc., of the plaintiff, under the provisions of section 1000 of the Code of Civil Procedure, and other sections of said Code related thereto, on her affidavit which contained allegations identical with those hereinbefore set forth in connection with the application for and issuance of the said subpœna duces tecum, the defendant obtained from the superior court an order by which the plaintiff was directed to produce such books, papers, etc., and to permit the defendant to inspect the same. The plaintiff having failed to comply with such order, on application made by the defendant, the superior court issued its order by which—in effect—the plaintiff was required to show cause why he should not be punished as for contempt of court. It further appears that on the hearing of the order to show cause, by order of the superior court, the plaintiff was discharged.

By affidavit of the plaintiff, it appears that preceding the issuance by the superior court of its order by which the plaintiff was directed to permit inspection by the defendant of all such books, papers, etc., by and through the curtesy of the plaintiff, the defendant, by her counsel, had free access to such records, throughout a period of approximately two months, during all of which time, the said counsel of defendant made full and complete examination thereof.

In the case of Shell Oil Co. v. Superior Court (Cal. App.) 292 P. 531, it is held that by the terms of section 1000 of the Code of Civil Procedure, which purports to authorize the inspection of records such as is desired by defendant herein, the superior court is vested with judicial discretion in passing upon any application for inspection thereof.

Taking into consideration the fact that the application made by the defendant to the superior court was based solely upon her information and belief; that it contained no statement of facts showing either the basis for the "belief" of the defendant, or the materiality of the defense of the defendant, or the establishment of any issue involved in her cross-complaint; and that theretofore she had enjoyed ample opportunity to make full and complete inspection of the identical books and papers which she again sought to inspect—it becomes clear that no abuse of discretion was displayed by the trial court in declining to punish plaintiff as for contempt of court because of his failure to again produce such records for inspection by the defendant. Shell Oil Co. v. Superior Court (Cal. App.) 292 P. 531.

It is ordered that the mandate of this court issue to the respondent herein by which it shall be directed to require the plaintiff in the action between him and the defendant, to which reference has been had herein, to fully answer each of the questions to him heretofore propounded on the attempted taking of his deposition as the same are set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16, 17, 19, 22, and 25 of the "Affidavit supporting motion for show-cause order," as the same appears at page 20, et seq., of the instrument filed in this court on July 15, 1931, and indorsed "Alternative Writ of Mandamus * * * Supplement to Petition for Writ of Mandamus." It is further ordered that as to all other matters and things, as to which complaint is made by the applicant herein and as to which she seeks a mandate from this court directed to the superior court, as aforesaid, the same be and each of them is denied, and as to them and each of them the alternative writ be and it is discharged.

I concur: CONREY, P. J.

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116 Cal.App. 312

LIDBERG v. E. T. LEITER & SON et al.

Civ. 7916.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1931.

1. Master and servant ⟹389.

Employer's lien for "expenditures for compensation," upon judgment recovered by employee against tort-feasor, does not cover portion of judgment covering physical pain and suffering (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

> Such lien is a lien solely for "expenditures for compensation" which employer is required to make under award of accident commission.

2. Master and servant ⟹389.

To determine portion of employee's judgment against tort-feasor to be subjected to employer's lien for expenditures for compensation, lien must be asserted before entry of judgment or verdict (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

> Such segregation of lienable portion of judgment from unlienable portion may be made, as in other classes of cases, by requiring jury, under proper instructions, to render verdict on special issues, as well as general verdict, or to answer special interrogatories which would enable court to ascertain amount of verdict attributable to elements of damage not compensable under act. When case is tried before court sitting without jury, or when verdict is general only, proper segregation would be ~~within~~ sound discretion of court, exercised in light of evidence in case. Such would also be case when court approves compromise and enters judgment in accordance therewith.

3. Judgment 🔑898(4).

In action by injured employee against tort-feasor, where employer's insurer failed to seek segregation of items of recovery subject to employer's lien, refusing insurer's motion to set aside satisfaction of judgment *held* not error; time for setting aside or modifying judgment, or appeal therefrom, having expired (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

> Judgment had become final and time for appeal or to move to set it aside or modify it had long since expired, and insurer merely moved to set aside satisfaction of judgment allowing judgment to stand as entered, although judgment admittedly made no segregation of lienable items. Hence, to set aside satisfaction would be futile, and motion for lien was one that court could not grant because judgment was not in such form as would enable court to determine extent of lien, and there was no error in denial of motion.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Theodore N. Lidberg against E. T. Leiter & Son, a copartnership, and another, of which action notice was given to plaintiff's employer and the Zurich General Accident & Liability Insurance Company, Limited, and wherein plaintiff recovered judgment. From an order denying a motion of the insurance company to set aside a satisfaction of judgment and consent thereto and for a lien upon that judgment in its favor, the insurance company appeals.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco, for appellant.

P. O. Solon and William H. Hollander, both of Oakland, for respondent.

NOURSE, P. J.

This is an appeal from an order denying the motion of the Zurich General Accident & Liability Insurance Company to set aside a satisfaction of judgment and consent thereto, and for a lien upon that judgment in favor of the insurance company.

The plaintiff Lidberg was injured while in the course of his employment as an interior decorator. In due course the industrial accident commission awarded him compensation amounting to $3,145.33, of which sum $2,291.30 was found to have been paid. Thereafter the plaintiff commenced this action against the defendants Leiter & Son and Western Asbestos Magnesia Company in tort for damages resulting from said injuries. Notice of this action was given to the employer and to his insurance carrier, the Zurich Company. The cause consumed four days of trial during which the attorney for the Zurich Company was continually present. At the end of the fourth day the matter was compromised and by written stipulation $10,000 was paid in full satisfaction of all claims arising out of the accident. Counsel for the Zurich Company sat in on all the negotiations leading to this settlement which were had in open court or in the judge's chambers. By the terms of the settlement the full sum of $10,000 was deposited in escrow subject to a number of conditions which are not of interest here, except the condition that plaintiff should commence a suit to quiet title to the fund against all parties to the suit and against the Zurich Company. Judgment was thereupon duly entered in accordance with this stipulation. At the same time this stipulation was filed the plaintiff requested the consent of the trial court to a satisfaction of the judgment. Such consent was given in writing by the trial court in the presence of all parties and satisfaction of the judgment was accordingly executed and filed. Thereafter the Zurich Company filed its notice of motion to set aside the satisfaction of the judgment upon the general grounds mentioned in section 473, Code of Civil Procedure, of inadvertence, error, and mistake. During the hearing upon that motion the foregoing facts were either shown by affidavit or, having occurred in the presence of the same trial judge, were agreed to in open court. The motion was denied upon the grounds that the Zurich Company had not moved within due season to attach its lien upon the judgment.

The order must be affirmed for two reasons.

[1, 2] First. The lien permitted by the terms of section 26 of the Workmen's Compensation Act (Stats. 1917, pp. 831, 854, as amended Stats. 1927, p. 1213; Deering's Gen.

Laws Supp. 1925–1927, Act 4749) is a lien solely for the "expenditures for compensation" which the employer is required to make under an award of the accident commission, and this lien does not cover that portion of a verdict or judgment for damages in tort which covers the physical pain and suffering resulting from the injury. Ansbach v. Dept. of Ind. Rel., 99 Cal. App. 677, 680, 681, 279 P. 224. In order to determine the amount of the judgment which should be subjected to a lien for these expenditures, it is necessary that the lien claimant assert his right to a lien within such time that the jury in its verdict, or the court in its judgment, may judicially segregate the items. Ansbach v. Dept. Ind. Rel., supra; Jacobsen v. Ind. Acc. Comm. (Cal. Sup.) 299 P. 66, 69. In the Jacobsen Case the Supreme Court says: "If the employer has the statutory notice of the commencement of the action by his employee, and fails to assert and *timely to apply* for the allowance of his lien, he must be deemed to have waived his right to the same, and should be estopped by reason of such failure from thereafter asserting the right. Obviously the time to assert the right would be before satisfaction of the judgment."

The appellant argues that the statute is indefinite in this respect and does not prescribe the procedure by which these items should be segregated. The same argument was made in the Jacobsen Case and to that argument the Supreme Court says: "To the contrary, it is suggested that the jury might, as in other classes of cases, be required under proper instructions to render a verdict on the special issue as well as a general verdict or to answer special interrogatories which would enable the court to ascertain the amount of the verdict attributable to elements of damage not compensable under the act. When the case is tried before the court sitting without a jury, or when the verdict is general only, the proper segregation would be within the sound discretion of the court, exercised in the light of the evidence in the case, Such would also be the case when the court approves a compromise and enters judgment in accordance therewith."

To better understand the mind of the Supreme Court upon the question of the time when such a lien should be asserted, we should add that, in the Jacobsen Case, segregation was made in the judgment, and the employer was reimbursed for *past* expenditures, and that, after the entry and satisfaction of the judgment, he sought to impose a lien for additional expenditures for compensation which had been awarded by the accident commission. In holding that the right to this lien had been waived, the court says (page 69 of 299 P.): "It presented its application for a lien on the judgment *to be rendered* in the form of a stipulation for judgment, specifying therein the amount of its past expenditures only. If it desired to assert a lien for future expenditures, *then was the time to do it.* It failed then to assert its right, and must be deemed thereby to have waived it." (Emphasis ours.)

It will be noted that the rights of the employer as to past expenditures were fully protected in the Jacobsen Case by its assertion of a lien for that purpose *prior* to judgment. The law thus gives to the employer and to his insurance carrier a simple means of protection and, because of the necessity of segregating the lienable portion of the judgment or verdict from the unlienable, the proper time to assert such a lien is before the judgment or verdict is entered.

[3] Second. But, for another reason the order must be affirmed. The judgment has become final and the time for appeal or to move to set it aside or modify has long since expired. Appellant merely moved to set aside the satisfaction of the judgment, allowing the judgment to stand as entered. But admittedly the judgment made no segregation of the lienable items. It is too late now to modify that judgment. Hence, to set aside the satisfaction would be futile. The motion for a lien is one that the court could not grant because the judgment is not in such form as would enable the court to determine the extent of the lien. There was no error in the denial of the motion.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

116 Cal.App. 282

ANDERSON v. MARKET ST. RY. CO.

Civ. 7837.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1931.

Rehearing Denied Sept. 24, 1931. Hearing Denied by Supreme Court Oct. 22, 1931.

1. **Negligence** ⚿136(26).

Issue of contributory negligence, while ordinarily for jury, may in some cases become question of law under undisputed facts.

> While ordinarily question of contributory negligence must be left to jury, there are cases where standard of conduct required of person under given circumstances is so obvious as to be applicable to all persons under such circumstances.

2. **Carriers** ⚿327.

Pedestrian running directly into path of approaching street car while crossing street on pedestrian lane, intending to board car, *held* contributorily negligent.

> Pedestrian was contributorily negligent as matter of law, because her own testimony showed that she exercised no care whatsoever when crossing street intending to board approaching street car at safety zone on other side of street. She knew that she was on "blind side" of car where no passengers were admitted, that car would stop only for persons waiting on safety zone, that there was nothing about manner in which car approached to indicate that it was stopping, that car was coming at fast rate of speed, and yet proceeded to run directly into its path. Defendant's uncontradicted testimony showed that there was headlight burning on street car, and that all lights on car were burning.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Amelia Anderson against the Market Street Railway Company. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

William M. Abbott, William M. Cannon, and Walter H. Linforth, all of San Francisco, for appellant.

C. H. Fish and L. S. Deming, both of San Francisco, for respondent.

SPENCE, J.

In this action to recover for personal injuries, judgment upon the verdict was entered in favor of plaintiff, from which judgment defendant appeals.

Appellant urges several grounds for a reversal, the main contentions being: First, that there is no evidence of negligence on the part of appellant; and, second, that, even if it can be said that there is testimony showing negligence on appellant's part, the evidence shows that respondent was guilty of contributory negligence as a matter of law. In our opinion the latter contention must be sustained, and we believe that a discussion of the remaining points raised by appellant would serve no useful purpose.

The accident occurred near the intersection of Mission and Avalon streets in San Francisco at about 7:20 p. m. on the evening of September 14, 1929. At that point Mission street runs in a general northerly and southerly direction. Respondent, a woman sixty-eight years of age, was struck by a northbound street car while she was running across the pedestrian lane from the west to the east side of said street. It does not appear that there was any other vehicle or street car in the immediate vicinity, and respondent's view of the street car was unobstructed. Respondent had come into Mission street on the west side at Theresa street, a short distance north of Avalon street. The northbound street car, according to her testimony, was then "far away in the other block." She was intending to board this car at the safety zone at the east side of Mission street near Avalon street, and she proceeded in a southerly direction to Avalon street before starting to cross. She testified that she had been taking the car frequently at this point over a period of several years. She stated that it was the custom of the cars to stop there when people were waiting at the safety zone, "but not otherwise." The uncontradicted testimony showed that this was not a "regular stop," and that cars stopped there only when passengers were waiting at the safety zone.

Respondent was the only witness called on her behalf to testify concerning the circumstances immediately surrounding the accident, and the testimony offered by appellant's witnesses with respect thereto was not helpful to her. Examining her testimony with respect to the movement of the street car, we find that she observed it several times after entering upon Mission street at Theresa street, and that it was at all times going fast. Using some of the expressions found in the record, we find that it was "going fast" when she first saw it "far away in the other block"; that later she observed it going just "as fast"; that "it hadn't slowed down any"; that thereafter when the car was at the south end of the safety zone it was "coming just as fast as it had been on the other occasions" when she saw it; that the car did not "slow down at any time," but "came fast the whole time." Referring to her own conduct, she testified that she

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

was running because she was in a great hurry. Again employing some of the precise words used, we find the following:

"Q. Did you try to run across the track in front of this car? A. Yes, I was in a great hurry. * * *

"Q. Yes, but as far as you went, you were running, weren't you? A. Yes, I was in a hurry to get over, but I didn't get over.

"The Court: Well, he wants to know if she was running; this is his question. A. I was running."

The following questions and answers of respondent show the approximate relative positions of respondent and the car, the safety zone referred to being fifty-four feet in length and being located just south of the lane on which respondent was crossing.

"Q. When the street car was at the other end of the safety zone, did you notice how fast it was coming? A. Very fast.

"Q. And you saw when it was at the other end of the safety zone and before you got upon the first track that it was coming very fast, did you? A. Yes.

"Q. And seeing it at that point and coming very fast, did you try to run across the track in front of it?

"The witness: Yes, I was in a hurry. * * *

"Q. At the time you started to run across the tracks, the rails on which this particular car was traveling, wasn't the front of it within twenty feet of you? A. I cannot say how many feet.

"Q. Well, in distance, wasn't the front of the car as near to you as from where you are now to where I am standing? I cannot say that."

Respondent testified that she raised her hand to signal the car when she was in the "middle of the street." At one point she testified that the car was then at the end of the safety zone, but further testified as follows:

"Q. Well how close to the line that you were crossing on was the front of this oncoming car when you held up your hand as a signal? A. I cannot say definitely how far it was. I cannot say that because I was in such a hurry.

"Q. Well, without telling us definitely where the front of the car was, tell us about how far it was from you when you put up your hand? Was it as far as from where you are to where I am? A. It was very near, very close."

The "hurry" to which respondent refers so frequently in her testimony bore relation to nothing other than the street car itself. She stated: "Yes, I was in a hurry to take the car." She did not remember whether she saw any one waiting on the safety zone as she crossed, but the uncontradicted testimony shows that there was no one waiting there. When asked whether the headlight was burning on the street car, she answered: "That I cannot say, because I was in a hurry." Replying to whether there were any lights lit on the street car, she said: "I didn't look after that; I was in a hurry." On this subject uncontradicted testimony showed that all lights on the car were lit.

[1, 2] It is true as contended by respondent that the issue of contributory negligence is ordinarily a question of fact for the jury, but there are cases in which it becomes a question of law under the undisputed facts. Brown v. Pacific Electric Railway Company, 167 Cal. 199, 138 P. 1005; Arnold v. San Francisco-Oakland Railways, 175 Cal. 1, 164 P. 798; Larrabee v. Western Pacific Railway Company, 173 Cal. 743, 161 P. 750; Young v. Southern Pacific Company, 189 Cal. 754, 210 P. 259. As was said in Brown v. Pacific Electric Railway Company, supra, at page 205 of 167 Cal., 138 P. 1005, 1007: "While it is true that ordinarily the question of contributory negligence must be left to the jury, we think that this is one of the cases where 'the standard of conduct required of persons under given circumstances is so obvious as to be applicable to all persons under such circumstances.' Hamlin v. Pacific Electric Co., 150 Cal. 779, 89 P. 1109. If Mr. Brown had taken the commonest precautions, the accident would not have occurred. * * *" In the present case respondent's own testimony showed that she did not take any precautions or exercise any care whatsoever. She was at all times aware of the approach of the car, of its speed, and of its proximity. She knew that she was on the "blind side" of the car where no passengers were admitted and knew that the car would stop only for persons waiting on the safety zone. She knew that there was nothing about the manner in which the car approached to indicate that it was stopping, and, to the contrary, testified that she knew that it "came fast the whole time." Having this knowledge she proceeded to run directly into its path, and the unfortunate accident is obviously accounted for by her great hurry to beat the on-coming car as she crossed the track. In our opinion the conclusion that her own negligence was a proximate cause, if not the sole proximate cause of her injuries, follows necessarily and irresistibly from the undisputed facts.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

116 Cal.App. 328

PADGHAM v. INYO MARBLE CO.

Civ. 7682.

District Court of Appeal, First District,
Division 1, California.
Aug. 27, 1931.

1. **Corporations** 🔑414(5).

Resolution authorizing president and secretary to liquidate corporate indebtedness and issue notes *held* not to authorize treasurer to issue note binding corporation.

2. **Corporations** 🔑414(1).

Note executed in name of corporation by officer not authorized by directors nor clothed with general power to execute note does not bind corporation.

3. **Corporations** 🔑424(5).

Where president executed note of corporation in violation of resolution authorizing note and voted for resolution, corporation was not estopped from urging defense of irregularity in execution of note against president suing on note.

4. **Corporations** 🔑433(2).

Financial statement prepared by general manager of corporation accepted by directors *held* insufficient as matter of law to constitute ratification of unauthorized note of corporation.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by A. J. Padgham against the Inyo Marble Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant.

George L. Greer, of Los Angeles (Perry F. Backus, of Los Angeles, of counsel), for respondent.

Mr. Justice KNIGHT delivered the opinion of the court.

Plaintiff brought this action to recover certain sums of money alleged to be due on several assigned claims against the defendant corporation, one of which was based on a promissory note for $5,000. The trial took place before the court sitting without a jury, and judgment was given in favor of plaintiff on all counts but one, which related to the promissory note. With reference thereto the court found that the note was executed and delivered to R. H. Tune "by the officers of said corporation without authority and that in so executing and delivering said note, they acted in excess of their authority and there was no consideration whatsoever therefor." Accordingly judgment on that count was rendered in favor of defendant, and plaintiff appeals therefrom.

A copy of the note was not set out in the complaint, nor was the original nor a copy thereof produced at the trial, but it appears from the findings that the note was executed and delivered on or about December 31, 1926, that it bore 7 per cent. interest, and provided for the allowance of an attorney's fee in case suit was brought to collect it. The circumstances leading up to the execution and delivery of the note, briefly stated, were as follows: On the date of its execution and for the several months preceding, the plaintiff herein, A. J. Padgham, was the president, and E. D. Rasmussen was the treasurer, of said corporation. R. H. Tune, the payee named in the note, had been its general manager and secretary for several years, but whether or not he occupied either of those positions on the date of or shortly preceding the execution of the note is not clear from the record. A man named Dunn owned the controlling interest in the company, but had held no office therein since 1915. The company had much outstanding indebtedness, and on November 5, 1925, the directors sought to adjust its financial affairs by borrowing money or issuing the notes of the corporation in liquidation or renewal of said indebtedness, and to that end adopted a resolution authorizing and directing "the president or vice president and the secretary or assistant secretary" of the corporation "to issue a note or notes or to borrow money from any private individual, firm, or company or bank for and in the name of this corporation, and on such terms as may be agreed to by said officers, such sum or sums of money as in the judgment of said officers this corporation may require for the purpose of liquidating, renewing, or funding any indebtedness of this corporation now owing and due, provided the aggregate amount of such loans or notes shall not at any time exceed the sum of $10,000"; and the resolution further provided that "said president or vice-president and said secretary or assistant secretary are hereby authorized, directed and empowered to execute in its corporate name for such moneys so borrowed or for such obligations so renewed, extended or refunded, and interest, the note or notes of this corporation, and deliver the same to said respective payees. * * *" The plaintiff herein, A. J. Padgham, as one of the directors of said corporation, was present at the directors' meeting at the time the resolution was passed and voted for its adoption. Shortly after the adoption of the resolution, Dunn, although not an officer of the corporation, prepared and handed to Tune the promissory note in question, which, as stated, was made payable to Tune, and requested the latter to obtain Padgham's signature thereto, which Tune did. Dunn then secured the signature of Rasmussen (the treasurer of the corporation) thereto, and, after leaving the note with Tune for a short while, took it from Tune's desk without having it indorsed by Tune. About a month later Tune saw the note for the last time. It was then on Dunn's desk, and he attempted to take possession of it, but was unable to do so. Shortly after these transactions took place a new directorate and set of officers took control of the corporation and thereafter conducted its affairs. At the time of trial (July, 1928), Dunn was in the penitentiary, and Tune admitted that he, too, had been sent there about the same time; but whether the offenses for which they were committed to prison grew out of the transactions connected with the affairs of said corporation does not appear. Evidence was introduced to show that the note was issued in part payment of money claimed to be due Tune from the corporation for past services, but it would seem that there is a conflict in the evidence as to how much, if anything, was actually due him at the time the note was executed; the accountant who examined the books under the new régime having testified that Tune's account was overdrawn.

[1-3] It is conceded that the sole authorization for the issuance of the note was the resolution above mentioned, no claim being made by plaintiff that any such authority was derived from statute or the by-laws or articles of incorporation of the company; and, as will be observed, by the terms of said resolution, the directors of the company restricted the authority to adjust its indebtedness and to issue notes in liquidation thereof to the "president or vice-president and the secretary or assistant secretary"; and admittedly neither the secretary nor the assistant secretary participated in this transaction, nor did either of them join with the president, as contemplated and directed by the terms of the resolution, in issuing and signing the note in question; the treasurer, Rasmussen, having presumed to do so in their place and stead without any legal authority whatever from the corporation

As said in Black v. Harrison Home Co., 155 Cal. 121, 99 P. 494, 497: "It is an elementary principle of corporation law that the president of a corporation has no power, merely because he is president, to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the by-laws and by the board of directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 Cook on Corporations, § 716, as follows: 'The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management. This is a rule which prevails everywhere, excepting possibly in the state of Illinois. * * * It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director' "—citing numerous cases. In that case the validity of a contract for the sale of real estate belonging to the corporation was challenged, and, as here, the directors' resolution authorized the president and secretary to execute the same; but it was executed by the president alone; and in holding that it was unenforceable against the corporation the court said: "The resolution of the board of directors authorized such contracts only when jointly executed by the president and secretary. The president's want of express authority to make either of these contracts on behalf of the corporation is thus affirmatively made to appear." Furthermore, it may be stated as a general rule that promissory notes executed in the name of a corporation by an officer thereof, who has not been authorized by directors' resolution so to do, and who is not clothed with general power to execute the same or other obligations on its behalf, do not bind the corporation. Pauly v. Pauly, 107 Cal. 8, 40 P. 29, 48 Am. St. Rep. 98. Of course, there are a number of exceptions to the foregoing rule, among them being where the corporation has received the proceeds or the benefit of the note, and where, by a course of conduct as outlined in the decisions, it is estopped from setting up noncompliance with corporate by-laws or resolutions; but it is unnecessary to go into those exceptions or discuss them here, because the facts of this particular case do not bring it within any of them. Nor are we to be understood as holding that the note in question would have been unenforceable in the hands of an innocent purchaser, because that situation is not involved. Here, as stated, the note which plaintiff is seeking to enforce against the corporation is one that he executed and delivered himself, as the president of the corporation, in violation of the very terms of the resolution which gave him the only authority to act at all in the matter; and it further appears without dispute that, as one of the directors of the corporation, he was present at the meeting of the board when the resolution was passed, and voted for its adoption. Under such circumstances we are of the opinion that the trial court correctly held that as against him the corporation is not estopped from urging as a defense the irregularity above mentioned, in the issuance and execution of the note. Putnam v. Ensign Oil Co., 272 Pa. 301, 116 A. 285.

[4] Plaintiff seems to attach some importance to a "financial statement" prepared by Tune as general manager of the corporation, which was submitted to and accepted by the old board of directors several weeks after the note in question was executed; but he has failed to refer to any part of the statement showing that the note in question was mentioned therein; and, even though it were mentioned, the transaction relied upon was entirely insufficient as a matter of law to constitute a ratification.

It is well to mention in conclusion that plaintiff has furnished us with no authorities whatever to support his position on the appeal; the very few he has cited involving questions far remote from those with which we are here concerned.

The judgment is affirmed.

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116 Cal.App. 353

AMERICAN EXCHANGE NAT. BANK v. SOFFEL et al.*

Civ. 6594.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1931.

Rehearing Denied Sept. 25, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

Appeal and error ⊂⇒1012(2).

Appellate court will not weigh evidence, where there was sufficient evidence to support findings, which were sufficient to support judgment.

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

Action by the American Exchange National Bank, a corporation, against Albert E. Soffel, doing business under the fictitious firm name and style of the Soffel Drug Company, and Albert E. Soffel, individually, and others. Judgment for plaintiff, and defendant Soffel appeals.

Affirmed.

Burton Briggs Crane, of Los Angeles, for appellant.

Sherman & Sherman, of Los Angeles, for respondent.

YORK, J.

This is an appeal by defendant Soffel from a judgment awarded on two trade acceptances signed by said defendant and held by plaintiff. The points raised by appellant would require a weighing of the evidence by this court. It cannot be said that there was not sufficient evidence to support the findings or that the findings were not sufficient to support the judgment. This is an action brought on two trade acceptances, and the court found that the plaintiff purchased said trade acceptances in the due course of business for value, prior to the maturity thereof; that plaintiff is an innocent purchaser for value of said trade acceptances, and that plaintiff is the holder for value of said trade acceptances.

The fact that the trial court had evidence before it that, at the time the trade acceptances were taken by the bank, the bank had made the statement upon the deposit slip, which was made out at the time the trade acceptances were presented to and accepted by the bank, "We will use our discretion as to sending direct or through intermediary banks for collection acting as your agent only and assuming no responsibility beyond carefulness in selecting such agents," is not conclusive upon the trial court, other evidence having been introduced in reference to the transaction, and sufficient to prove that respondent was the holder of the acceptances by purchase in due course and for value.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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*For opinion denying rehearing, see 3 P.(2d) 338.

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116 Cal.App. 255

CASSETTA et al. v. DEL FRATE et al.

Civ. 7897.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1931.

Rehearing Denied Sept. 23, 1931. Hearing Denied by Supreme Court Oct. 22, 1931.

1. **Attorney and client** ⊂⇒182(2).

Agreement to pay counsel percentage of amount recovered by suit or settlement, and that assignment should be lien on judgment or amount recovered, *held* merely assignment of proceeds of judgment or settlement, creating lien on fund recovered.

2. **Attorney and client** ⊂⇒134(2).

Attorney's lien on judgment does not create interest in subject-matter of suit entitling him to control litigation.

3. **Assignments** ⊂⇒24(2).

Action for personal injuries is not assignable.

4. **Assignments** ⊂⇒24(1).

Action arising out of automobile accident, may be assigned to extent of damages to property (Civ. Code, § 954).

5. Attorney and client 🔑134(2).

Under agreement that client pay counsel percentage of amount recovered by suit or settlement for personal injuries and making assignment lien on judgment or amount recovered, client could change attorney at any stage (Civ. Code, § 2356).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by John Cassetta and another against George Del Frate, William J. Gloria, and Alfred J. Hennessy. From a judgment for plaintiffs, defendants Gloria and Hennessy appeal.

Affirmed.

See, also, 298 P. 55.

Alfred J. Hennessy and William J. Gloria, both of San Francisco, in pro. per.

James F. Brennan, of San Francisco (E. A. McDonald, of San Francisco, of counsel), for respondents.

NOURSE, P. J.

Plaintiffs employed Mr. Gloria and Mr. Hennessy as their attorneys to prosecute an action in tort for injuries arising from a motor vehicle accident. After the suit was filed, plaintiffs moved for leave to substitute other counsel. Their motion was granted, and Mr. Gloria and Mr. Hennessy appeal upon a bill of exceptions.

The contract of employment was in writing. The parties agreed to pay their counsel 50 per cent. "of all amounts recovered by suit or settlement or compromise and said assignment shall be a lien on any judgment or any amount recovered by judgment or compromise or settlement."

[1] On the strength of this assignment, appellants insist that they have an interest in the subject-matter of the action which prevents their discharge as attorneys under the rule of Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581, and Kirk v. Culley, 202 Cal. 501, 505, 261 P. 994. Their assignment, however, is merely an assignment of the proceeds of the judgment or settlement. As such it creates a lien upon the fund recovered. Hoffman v. Vallejo, 45 Cal. 564, 572; Goad v. Hart, 128 Cal. 197, 201, 61 P. 761, 964; Tracy v. Ringole, 87 Cal. App. 549, 552, 262 P. 73.

[2-5] But a lien upon the judgment does not alone create an interest in the subject-matter of the suit which would entitle the holder to control the litigation (Todd v. Superior Court, 181 Cal. 406, 419, 184 P. 684, 7 A. L. R. 938; Scott v. Superior Court, 205 Cal. 525, 532, 271 P. 906), and it is the interest in the subject-matter which is the controlling factor. The complaint in the main case is not in the record, but it is stated in the bill of exceptions that the action is one for "injuries" received by plaintiffs in an automobile collision. If the action is for personal injuries alone, it is not capable of assignment. Oliver v. Walsh, 6 Cal. 456; Jones v. Manning, 35 Cal. App. 321, 323, 169 P. 912. If it involves damages to property, it might be assigned to that extent. 3 Cal. Jur. 256; Civ. Code, § 954; Stapp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 46, 166 P. 823. If the cause comes within the class of cases "arising out of the violation of a right of property," which are made assignable under the Code section, it was incumbent upon appellant to show that fact. Upon the record before us we must conclude that the interest of appellants under their assignment is therefore an interest in the proceeds collected under their power, and this power is not one "coupled with an interest in the subject of the agency" within the meaning of section 2356, Civil Code. In the absence of such a relation, the client has the absolute right to change his attorney at any stage in the action. Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581; Scott v. Superior Court, 205 Cal. 525, 531, 271 P. 906.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

115 Cal.App. 525

In re BRUGGEMEYER'S ESTATE.

BRUGGEMEYER v. ZIMMERMAN.

Civ. 195.

District Court of Appeal, Fourth District, California.

July 17, 1931.

1. Executors and administrators 🔑109(2).

Executor may erect monument over tomb or grave, if cost thereof is reasonable.

2. Executors and administrators 🔑109(2).

Executor, without express authority under will, may not erect public library as monument to memory of deceased, and charge expense to estate as part of funeral expense.

3. Executors and administrators 🔑504(1).

Court in settling executor's account must reject any improper items, whether objections are interposed or not.

4. Husband and wife 🔑273(1).

Wills 🔑6.

Wife's attempted testamentary disposition of interest in community property acquired before statutory amendment *held* not to destroy operation of original statute relating to disposition of community property on death of wife (Civ. Code, § 1401, as amended in 1923).

5. Husband and wife 🔑262(1).

Statutory presumption that property conveyed to married woman constitutes her separate property is disputable (Civ. Code, § 164).

6. Husband and wife 🔑49½(8).

Finding that husband's transfer of his separate property to wife was not intended as gift *held* supported (Civ. Code, § 164).

7. Husband and wife 🔑246.

Statutory amendments did not convert personalty acquired by husband while domiciled in another state, under laws of which property constituted his separate property, into community property when subsequently brought into state on husband's becoming resident of state (Civ. Code, § 164, as amended by St. 1917, p. 827, and by St. 1923, p. 746).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Final accounting of Mancha Bruggemeyer, executor of the estate of Roberta Pauline Bruggemeyer, deceased. From an order approving and settling the final account and decree of distribution, Walter G. Zimmerman, heir of the deceased, appeals.

Reversed and remanded, with directions.

Eli F. Bush, of Los Angeles, and John H. Miller, of San Francisco, for appellant.

Walter J. Hartzell, of Redlands, and Hill, Morgan & Bledsoe and Benjamin F. Bledsoe, all of Los Angeles, for respondent.

GRIFFIN, Justice pro tem.

Petitioner and decedent intermarried in Chicago, Ill., on the 8th day of February, 1912. He had known decedent and lived in her family a greater portion of the time for more than 33 years prior to the marriage. They took up their residence in California on November 1, 1923, and continued to reside in this state until the death of the decedent, which occurred on August 6, 1928. The bulk of the estate in question was accumulated in Illinois. About $20,000 cash in fees was received by petitioner while he was in California, for legal work that he had partially completed before he came to California. He estimated the proportionate value of his services in the two states to be as follows: $15,000 while he lived in California and $5,000 while living in Illinois; that he received from his law practice from 1911 to the date of his wife's death about $79,000 gross. At the time of the marriage the decedent had property of the approximate value of $2,000; $803 of this sum was in the savings department of the American Trust & Savings Bank of Chicago. The petitioner had two pieces of property in Chicago worth from $2,000 to $5,000; a piece of property on Michigan avenue which in 1912 was worth about $30,000; a law business with modest equipment, and $2,000 in the bank. The decedent, according to the testimony of contestant, operated a hotel of 157 rooms in Chicago from the year 1895 to 1909, which hotel had a gross income of about $50 per day; what the exact net earnings were was not known to the witness; in 1909, decedent divorced her first husband, paying him the sum of $1,000; that there is but one son living, the contestant herein, the issue of the first marriage; that decedent had an account in an amount unknown, in the Greenbaum Sons Bank in Chicago, prior to 1925.

The items set forth in the inventory and appraisement, claimed by respondent to be community property and by contestant claimed to be the separate property of the deceased, are enumerated as follows: (1) Checking account in the name of Roberta Bruggemeyer, in the First National Bank of Monterey Park, Cal., $1,470.45; (2) a savings account in the name of deceased in the Bank of America of California, Redlands branch, $5,000; (3) a savings account in the name of deceased in the Security First National Bank of Los Angeles, Redlands branch, $39,718.30; (4) a checking account in the name of deceased in the Bank of America, Chicago, Ill., $623.43; (5) a promissory note dated "7/15/27," payable to deceased, secured by deed of trust on property in Los Angeles county, Ramona Acres (Steele property), $4,713.75; (6) personal effects, jewelry, and clothing, $675; (7) lot 165, Ramona Acres plat, Los Angeles county $6,000; (8) a contract of sale to Aaron and Anna Rodman, being a portion of lot 165, Ramona Acres, given by Mancha and Roberta Bruggemeyer, which contract of sale was made prior to September 17, 1925, balance due $1,568.13; (9) a contract of sale of a portion of lot 165, Ramona Acres, given by Roberta Bruggemeyer, made subsequent to September 17, 1925 (Reid property), $5,200; (10) a contract of sale of a portion of lot 165, given by Mancha Bruggemeyer and Roberta Bruggemeyer, dated prior to September 17, 1925 (Wilkinson property), the unpaid balance being $4,667, the estate's interest therein being $2,338.50; household furniture therein, $500. Petitioner admits item 11, consisting of three $50 Third Liberty bonds, appraised at $150, and item 12, being sixteen $50 Fourth Liberty bonds, appraised at $527.79, to be the separate property of deceased.

Item 1. This item was placed in this bank in the name of the wife, Roberta Bruggemeyer, by petitioner September 17, 1925, it being the earnings of the petitioner, received while he was engaged in the practice of law in Chicago and brought here by him. The reason assigned by petitioner for placing this money in her account at that time was that Mrs. Bruggemeyer had a stroke of paralysis in 1925, that it affected the right side of her head, that she was laboring under the delusion that he (the petitioner) was seeking to get rid of her; that she would be ejected from the house that she was living in and that she was penniless; that to satisfy her peace of mind petitioner took her over to her banker, and that at that time he drew a deed and handed it to the banker and at the same time deposited the money mentioned in this item in her name, which he took from a joint account of petitioner and his wife. He further testified that he had no intention of giving her the property or this money for the purpose of creating a separate estate for her; that it was done only to ease her mind and to assure her that he was not neglecting her.

Item 2. This item of $5,000 came from a check drawn by Mrs. Bruggemeyer on the Bank of America in Chicago, Ill., and was deposited by petitioner to her account in the Bank of America at Redlands, Cal., January 9, 1928. It was part of a sum of money, to wit, $20,000, that he (the petitioner) placed to her account about May 1, 1925, when they were both back in Chicago on a business trip after they had moved to California. This particular $20,000 was one-half of the proceeds from the sale of Monarch Refrigerator Company's stock that he had sold a day or two before for $40,000. This stock was purchased by him in July, 1919, when he was president of this company, and paid for out of his earnings. The reason assigned by petitioner for this deposit of funds to her account in Illinois was to the effect that he told her (his wife) he had made this deposit to her account, but that he had no intention of making her a gift of it as her separate property, as they never had any separate property, and that, as they were just coming back to California, it seemed the courteous thing to let her know that "they stood in equal partnership in the same," and "that the money would not always stand in his name." He stated further "that he had practiced that before in a limited way."

Item 3. Petitioner testified that this item of $39,718.30 was wholly his earnings from his law practice and earnings from his real estate in Chicago; that it came in her name under the following conditions: The petitioner and Roberta Bruggemeyer had a joint account in the First National Bank of Los Angeles in the sum of $9,897.48, which was transferred to Roberta Bruggemeyer's account December 5, 1925, and on the same day petitioner transferred from the Bank of America of Illinois the balance of the $20,000, to wit, $15,000, that he had received from the sale of his Monarch Refrigerator Company stock and deposited this in her account. A few days after this he then deposited the proceeds from the sale of two Liberty bonds of his in her account, making a sum total of about $25,500. The interest that accumulated over this period was added to it; no further explanation was made as to the source of the balance in the account. The reason assigned by the petitioner for this transfer was similar to the reasons above stated, but, adding that on this particular day, and for some days prior, she (Mrs. Bruggemeyer) was in a very bad way (in a sense she was worrying); that he told her that the money he received from that stock he would put in her name so that she would never have anything to worry about. Petitioner further testified that in her (Mrs. Bruggemeyer's) last days, that is, the last three years of her life, she had hallucinations, some of which were that he was consorting with other women; that these other women were polluting petitioner and were robbing her; that she was "broke" and petitioner had all the money; that petitioner was trying to get rid of her; that petitioner's dirty women had been on the porch, and that it was too filthy for her to use. Petitioner was compelled to tear out the entire cement porch, steps, and brick columns and put in a different colored porch, before she would be willing to sit in the swing on the porch. Petitioner further testified that in the transfer of this account, the deposit of the proceeds of the Liberty bonds, and the transfer of the account from Illinois, he did not at any time intend to make her a gift, or that it should become her separate property or estate; that her condition was so appealing to his own mentality that he was seeking to ease her mind; that he did not believe that he was divesting himself of the money, by placing the same in her name instead of either his name or their names.

Item 4. This item, in the sum of $623.43, petitioner testified was accumulated interest from the deposit petitioner made from his funds, the proceeds of the sale of the Monarch Refrigerator Company stock, which was placed in the account of Mrs. Bruggemeyer in May, 1925.

Items 5 and 6. Regarding these items petitioner testified that he purchased the real property, lot 165 of Ramona Acres, in April, 1923, for the sum of $10,500 from his earnings as a lawyer. This money was withdrawn from petitioner's account in the Greenbaum & Sons Bank, now called the Central Trust Company, in Chicago. Title to the real property was held in joint tenancy with petitioner's wife. Houses were built upon it and rented, the money deposited in their joint account, the cost of building being paid from petitioner's $20,000 he received from the sale of his Monarch Refrigerator Company stock. The trust deed was taken back in the name of Mrs. Bruggemeyer for convenience sake only, as he was in the east on business a portion of the time and that he had no intention of giving her the trust deed or the fruits thereof as her separate property.

Items 7, 8, and 9. These items were contracts of sale of a portion of this Ramona Acres executed and delivered under about the same conditions and circumstances as above related, with the express intent that they should not operate as a gift or be considered to be the separate property of deceased.

All of the title of Mancha Bruggemeyer to the above described tract was on the 17th day of September, 1925, by grant deed conveyed to Roberta P. Bruggemeyer, his wife. Petitioner gives as his reasons for this transfer that Mrs. Bruggemeyer's condition in September of that year was perhaps as bad as at any time in her life; that she was saying that petitioner was trying to get rid of her; that she had no place to go, and that petitioner was going to put her out; that as a result of this petitioner took her to her banker and made the deed of this property to her to satisfy her peace of mind only, and that he had no intention of making a gift of this property to her as her separate estate.

Dr. Sweeney, manager of the Security First National Bank, testified that petitioner transferred the funds to the account of his wife, and that there was some conversation about the fact that petitioner wanted her to feel perfectly happy and contented, and if she was worried or annoyed about it petitioner would transfer to her name certain sums of money, $10,000 or $15,000 from some other bank, as well as the real property above mentioned.

Dr. John A. Morande, a physician personally acquainted with Mrs. Bruggemeyer, treated her from 1925 until her death. He testified that she had a severe cerebral hemorrhage some time before he saw her in 1925; that he then considered her a mental case; that she had hallucinations and falsely believed that her husband was keeping company with other women; that on one occasion she stated: "Well, I have got him now where I want him—I have got all this (money and property) in my possession now"; that she seemed to get better after she had been satisfied of the transfer of the property, but he did not think she was ever really rational; that he called in a Dr. Bishop, who handles mental cases, and he thought he would have to take her to a sanitarium. Dr. E. J. Eytinge corroborated the testimony of Dr. Morande and petitioner as to her mental and physical condition and as to her peculiar characteristics and hallucinations. He testified that he had often heard petitioner try to make Mrs. Bruggemeyer agree with him that she should eat certain foods and take some medicine or have a nurse, and he would do his best to argue her into his point of view, but that it never worked.

The evidence discloses that petitioner, within three weeks after the death of deceased, conceived the idea of erecting a monument to the memory of his departed wife and accordingly contracted for and erected a public library and denominated it the "Bruggemeyer Memorial" and presented it to the city of Monterey Park, where his wife died; that the expenses were paid from the funds of the estate by the executor, Mancha Bruggemeyer, without an order of court or being directed to do so by the will. That the contestant herein did examine the plans and specifications and take some part in the preparation for the dedication of the library is admitted, but he was not aware of the source from which payment was to be made. The trial court found that the property, real, personal, and mixed, that the deceased Roberta Pauline Bruggemeyer may have had at the time of her marriage to petitioner had been either expended and used up, or had been so commingled with the property acquired by the said Mancha Bruggemeyer and his wife after their marriage that the same can no longer be identified; that all the property standing in the name of Roberta Pauline Bruggemeyer at the time of her death is directly traceable to and was derived from the earnings and efforts of the said Mancha Bruggemeyer excepting some personal effects and Liberty bonds of the total value of about $1,500; that, with no intention of making a gift, but solely to counteract the vagaries and hallucinations of deceased, Mancha Bruggemeyer transferred into the name of said Roberta Bruggemeyer all of the property set forth in the inventory, except that portion above mentioned, found to be her separate property; that the remaining portion of the property mentioned in the inventory is and was community property; that the expenses of administration, burial, and last illness of deceased (without taking into consideration any of the moneys expended on the memorial library) exceeded the value of the separate property of the decedent which was expended for this purpose; that the contestant is only entitled to his share of the separate property and only entitled to question the correctness, validity, and propriety of the executor's account in connection therewith; that it is not true that the entire estate of said decedent or any portion thereof was acquired by said decedent as her separate property in the state of Illinois or that said property came into the state of California impressed with the character of her separate property.

1. Contestant claims that the trial court erred in finding that the property inventoried in the estate was community property, there being no sufficient evidence upon which the trial court could or should have made such a finding.

2. Contestant claims that, even if said property should appear to the court to be community property, one-half thereof has by said testatrix been taken out of the category of community property by the will of said decedent and should be distributed to the contestant under section 1307 of the Civil Code.

3. Contestant further claims that the entire estate of said decedent was acquired by said decedent in the state of Illinois, where the law of community property, so called, does not prevail, and that said property was, in the state of Illinois, the absolute property of said decedent, and that said property came to the state of California impressed with the character which it bore in the state of Illinois, and is therefore, in California, the separate property of said decedent. Contestant objects to the approval of the final account of executor for the reason that it appears by said account that the executor, without previous authority of court or by specific direction in the will of deceased so to do, has expended as part of the expenses of administration, to the prejudice of contestant, the sum of $33,294.71, for the purpose of erecting a monument or memorial to the deceased in the form of a public library; that said expenditure is disproportionate to the value of the entire estate, which is appraised at $68,485.33, and asks that said sum be disallowed in said account.

[1, 2] Respondent contends that he is authorized under the general provisions of the law to make such expenditure, and that it was and should be a proper charge of administration against the estate; that the contestant is estopped from contesting this item in the account by reason of his participation in the erection of the monument. An executor may erect a monument, such as a pillar, statue, shaft, or any other structure placed over a tomb or grave, if the cost of same is reasonable and does not exceed such sum as may, upon a consideration of all of the circumstances, including the station of the deceased and the value of her estate, be found to be proper and reasonable, but an executor, as such, without express authority so to do by will, has no right to erect a public library as a monument to the memory of his deceased wife, donate it to a city, and charge the expense of erecting same to the estate as a part of the funeral expense. Fancher v. Fancher, 156 Cal. 13, 103 P. 206, 23 L. R. A. (N. S.) 944, 19 Ann. Cas. 1157; 12 Cal. Juris. 88; Estate of Lucy Weringer, Deceased, 100 Cal. 345, 34 P. 825.

[3] Independent of objections urged by any person to items in the account of an executor, it is the duty of the court, especially where the item is brought to the attention of the court in settling the account, to carefully scrutinize the same and to reject any improper items therefrom, whether objections are interposed or not. Estate of Willey, 140 Cal. 238, 73 P. 998; 12 Cal. Juris. 56.

[4] Where a wife makes a will in general terms, disposing of her interest in community property, which property was acquired before the amendment of section 1401 of the Civil Code in 1923, such a testamentary disposition does not destroy the operation of the statute relating to the disposition of community property upon the death of the wife under said section. McKay v. Lauriston, 204 Cal. 557, 269 P. 519.

Whether the court, under the evidence and the law applicable thereto, can rightfully find that the personal property above designated to be community property, is a question that requires some consideration, in view of the amendment of 1917 (St. 1917, p. 827) to section 164, Civil Code, of this state and its subsequent amendment in 1923 (St. 1923, p. 746), which subsequent amendment reads as follows: "All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property, * * *" and the construction the courts have placed on these amendments as to their effect on property brought into this state from another state where the so-called community property law does not exist.

In Estate of Drishaus, 199 Cal. 369, 249 P. 515, it was held, in so far as the amendment of 1923 was concerned, that the amendment to section 164 of the Civil Code adding the words "heretofore or hereafter" is not to be given retroactive effect so as to injuriously affect the rights of a husband in respect to his separate property owned and brought to this state in 1916 prior to the adoption of said amendment; and his vested interest in personal property brought to this state in 1916 prior to said amendment and which was his separate property under the laws of a state in which it was acquired is unaffected by said amendment. And at page 371 of 199 Cal., 249 P. 515, 516, the court held: "The effect of the amendment, if valid, would be to render the personal property of the decedent, acquired prior to the taking effect of the amendment and while a resident of the state of Nebraska, community property, and as such subject to the laws of this state declaring the status of husband and wife with relation to the community property during the period of their residence in this state prior to the husband's death. The property of the decedent herein acquired by him in and under the laws of the state of Nebraska prior to the date when he became a resident of California, and having been under the laws of the state of Nebraska his separate property, continued to be such when the decedent became a resident of this state in the year 1916, in conformity with the well-settled rule upon that subject set forth in the following uniform line of decisions: Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrows, 136 Cal. 113, 68 P. 488; Estate of Niccolls, 164 Cal. 368, 129 P. 278; Estate of Warner, 167 Cal. 686, 140 P. 583; Estate of Boselly, 178 Cal. 715, 175 P. 4; Estate of Arms, 186 Cal. 554, 199 P. 1053; Estate of Frees, 187 Cal. 150, 201 P. 112."

The last case cited has reference to a case wherein a decedent, who had acquired certain property in the state of Wisconsin which was separate property under the laws of that state, had subsequently removed to Illinois (which is the state from which some of the funds in the case before us were acquired), and under the laws of which state, also, personal property acquired by a decedent during his marriage would constitute his separate property, and had thereafter, in the year 1910, removed to California, where with his wife he had resided until his death in the year 1920. This court had, therefore, before it the question as to the effect of the amendment to the Civil Code made in the year 1917, as to whether by reason of said amendment to the Code the property had become community property. The court, in determining that question, considered two propositions: (1) As to whether said amendment of the Civil Code made in 1917 (which read in part as follows: "Including real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state") would be constitutional in so far as it was attempted by the Legislature thereby to convert the property of the husband which had theretofore been separate property into community property; (2) as to whether the statute of 1917 should or could be given retroactive effect.

In considering these propositions this court held that under the decisions of Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, the amendments to sections 164, 172, and 172a of the Civil Code adopted in 1917 (St. 1917, pp. 827, 829) were not to be given retroactive effect so as to injuriously affect the vested rights of the husband in respect to his separate property owned by him prior to said amendment to the Code. So may it be said of the amendment of 1923 amending section 164, Civil Code, in so far as it applies to property acquired before, and the character of the property determined prior to the adoption of the amendment. Whether all of the money which was brought to California was accumulated in Illinois by decedent before or after the adoption of this amendment in 1917 is not clear from the evidence before us. The trial court has found it to be community property. (If this amendment of 1917 is valid and does apply, then practically all of said personal property brought into the state by the petitioner would have been community property.) If said law is not valid and does not apply, practically the entire balance, being the earnings of petitioner acquired in the state of Illinois and standing in his name, would be his separate property when brought here.

Adopting either view of it, contestant herein would not be benefited, nor would he be entitled to participate in the proceeds of the estate unless petitioner, by his subsequent act, has made a gift of this property to his wife and by reason thereof it became her separate property.

[5] It is true that section 164, Civil Code, p. 746, reads: "But whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing the presumption is that the same is her separate property, and if acquired by such married woman and her husband, or by her and any other person, the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; and the presumptions in this section mentioned are conclusive in favor of a purchaser, encumbrancer, payor, or any other person dealing with such married woman, in good faith and for a valuable consideration."

The presumption herein referred to is a disputable presumption and may be overcome by competent evidence. Vandevort v. Godfrey, 58 Cal. App. 578, 208 P. 1017.

In Bare v. Parker, 51 Cal. App. 106, 108, 196 P. 280, the court said: "In affairs matrimonial, such as this, men are often moved to action by the prompting of emotion or sentiment, or even by considerations of domestic policy. To relate all the operating causes that influenced human conduct long after the passing of the occasion, with varying attending circumstances, is quite difficult for the average person. The rigid rules of logic, properly applied in an effort to explain conduct in ordinary business transactions, are often unsatisfactory aids in divining motives that may have influenced matrimonial conduct. For this reason, all other things being equal, careful consideration must be given to the testimony of the survivor of the marriage, who, perhaps, alone has knowledge of the secret understanding of marital purposes and intentions. The credibility of the witness, however, is subject to the test of the general rules of evidence. It has been held that title placed in the wife's name, with no intention of making a gift to her of the property, but merely for the purposes of pleasing her, is sufficient to rebut the presumption prescribed by section 164, Civil Code"—citing Fulkerson v. Stiles, 156 Cal. 703, 105 P. 966, 26 L. R. A. (N. S.) 181.

[6] The trial court found that the transfer of all of the property above mentioned was not intended as a gift. We believe that the evidence amply justifies this finding. Fanning v. Green, 156 Cal. 279, 104 P. 308; Estate of Jolly, 196 Cal. 547, 238 P. 353; Estate of Nickson, 187 Cal. 603, 203 P. 106.

The evidence establishes as a fact that there was the item of about $20,000 in money which was received through the sale of petitioner's stock and was placed to the account of the wife, not as a gift, but under conditions as heretofore related, after petitioner and his wife became residents of the state of California.

Respondent relies upon section 946 of the Civil Code, which provides that, "if there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile," and that, independently of the statute of 1917, personal property in Illinois acquired by a married man, by his efforts, should be treated as community property where he was domiciled in California at the time of its acquisition and vice versa. 5 Cal. Jur. § 6, p. 280, and cases cited. We find that the trial court has found adversely to respondent, defeating his contention that the property was acquired while petitioner and his wife were residents of the state of California and therefore was community. It held that deceased never acquired the money as her separate estate as a gift from her husband; therefore it remained the separate property of the husband under the law of the state of Illinois; he acquired it through the sale of his stock, which said stock was acquired by him during the month of July, 1919, by his private earnings while residing in Illinois.

We are of the opinion that the evidence in this case establishes as a fact beyond dispute that the bulk of the property above listed and ordered distributed in the decree of distribution was the separate property of the husband and is directly traceable to his earnings in Illinois, which were brought to this state by him.

[7] Under the laws of the state of Illinois, Estate of Arms, 186 Cal. 554, at page 563, 199 P. 1053, all of this property acquired in the state of Illinois would have been the separate property of the husband when brought to this state and would remain such, notwithstanding the provisions of section 164 of the Civil Code as amended in 1917 (St. 1917, p. 827), and its subsequent amendment in 1923 (St. 1923, p. 746). In so far as said amendments attempt to change the character of personal property acquired by either husband or wife, or both, while domiciled in another state, when by the laws of the other state it would be their separate property, said amendments are ineffectual and do not convert that particular property into community property when subsequently brought to this state, and when the owner becomes a resident of California.

We are of the opinion that the authorities above cited sufficiently justify the reasons for this holding without restatement of them at length in this decision.

Therefore the finding of the trial court that all of the property above mentioned was the community property of petitioner and the deceased must be reversed to exclude from consideration in the probate proceedings of the deceased wife's estate such portions of the property as is the petitioner's separate property, it being no part of the estate and not subject to distribution thereunder. There is ample evidence to support the finding that the property above mentioned was and is not the separate property of the deceased.

Therefore the decree of distribution is reversed and the case remanded for appropriate proceedings. That portion of the order of the trial court approving and settling the final account allowing the item of $33,294.71 as a proper charge against the estate is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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116 Cal.App. 184

HARMON et al. v. HOPKINS.

Civ. 451.

District Court of Appeal, Fourth District, California.

Aug. 19, 1931.

Rehearing Denied Sept. 17, 1931. Hearing Denied by Supreme Court Oct. 15, 1931.

1. Jury ⚷9.

No one may be deprived of constitutional right to jury trial except in manner provided in Constitution and laws passed in pursuance thereof (Code Civ. Proc. § 631, subd. 5, as amended by St. 1929, p. 851, § 1; Const. art. 1, § 7).

2. Jury ⚷28(1).

Under Constitution, Legislature may determine acts or omissions which shall deprive litigant in civil action of trial by jury (Code Civ. Proc. § 631, subd. 5, as amended by St. 1929, p. 851, § 1; Const. art. 1, § 7).

3. Jury 🔑26.

Phrase "day set for trial," as used in statutes regarding waiver of jury trial by failing to file jury fee, means first date fixed for trial, of which parties have been duly notified (Code Civ. Proc. § 631, subd. 5, as amended by St. 1929, p. 851, § 1; Const. art. 1, § 7).

[Ed. Note.—For other definitions of "Day of Trial," see Words and Phrases.]

4. Jury 🔑26.

"Within" as used in statute providing for waiver of jury trial by failing to deposit jury fee within ten days prior to date set for trial means "not later than" or "at any time not less than" (Code Civ. Proc. § 631, subd. 5, as amended by St. 1929, p. 851, § 1; Const. art. 1, § 7).

[Ed. Note.—For other definitions of "Within," see Words and Phrases.]

5. Jury 🔑26.

Plaintiff, by depositing jury fee only six days before first date set for trial, waived jury trial, notwithstanding case was reset and tried at later date (Code Civ. Proc. § 631, subd. 5, as amended by St. 1929, p. 851, § 1; Const. art. 1, § 7).

6. Appeal and error 🔑949.

Court's discretion in refusing to submit case to jury, where plaintiff failed timely to deposit jury fee, will not be disturbed, unless grossly abused.

7. Jury 🔑26.

Where plaintiff failed to deposit jury fee within proper time, court's refusal to submit case to jury *held* not abuse of discretion (Code Civ. Proc. § 631, subd. 5, as amended by St. 1929, p. 851, § 1; Const. art. 1, § 7).

This was so, although fee had actually been paid and jury was present when case was called.

8. Appeal and error 🔑1031(1).

Prejudice will not be presumed because issues of fact were tried by court instead of jury.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by F. W. Harmon and another against Isabel Morrison Hopkins. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Carlton D. Dethlefsen, of San Francisco, for appellants.

Wright & McKee, and C. M. Monroe, all of San Diego, for respondent.

FINNEY, Justice pro tem.

This is an appeal by plaintiffs from a judgment in favor of the defendant, rendered by the court sitting without a jury, in a trial held after plaintiffs' demand for a jury trial had been denied.

This appeal presents just one question, viz., Did the court err in denying plaintiffs' demand for a jury trial?

On March 21, 1929, the attorney for the plaintiffs wrote the clerk of San Diego county asking if it was necessary to make a deposit for jury fees at the time of filing the memorandum of motion to set this cause for trial, and on March 25 received from the clerk a reply stating that $36 must be deposited as jury fees at least six days prior to the date of the trial. This was the rule in San Diego county prior to the amendment to section 631 of the Code of Civil Procedure, which went into effect in August, 1929. Under rule V, adopted by the judicial council, the Superior Court of San Diego county has a "Civil Active List" and a "Civil Trial List" of cases pending for trial, and by inadvertence this cause was set on the "Civil Trial List" on October 10, 1929, but no notice of this setting was ever served upon the plaintiffs or their attorney. By consent of plaintiffs the case went over and was again set on the "Civil Trial List," for trial on November 25, 1929, and notice of the setting was served upon plaintiffs' attorney on November 5, 1929. It was inconvenient for plaintiffs' attorney to try the case on November 25, and an effort was made by defendant's attorneys, for his accommodation, to have the case removed from the "Civil Trial List" and reset at the first call of the calendar in December. This request for removal was refused by the presiding judge and the case continued on the "Civil Trial List" for trial until November 27—two days after it should have been tried—when it was again reset for trial on December 18, 1929, on which latter date it was tried and judgment rendered for the defendant by the court sitting without a jury, after plaintiffs' demand for a jury trial had been denied, although a jury was present and available for the trial at that time.

On November 19, 1929, plaintiffs' attorney wired to the county clerk of San Diego county, inquiring the amount necessary to be deposited as jury fees in this case, and on the same date received a reply that the jury fees were $24, but that it was too late to make the deposit. However, on the same date, November 19, 1929, the jury fees in the sum of $24 were deposited in this case by the plaintiffs and were received and accepted by the county clerk.

Article 1, § 7, of the Constitution, which relates to the matter of jury trials, so far as material here, reads as follows: "The right of trial by jury shall be secured to all, and remain inviolate. * * * A trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law."

And section 631, Code of Civil Procedure, as amended in 1929 (St. 1929, p. 851, § 1), relating to waiver of jury trials in civil cases, and in force at the time in question, so far as here involved, reads as follows, to wit:

"Trial by jury may be waived by the several parties to an issue of fact in manner following: * * *

"5. By failing to deposit with the clerk, within ten days prior to the date set for trial, a sum equal to the amount of one (1) day's jury fees payable under the law."

[1-5] The right of trial by jury is a constitutional right, and no one may be deprived thereof except in the manner provided in the Constitution of this state and laws passed in pursuance thereof. The Constitution, under the provision above quoted, has delegated to the Legislature the power to determine what acts or omissions shall deprive a litigant in a civil action of a trial by jury, and in section 631, Code of Civil Procedure, above quoted, the Legislature has defined these acts and omissions. Subdivision 5 of this section of this Code has not been judicially construed by the Appellate or Supreme Court, so far as we are aware, but a construction has been placed upon it by the bench and bar, in operating under it, wherein said subdivision is commonly understood to require a deposit of the jury fee to be made with the clerk of the court, not less than ten days before the day set for the trial of the action, or a jury trial will be waived, and of course the "day set for trial" means the first date fixed for the trial, of which the parties have been duly notified. We think, undoubtedly, this is the true and correct construction of subdivision 5 of this section. While appellants contend that the word "within" as used in the phrase "within ten days prior to the date set for trial," in subdivision 5, is equivocal and may be interpreted to mean "at any time less than ten days prior to the date of trial," we do not regard this contention as having any merit, when we consider the connection in which the word is used and the purpose to be served by this provision of the Code. One important purpose of the provision is to make certain that there will be time to call the jury after the deposit of the jury fee had been made and that the jury fee will be available when required. Such a provision is necessary to enable the court to conduct its business without delay and in an orderly manner. The word "within" as used in the phrase above quoted means "not later than" or "at any time not less than," and the phrase so interpreted would read "not less than ten days prior to the date set for trial" or "at any time not less than ten days prior to the date set for trial." The word "within" has been so construed by this court when used in a similar connection, and such construction must be adopted here. Royal Grocery So. v. Oliver, 57 Cal. App. 278, 207 P. 61. The jury fee in this case was deposited only six days prior to the first date set for the trial, and it is, therefore, plain that appellants, under the Code section referred to, waived a jury trial by failure to make the deposit four days earlier, that is to say, ten days prior to the first date set for trial, of which they had been duly notified. The fact that the case was reset for trial and tried at a later date is immaterial, and has no bearing on the point under consideration, if we are to give effect to the plain meaning of the language used in subdivision 5 of section 631, Code of Civil Procedure, and the purpose for which it was enacted.

[6-8] Appellants urge that, even if there was a waiver of a jury trial, by failure to deposit the fees within ten days prior to the date set for trial, it was an abuse of discretion, on the part of the court, to refuse to submit the case for trial to the jury, inasmuch as the jury fee had actually been paid, and the jury was present when the case was called for trial, and it would have involved no delay in the proceedings of the court.

It is probably true that the court had the right, notwithstanding such waiver, to submit the case to trial by jury, if he had chosen to do so (Doll v. Anderson, 27 Cal. 249), but the court has a discretion in the matter, and its order refusing to submit the case to a jury will not be disturbed, when no gross abuse of discretion appears (Ferrea v. Chabot, 121 Cal. 233, 53 P. 689, 1092). Appellants have not attempted to point out wherein they have suffered any injury or prejudice by reason of the trial by the court instead of the jury. Their only complaint on this appeal is "the trial court erred in denying plaintiffs a jury trial." Prejudice will not be presumed as a consequence of the issues of fact, in a case being tried by the court instead of the jury. On the contrary, the presumption is that the appellants have enjoyed the benefit of a fair and impartial trial, according to the usual modes of procedure under the Constitution and laws of this state. Clearly, the appellants have failed to show any prejudice or other error on the part of the court which would justify a reversal of the case.

Accordingly, the judgment appealed from is affirmed.

We concur: **JENNINGS**, Acting P. J.; **MARKS**, J.

116 Cal.App. 157

PEOPLE v. WILLISON.

Cr. 2038.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1931.

Hearing Denied by Supreme Court Sept. 17, 1931.

1. **Burglary 🔑42(3).**

Possession of stolen property, together with other evidence, including admissions by defendant that he had taken some of stolen articles from owners' houses, justified burglary conviction.

2. **Criminal law 🔑1202(3).**

In burglary prosecutions, evidence *held* insufficient to justify finding of prior convictions, state having failed adequately to identify defendant with former prisoners.

3. **Jury 🔑31(11).**

Jury trying not guilty plea in burglary prosecutions could also properly try plea of not guilty because of insanity (Pen. Code, § 1026).

4. **Criminal law 🔑1201.**

Statute regulating imprisonment on fourth conviction of felony is constitutional (Pen. Code, § 644).

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

J. J. Willison was convicted of burglary, together with prior convictions, as charged in two actions which were consolidated for trial, and he prosecutes appeals.

Judgment modified, and order denying defendant's motion for a new trial affirmed in part and reversed in part, and cause remanded.

Superseding opinion in 296 P. 644.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, P. J.

These appeals include two actions which were consolidated for trial. In action 42098 the defendant was accused of burglary committed on September 12, 1930, at the house of one Katayama in the city of Arcadia. In said action it was further charged that before the commission of said offense the defendant on May 11, 1925, was convicted of burglary in the county of Los Angeles; and in April, 1911, was convicted of grand larceny in Sonoma county, and in April, 1908, was convicted of petit larceny with prior conviction in the county of Alameda; and for each of said offenses served a term of imprisonment in a penal institution. In action 42179 defendant was accused of the crime of burglary committed on September 13, 1930, at the house of one Vanderbeck in the city of Pomona.

[1] The points on appeal, as stated in the brief for appellant, are substantially as follows: First. That the evidence is not sufficient to justify the verdict in either one of the two actions in this, that the evidence shows merely that the defendant was found in possession of certain stolen property, but that this evidence was not accompanied by other and additional evidence sufficient to support the verdict. Appellant seeks to have applied to this case the rule that possession of stolen property, the fruits of a burglary, is a circumstance tending to show guilt, but is not sufficient alone to justify a conviction. An examination of the record discloses testimony of admissions made by the defendant that he had taken some of the stolen clothing from the house of Katayama, and also that he had taken some of the stolen articles from the house of Vanderbeck. There is also evidence tending to prove that certain explanations made by the defendant, concerning the sources from which he had obtained possession of the stolen articles, were false.

The second point is that no entry was shown in either case. The record shows that in each case the house was locked when the owner went away for a temporary absence, and upon the owner's return the house was found broken open, and articles of personal property had been removed. It was made very clear in each instance that a burglary had been committed by some one, and the circumstances were sufficient to justify the jury's finding that the defendant was the guilty person.

[2] Under points 3 and 4 it is claimed that the evidence was not sufficient to justify the finding of prior conviction in the county of Alameda and of prior conviction in the county of Sonoma, to which we have referred. In the case from Alameda county, the judgment was rendered against one James Mallek. The witness Metcalf, for many years an employee in the prison at San Quentin, identified the defendant herein as being the same person whom he knew in the prison as Tony Mallach. There is, however, a total absence of evidence that the person known to the witness as Tony Mallach was the same person named as defendant in the prison commitment issued against James Mallek.

The witness Metcalf further testified that, after being in prison under the name of Tony Mallach, the defendant came in again as a prisoner under the name of Powers, whose first name, according to this witness, was either John or George. Metcalf recognized the defendant here as the man whom he had known in the prison as Powers. The witness produced in evidence the prison commitment of Powers, whose prison number was 25040. The defendant named in this commitment was not George or John Powers, but was Edward Powers. There is no evidence that, while the defendant was in prison and known by the name of George Powers, he was being held there under the commitment issued against a defendant named Edward Powers. It may be that these defects in the record are the result of carelessness in the introduction of the evidence. But, where the state completely fails to produce any evidence of an essential fact, defendant is entitled to the benefit of the record thus made.

The fifth point assigns error in the giving of an instruction concerning possession of stolen property as a circumstance tending to show guilt. The decision in People v. Brown, 71 Cal. App. 181, 192, 235 P. 72, and other decisions there cited, are sufficient authority to sustain the said challenged instruction in the present case.

[3] Under point 6, appellant claims that the court erred in overruling defendant's motion that the issue of insanity, under his plea of not guilty by reason of insanity, be tried before another jury, and not by the jury which had passed upon the plea of not guilty. There is no merit in this contention. Pen. Code, § 1026; People v. Leong Fook, 206 Cal. 64, 273 P. 779; People v. Troche, 206 Cal. 35, 273 P. 767; People v. Davis, 94 Cal. App. 192, 270 P. 715.

[4] Finally, appellant contends that the provisions of section 644, Penal Code, concerning the term of imprisonment prescribed in the case of a felony conviction of a person who has been previously three times convicted of felony, are unconstitutional for various stated reasons. The principles which underlie legislation affecting the penalties to be inflicted upon habitual criminals were discussed by the Supreme Court of California in the case entitled In re Rosencrantz, 205 Cal. 534, 271 P. 902. The validity of section 644 of the Penal Code was therein sustained as against several forcefully presented grounds of objection thereto. The present appellant has not offered any more substantial reason for determining that said section is unconstitutional than were the contentions made by the petitioner in the Rosencrantz Case, and we conclude that there is no merit in the contention here made.

The judgment of the court is modified. The order denying defendant's motion for a new trial, in so far as said motion is related to the alleged prior convictions in the superior court of the county of Sonoma and in the superior court of the county of Alameda, and as to those matters only, is reversed, and, as to all other matters and issues of the case, the said order is affirmed. Upon completion of the disposal, by new trial or otherwise, of said issues relating to former convictions in the county of Alameda and in the county of Sonoma, the trial court is directed to pronounce and enter judgment against the defendant, as prescribed by law. For the purposes hereinabove stated, the cause is remanded to said trial court.

We concur: HOUSER, J.; YORK, J.

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116 Cal.App. 126

THOMAS v. SOUTHERN PAC. CO.

Civ. 7692.

District Court of Appeal, First District, Division 1, California.

Aug. 14, 1931.

Rehearing Denied Sept. 12, 1931. Hearing Denied by Supreme Court Oct. 9, 1931.

1. Evidence 🔑75.

That railroad produced no evidence contradicting that of injured switch tender respecting his duties afforded strong presumption that evidence within its control as to true situation, if produced, would have been unfavorable to railroad (Code Civ. Proc. § 1963, subd. 6, and § 2061, subds. 6, 7).

2. Negligence 🔑124(3).

Upon issue of negligence in performance or omission of act, evidence of ordinary practice and custom is competent.

3. Master and servant 🔑101, 102(1).

Master must furnish servants reasonably safe instrumentalities and work place.

4. Master and servant 🔑231(1).

Servant has right to assume that master furnished reasonably safe instrumentalities and place.

5. Master and servant 🔑286(14).

Whether switch tender, injured when lever was jerked out of hand, was furnished reasonably safe instrumentalities and place to work, *held* for jury (Federal Employers' Liability Act [45 USCA §§ 51–59]).

Evidence for plaintiff tended to show that when he was attempting to operate switch he was thrown and injured, which was due to fact that lever was jerked out of his hand as result of switch having been blocked by engine sand that had been permitted to run into switch by railroad yard engine which had passed over switch short time before accident. There was engine oil upon iron plate upon which switch tender was required to stand when operating lever, and, according to plaintiff's evidence, he could not see oil because of darkness and it was not his duty to keep platform clean.

6. Master and servant 🔑286(14).

In action by injured switch tender, whether fellow servants' permitting switch engine to deposit sand in switch, and permitting oil on lever platform, was negligence, *held* for jury (Federal Employers' Liability Act [45 USCA §§ 51–59]).

7. Master and servant 🔑262(3).

Assumption of risk, whether ordinary risk or extraordinary hazard caused by master's negligence, must be pleaded.

8. Master and servant 🔑265(13).

To show assumption of risk, master must show that danger was so obvious that servant knew and appreciated, or must be charged with knowledge and appreciation of, hazard.

9. Appeal and error 🔑999(3).
Master and servant 🔑288(3).

Whether switch tender, injured when throwing lever because of sand blocking switch and oil on platform causing him to fall, assumed risk, *held* for jury, whose decision was conclusive (Federal Employers' Liability Act [45 USCA §§ 51–59]).

10. Trial 🔑296(1).

Omissions or inaccuracies in instruction are cured if supplied by others, and if jury were fairly and consistently instructed generally.

11. Damages 🔑132(3).

$25,000 to 34 year old railroad switch tender for serious and permanent spinal and back injuries preventing physical work *held* not excessive.

Evidence favorable to injured plaintiff tended to show that, at time of accident, he was 34 years old and had life expectancy of 32.5 years and earning capacity of $175 monthly; that, at time of trial, two years after accident, plaintiff was still incapacitated from performing any work; that he had chronic, permanent disability in lower part of back, the sacroiliac joint, and lumbar spine; that subluxation in sacroiliac joint was on its right side; that spondylolisthetic condition was permanent; and that he had not been able since accident, and would not be able in future, to do any physical work.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by George Thomas against the Southern Pacific Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Paul Blackwood, of Los Angeles, for respondent.

MURPHEY, Justice pro tem.

In this action respondent seeks to recover damages against appellant for personal injuries sustained by him while employed by appellant in interstate commerce as a switch tender, which position he had occupied in the Los Angeles yards for approximately three years before the accident. During the course of a night's work, his duty required him to throw about thirty switches. In throwing a switch, the operator stands on an iron plate approximately twenty inches wide and forty feet long. The switches are thrown by a lever set into and level with the plate or platform on which the operator stands. In order to reach the lever, the operator stoops, releases a safety catch with one hand, and takes hold of the lever with the other, raising it to make the throw of the switch points. The lever weighs fifteen or twenty pounds and requires considerable pressure to operate it. One operation of the lever throws eight switch points, each about fifteen feet long, and the total weight of equipment operated by one swing of the lever runs into tons.

At 11:30 o'clock on the night of the accident, when respondent came on duty, the switch was in good condition and was thrown by him six or eight times prior to the accident. On two of these occasions, about twenty or twenty-five minutes before the accident, the switch was thrown for the particular yard engine claimed to have deposited the sand, which caused the accident, in the switch points, and on these occasions it worked all right. At the time of the accident, respondent was attempting to operate the switch again and claims to have been thrown and injured, due to the lever being jerked out of his hand, as a result of the switch having been blocked by engine sand that had been permitted to run into it by appellant's yard engine above mentioned, which engine had stopped over the switch a short time before the accident. The facts of the case, so far as the happening of the accident is concerned, are substantially conceded to be as above set forth. There is some disagreement as to whether any duty devolved upon the plaintiff to perform any other service than that of throwing switches. It may be conservatively said, however, that there is an abundance of evidence to support the finding that such was his sole duty, and the full extent of his responsibilities as an employee of the defendant. The plaintiff was seriously injured as the result of his original unsuccessful effort to throw the switch point. There is ample evidence in the record to sustain this statement of fact, but in addition to the record evidence, the trial judge and jurors were taken to the scene of the accident on the afternoon of the first day's trial, where a personal inspection was made of the physical condition prevailing at that point, and experiments were made, by employees of the defendant and one of the jurors, in operating the switches.

So far as the negligence phase of the case is concerned, the only defense available to the defendant is that, with respect to the happening of the accident, the admitted facts do not measure up to the legal standards of actionable negligence. An examination of the authorities, we are satisfied, can leave little doubt that under the facts and circumstances of this case, the determination of the question of the negligence of fellow servants of respondent is a question of fact for the jury. The evidence as to the duties incumbent upon respondent as a switch tender may be fairly summarized as follows: The respondent testified: "The job I was holding at the time of my accident was an active job. I worked eight hours; there were three shifts, and I held one shift during all that time. My duties as switch tender were these—the switch tender throws switches and keeps the trains moving. You take the orders which the yardmaster passes over to you, and keep your trains going, and see that you get them in the right place. I had no duties to perform at the switch stand except that of throwing the switch itself. I have never been required to clean up oil and stuff around places on the railroad. I didn't know the oil was there. I might have wiped it off if I had known; probable would. The assistant yardmaster, Henry W. Young, was in charge of this place down where I was working. When I had matters to report, I reported them to him. When I fell forward there, I got up on my hands and knees and I was covered with black engine oil. The oil was on the place where I had been standing to attempt to throw the switch. I stood on this plate for the purpose of throwing the switch. I do not know how that oil got on that switch plate. I had seen oil on that particular switch plate before. I do know how that oil got on that switch plate; it got there spilling from the engines. When I saw oil on other occasions, I did do something; I notified the yard office. I had a lantern that night. I didn't notice the oil at all, until I had it on my hands and knees after my fall." Con Riley, a witness called by the appellant, testified: "My business is passenger section foreman in the passenger yards, Los Angeles passenger yards. I have been with the Southern Pacific Company for twenty-five years. I do know where this switch is that is in evidence in this accident; that is in my territory and I have charge of that equipment. I inspect those switches, see that they are in proper working condition; I inspect those switches in the yard nearly every day. I do remember the occasion of November 12th, 13th, 14th, along in there, of 1925. I have not at any time in my daily inspection found any oil on that switch up there."

[1] It is admitted that one of the printed rules of appellant, No. 46, provides yardmasters are responsible for conditions within the yard. There is no contradiction in the record with respect to the duties of the switch tender. Appellant did not produce evidence at the trial conflicting in any way with that above set out, which fact affords a strong presumption that if the appellant had produced the evidence within its control as to the true situation, such evidence would have been unfavorable to it. Code Civ. Proc. § 1963, subd. 6; Id., § 2061, subds. 6 and 7. This has generally been the rule in the federal court. Fitzsimmons v. Ogden, 7 Cranch (11 U. S.) 2, 3 L. Ed. 249; Clifton v. United States, 4 How. (45 U. S.) 242, 273, 11 L. Ed. 957; Kirby v. Tallmadge, 160 U. S. 379, 16 S. Ct. 349, 40 L. Ed. 463. This presumption is further strengthened by the fact that such testimony as was produced by appellant at the trial of this action was corroborative of respondent's positive testimony that it was not his duty to inspect or maintain this switch and keep it in good working order.

With respect to sand at the switch point, respondent testified as follows: "It was unusual to have the sand. I had never seen sand that way before. That was the first time I had found sand in that particular switch in my whole railroad experience. I do know what sand is used for on railroads. It gives the engine traction power. * * * I know that every railroad engine, practically, carried a sand tank for that purpose." Edward J. Kelly, who for twenty-three years had been an engineer for the Southern Pacific Company, five years of which he operated a switch engine, but who was not in the employ of the appellant at the time of the accident, testified: "The practice is to shut off sand when approaching these switches. It is shut off because it is dangerous to let sand run. It will plug up the switch points and prevent the operation of the switch."

[2-5] It is a well-settled rule upon the issue of negligence in the performance or omission to perform an act, that evidence of the ordinary practice and custom, if any, generally followed in the performance of same, is competent. Hennesey v. Bingham, 125 Cal. 627, 58 P. 200; Cadillac Motor Car Co. v.

Johnson (C. C. A.) 221 F. 801, L. R. A. 1915E, 287, Ann. Cas. 1917E, 581; McComb v. Atchison, Topeka & Santa Fé Railway Company (Cal. App.) 294 P. 81; Owl Creek Coal Co. v. Goleb (C. C. A.) 210 F. 209, 216. In which last case, the court used the following language: "It is equally well settled that, upon the issue of negligence in the performance or omission of an act, evidence of the ordinary practice and the usual custom, if any, of ordinarily prudent and intelligent persons in the performance, under the same or like circumstances, of the same, or like acts, is competent." (Citing cases.) It is manifest, therefore, that there is substantial evidence to support the contention of the respondent in this case that his sole duty in the operating of the switch point did not require him either to inspect the platform or the place upon which he stood or the switch points themselves to determine whether they were in working order. Furthermore, that the deposit of sand in the switch point was an unusual occurrence generally and, as to the respondent himself, entirely unknown to his experience. It would hardly seem necessary to quote authorities to sustain the position that there is a positive duty upon the master to furnish its servants with reasonably safe instrumentalities, and a reasonably safe place wherein to do their work, and that the servant has a right under the law to assume that the master has performed such duty. There is an abundance of authority both federal and state, to support the proposition that under the facts and circumstances of this case the question, as to whether the instrumentality supplied to the plaintiff in the performance of his duties measured up to that standard, is one of fact for the jury. Mappin v. Atchison, Topeka, etc., Ry. Co., 198 Cal. 733, 247 P. 911, 49 A. L. R. 1330; Neale v. Atchison, etc., Ry. Co., 178 Cal. 225, 172 P. 1105; Boin v. Spreckels Sugar Co., 155 Cal. 612, 102 P. 937; Kreitzer v. Southern Pacific Co., 38 Cal. App. 654, 177 P. 477; Chesapeake & Ohio Railway Company v. De Atley, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016; Carolina C. & O. Ry. Co. v. Stroup, 239 F. 75, 152 C. C. A. 125.

[6] There is ample evidence in the record, direct and inferential, that the sand found in the switch point upon which the accident is predicated, was deposited by a switch engine operated by an employee of the defendant. Whether such acts, conduct, and activities constituted negligence under the authorities is a question of fact for the jury. In Sioux City & Pacific Railroad Company v. Stout, 84 U. S. (17 Wall.) 657, 661, 21 L. Ed. 745, the court says: "If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to" a nonsuit, but the question of negligence must be left to the jury. In Davidson Steamship Co. v. United States, 205 U. S. 187, 192, 27 S. Ct. 480, 482, 51 L. Ed. 764, the court says: "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them."

[7-9] The second ground of defense set up by appellant in this action is that the plaintiff was engaged in interstate commerce and that said accident and injury, if it occurred at all, arose directly from the risks and dangers ordinarily incident to and attendant upon the operation of the equipment in interstate commerce and that said risks and dangers, by virtue of his employment, were risks and dangers assumed by him. The law is clear that upon the question of the assumption of risk or danger, whether from ordinary risks incident to the employment or from extraordinary hazards caused by the master's negligence, is a special defense and must be pleaded. It may be noted, however, in this connection that the defendant does not plead extraordinary hazard. In the case of Bird v. Utica Gold Mining Co., 2 Cal. App. 674, 677, 84 P. 256, 258, the court says: "If the particular employment of plaintiff was such that he must be deemed to have assumed the risk of working in a dangerous place, we think this was an affirmative defense to be shown by defendants. One who relies upon an exception to a general rule must state the facts which bring his case within it. Senter v. Davis, 38 Cal. 450. It is the general rule that an employer is liable to his servant for injuries resulting from the employer's negligent failure to provide a safe place to work. To this there may be exceptions, as where the servant is employed to make the place safe. A defense founded on such an exception is an affirmative defense, and need not be negatived by the plaintiff." In the case of Oregon Short Line & U. N. Ry. Co. v. Tracy, 66 F. 931, 936 (C. C. A. 9), the court says: "It is assigned as error that the court excluded evidence offered by the defendant tending to prove that the plaintiff knew the condition of the track where the accident occurred, and that he therefore assumed the risks incident thereto. The defendant had not pleaded such knowledge upon the part of plaintiff, and the ruling of the court was in accordance with the doctrine established by the authorities. [Citing cases.] The doctrine of these decisions is that the assumption of the risk after knowledge of the defects is matter of defense in the nature of a waiver of the right to recover for the defendant's negligence, and must be pleaded."

It is not enough for appellant to attempt to show bare knowledge in order to raise this question, but it must go further and show that the situation was dangerous, and that the danger was so open and obvious that respondent knew and appreciated or must be charged with the knowledge and appreciation of its hazards. In Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 102, 34 S. Ct. 229, 231, 58 L. Ed. 521, the court says: "Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it." Chesapeake & Ohio Ry. Co. v. De Atley, supra; Chicago, R. I. & P. Ry. Co. v. Ward, 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430.

The record does not disclose any evidence whereby appellant attempted to offer any proof whatever upon the question of extraordinary risks and hazards caused by the master's negligence. In appellant's answer it is alleged, only, that the accident and injury arose directly from risks and dangers ordinarily incident and attendant upon the operation of said equipment. However, in any event, if respondent's assumption of risk of the negligent acts of appellant's employee by reason of his knowledge of the risk, and an appreciation of the danger arising therefrom, may be said to be an issue in this case, there can be no question but that the matter was submitted to the jury for its decision, and the decision of the jury and the judgment of the court based thereon will be binding and determinative of the issue on this appeal.

In Kanawha, etc., Railway Co. v. Kerse, 239 U. S. 576, 581, 36 S. Ct. 174, 175, 60 L. Ed. 448, the court said: "The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury."

In Mappin v. Atchison, Topeka, etc., Ry. Co., 198 Cal. 733, 742, 247 P. 911, 915, 49 A. L. R. 1330, the court says: "It may be stated in limine that it is conceded that the defense of assumption of risk is one of the defenses which may be taken advantage of by a defendant carrier, where the action is brought under the provisions of the Federal Employers' Liability Act; but it should also be said that upon the issue of assumption of risk the burden of proof is upon the employer (Kanawha, etc., Railway Co. v. Kerse, 239 U. S. 576, 60 L. Ed. 448, 36 S. Ct. 174; see, also, Rose's U. S. Notes; 18 R. C. L. § 126, p. 631; 16 Cal. Juris. p. 1079, and cases cited); and that as a general rule the question of assumption of risk is a question of fact for the jury. (16 Cal. Juris. p. 1080, and cases cited). The only exception to this rule is that, when the evidence in the case is clear, direct, and undisputed, the question of assumption of risk becomes a question of law for the court."

When applied to the facts of this case, it is manifest that the evidence, if any, of the assumption of risk by respondent fails utterly to measure up to this standard. In Chesapeake & O. Ry. Co. v. Winder, 23 F.(2d) 794, 795 (C. C. A., 4th Cir.), the court says: "On the second point, as to the assumption of the risk by the defendant, while it is true that the defense of the assumption of risk is not barred by the Federal Employers' Liability Act (45 USCA §§ 51–59; Comp. St. §§ 8657–8665) —Jacobs v. So. Ry. Co., 241 U. S. 229, 36 S. Ct. 588, 60 L. Ed. 970—the burden of proving that plaintiff had assumed the risk is upon the defendant, and in order to justify a directed verdict for the defendant on that ground the evidence tending to show such assumption must be clear and uncontradicted."

In Kreitzer v. Southern Pacific Co., supra, at page 667 of 38 Cal. App., 177 P. 477, 482, the court says: "Whether or not defendant was negligent in failing to provide a safe place for the decedent to work; whether decedent was guilty of gross negligence in failing to select a place which was designed for safety and was safe; whether, when placing himself in the position selected, he failed to take ordinary precautions to protect himself—were questions which, under the evidence, could not be taken from the jury and decided by the court as matter of law, but were proper questions for the jury. In Herbert v. Southern Pacific Co., 121 Cal. 227, 229, 53 P. 651, the court said 'The rule is, that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence.' * * * The burden of establishing the defense of assumption of risk is upon the defendant. * * * 'The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. * * * This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation.'" It may be remarked in passing that the facts and circumstances of this case did not bring the respondent within the purview of the exception above noted.

[10] Appellant criticizes many of the instructions given by the trial court, but we are satisfied from a careful examination of the instructions given that the jury was fully and fairly instructed upon all the issues pertain-

ing to this case; in fact, the court fully instructed the jury upon the question of extraordinary risks and hazards, notwithstanding the fact that that issue was not raised by the pleadings as hereinabove mentioned. In its criticism of the instructions given by the trial court, it is difficult to determine what particular instructions are objected to by the defendant. Exceptions are noted to all instructions offered by the court, and among those specifically excepted to in appellant's brief are several instructions which were offered by the defendant and given by the court at its instigation. In Campbell v. Southern Pacific Ry. Co., 21 Cal. App. 175, 177, 131 P. 80, 81, the court said: "'* * * It may well be that some particular instruction fails to contain a complete or accurate statement of the law. If, however, when the entire charge is examined, the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions.'" This language is strikingly appropriate to the situation disclosed by the record in this case. If we were to make any criticism at all of the instructions given by the court in this case, we would say on the whole that they were more favorable to the appellant than the law applicable thereto justified. Every issue was fully, clearly, and correctly presented to the jury.

[11] The damages awarded in this case—$25,000, assessed by the jury and approved by the court—are large, but it cannot be fairly said that when the evidence offered by the respective parties is dispassionately considered the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment. This accident happened on the 13th day of November, 1925, and the verdict was rendered by the jury on the 23d day of November, 1927, two years after the happening of the accident. The plaintiff's earning capacity was $175 a month. At the time of the trial, the evidence showed that he was still entirely incapacitated to perform any kind of work. At the time of the accident he was 34 years of age and had a life expectancy of 32.50 years. The opinions of several experienced physicians were to the effect that the plaintiff has a chronic permanent disability in the lower part of his back, the sacroiliac joint, and also the lumbar spine; that the subluxation in the sacroiliac joint is on the right side of the joint; that there are two sides of the joint; that he will never recover. With regard to the spondylolisthetic condition, the physicians are of the same opinion. He has not been able to do any work and is not in a condition to do any physical work. In the future he will not be able to do any work involving physical activity. This evidence if believed by the jury is sufficient to support the verdict given in this case. The court on its own motion appointed a young physician to make an examination of respondent, but, notwithstanding the fact that upon such examination this physician in his testimony minimized not only the injuries found by the more experienced doctors to exist, but was of the opinion that such injuries as respondent was afflicted with were not caused by the accident involved in this action, nevertheless it is significant that the trial judge, in sustaining the verdict of the jury, entirely discredited this evidence of his appointee. On the question of damages, in its closing brief appellant says: "* * * We must concede that in view that there was a dispute as between the respective parties as to the amount of damages which the respondent sustained, this court will not disturb the verdict of the jury, unless it can be said that the amount of damages given was awarded under passion and prejudice. We do contend, however, that a careful examination and analysis of the medical testimony given in the instant case does not justify the award of damages given by the jury; but in any event, we earnestly contend that the respondent was not entitled to any damages for the reason that he did not receive his injuries by reason of any negligence on the part of appellant or any of its servants or employees." All of which contentions were resolved in favor of the plaintiff and against the defendant, which determination under the well-settled principles of law are binding upon this court.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

115 Cal.App. 563

BUSHNELL v. YOSHIKA TASHIRO et al.

Civ. 7166.

District Court of Appeal, First District, Division 1, California.

July 22, 1931.

Rehearing Denied Aug. 21, 1931. Hearing Denied by Supreme Court Sept. 17, 1931.

1. **Automobiles** ⚷242(6), 244(26).

Proof that automobile striking plaintiff belonged to defendant and was operated by defendant's employee established prima facie that employee was acting within scope of employment; defendant having burden to prove contrary.

2. **Automobiles** ⚷245(30).

Presumption that employer's automobile, operated by employee when it struck plaintiff, was being operated within scope of employment, *held* sufficient to take issue to jury, notwithstanding rebutting testimony was uncontradicted.

3. **Trial** ⚷139(1).

Jury is sole judge of weight of testimony.

4. **Trial** ⚷140(1).

Jury is sole judge of credibility of witnesses.

5. **Evidence** ⚷89.

Presumptions do not vanish as matter of law when contradicted by evidence of party against whom they are invoked.

6. **Evidence** ⚷89.

Testimony of adverse party called as witness does not, as matter of law, dispel presumption contrary thereto and in favor of party calling adverse witness (Code Civ. Proc. § 2055).

7. **Evidence** ⚷89.

"Presumption" created by statute is interchangeable with "inference" arising from facts, as regards not being dispelled as matter of law by contradictory evidence.

[Ed. Note.—For other definitions of "Inference" and "Presumption," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Waters A. Bushnell against Yoshika Tashiro and another. From an adverse judgment, defendants appeal.

Affirmed.

Ford & Johnson, of San Francisco, for appellant People's Laundry Co.

Myrick & Deering and Scott, of San Francisco, for respondent.

KNIGHT, J.

While walking across a street in San Francisco, plaintiff was struck and injured by a Ford delivery truck owned by the defendant People's Laundry Company and driven by its employee and codefendant Tashiro; and subsequently he brought this action for damages against the owner and the driver, claiming that the accident was caused by the driver's negligence. Upon trial a jury rendered a verdict against both defendants for the sum of $6,500, and from the judgment entered thereon People's Laundry Company prosecutes this appeal. The accident occurred on a Sunday evening about 6 o'clock on Folsom street, near Ninth, a short distance from the laundry, and the sole ground urged for reversal is that the evidence establishes as a matter of law that at that time Tashiro was not performing any service within the scope of his employment, but was using the truck for his own pleasure and convenience without the knowledge or consent of his employer; and that consequently appellant is absolved from liability.

[1-4] The decisions are uniform in holding that, in an action for damages against an employer for personal injuries caused by the negligence of his employee while operating the employer's automobile, proof that the automobile belonged to the employer and at the time of the accident was being operated by the employee, raises an inference sufficient to establish a prima facie case that the automobile was being operated by the employee under the authority of the employer and within the scope of the employment, and that the burden is then upon the defendant to overcome or dispel such inference by proof of facts to the contrary. Among the numerous cases so holding are McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697; and Wagnitz v. Scharetg, 89 Cal. App. 511, 265 P. 318. And it is further held that such inference is not destroyed or overcome as a matter of law merely because it is contradicted by the testimony of the employee or of other witnesses produced on behalf of the defendants, but that the issue remains one of fact for the determination of the jury, for the reason that, as sole judges of the weight of the testimony and the credibility of the witnesses, the members of the jury are not bound to accept such testimony as true, but may, if not convinced thereby, reject any portion or the whole thereof. Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73; Wagnitz v. Scharetg, supra; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Adams v. Wiesendanger, 27 Cal. App. 590, 150 P. 1016;

Perry v. Paladini, Inc., 89 Cal. App. 275, 264 P. 580; Dierks v. Newsom, 49 Cal. App. 789, 194 P. 518, 520; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358, 361; Lemka v. Nauman, 103 Cal. App. 757, 284 P. 1062; Crain v. Sumida, 59 Cal. App. 590, 211 P. 479; Frierson v. Pacific Gas & Electric Co., 55 Cal. App. 397, 203 P. 788.

In the present case appellant in its answer expressly admitted ownership of the truck, and respondent established the fact of Tashiro's employment at the time of the accident by Tashiro's deposition theretofore taken by respondent, and which respondent introduced in evidence subject to the provisions of section 2055 of the Code of Civil Procedure. Tashiro also testified therein, however, that at the time the accident occurred he was not performing any service for his employer, but was using the truck, without permission, for his own pleasure. In this connection the evidence shows without dispute that Tashiro's duties consisted of collecting and delivering laundry by means of said truck, his territory covering the regions lying north of Market street; that he was obliged to work every day, including Sundays, his duties on Sundays requiring him to collect and deliver "left over" laundry, which he was allowed to do at such hours during the day as best suited his convenience; and he claimed that on this particular Sunday, after having collected and delivered the "left over" laundry, he drove the truck back to the laundry, on Tenth street two blocks south of Market, placed it in the garage, and thereafter took it out again without permission, and, accompanied by his wife and a friend, both of whom were employed at and lived over the laundry, went for a ride. It was while they were returning to the laundry that they collided with respondent. Tashiro, his wife, and the superintendent of the laundry, named Tsukamoto, were afterwards called as witnesses for the defense; and Tashiro testified to substantially the same story. His wife stated also that at the time of the accident they were using the truck on a mission of their own; and Tsukamoto testified that the drivers were not allowed to use the trucks on Sundays for their own pleasure without asking permission, and that on the Sunday in question Tashiro neither asked for, nor was granted, such permission.

It is evident that the foregoing testimony would have been legally sufficient to controvert the inference establishing the prima facie case against appellant, if the jury had accepted the testimony as true; but it did not do so, and under the doctrine of the cases above cited it was not compelled, as a matter of law, to do so, notwithstanding that the testimony was not rebutted. As said in Dierks v. Newsom, supra, "the evidence introduced by the appellant made out a complete defense if full credence was given to it by the trial court [here it was the jury]; but the court was not bound thus to unreservedly accept it, even if uncontradicted. The court saw and heard the witnesses testify, and with this advantage, not enjoyed by us, it was for it to determine the degree of credence to be accorded to this testimony. It is not essential that the credulity of the court should correspond with the positiveness with which a witness testifies. A court may reject positive testimony, although it be not contradicted or impeached by any direct testimony. Its inherent improbability may be such as to deny it all claims to belief. A witness' manner of testifying may give rise to doubts as to his sincerity, or create the impression that the facts testified to by him are colored or not correctly stated."

In this connection it may be stated that according to Tashiro's testimony he spent much of the time on this particular Sunday afternoon shopping and visiting friends in the district in which his duties were daily performed, including a visit to another laundry operated by the same company; and his testimony as to the route they traveled that afternoon was not only self-contradictory in several respects, but was at variance to some extent at least with that given by his wife as to the places and persons they visited and the object of taking the truck that afternoon. And although his wife first stated that she accompanied her husband on the truck only on Sundays, she afterwards admitted that she sometimes rode with him on week days to do her shopping, while he was performing his regular duties. And again it was shown that, although Tashiro had been employed by the laundry for over four years, and had been accustomed to using the truck on Sundays for his own pleasure, this was the first Sunday that he had ever taken it out, as claimed by him and Tsukamoto, without asking permission; and that the reason he did not obtain permission on this single occasion was, as he testified, that he believed Tsukamoto was in church.

It would appear therefore, that there were certain elements of weakness in the testimony of said witnesses which warranted the jury in deeming it to be of doubtful probative value; and consequently it cannot be reasonably held on appeal, as a matter of law, contrary to the implied finding of the jury, that such testimony was and is conclusive as to all matters to which it relates. To appropriate some of the language used in the decision in Randolph v. Hunt, supra, "Being the exclusive judges of the weight of the evidence and the credibility of the witnesses, if the testimony did not carry conviction to their minds [the minds of the jury], they had the legal right to reject it. We must assume that they did not believe the story, and we cannot say, in the absence of any showing to the contrary, that the jury acted arbitrarily, or otherwise than in good faith and with an honest purpose.

We would not be justified by the record in branding the statement of these witnesses as false, although there are certain circumstances that tend somewhat to discredit it, but we are not in a position to interfere with the jury's discretion in that particular." We conclude, therefore, that under the doctrine of the group of cases above cited the testimony of said witnesses given in contradiction of the inference establishing the prima facie case of liability against appellant did no more than create a conflict therewith, even though said testimony was not rebutted; and, that being so, the determination of the jury on that issue is conclusive on appeal.

[5, 6] Appellant has cited several cases which it claims sustains its contention that, where the evidence adduced in controversion of an inference is uncontradicted, it is sufficient as a matter of law to overcome such inference. An examination of those cases shows, however, that some of them merely declare the general rules relating to an owner's liability, about which there is no dispute, and do not involve, as here, the question of the legal effect of uncontradicted testimony given in opposition to such an inference; and as to some of the others it will be found that there are certain elements present therein or absent therefrom which exclude them from the operation of the rule which appellant is seeking to invoke. But, even conceding that a conflict in principle exists between some of those cases and the group hereinabove set forth, it is apparent that such conflict has been done away with by the decision of the Supreme Court in the recent case of Smellie v. Southern Pacific Company, 299 P. 529, 534, which was rendered since the present case was argued and submitted. There the court reviews the entire subject, and discusses several of the earlier cases, including some of those upon which appellant relies, and, after doing so, adheres to and restates as the law of this jurisdiction the doctrine of the group of cases above cited, and of which Grantham v. Ordway, Randolph v. Hunt, and Perry v. Paladini, Inc., are fair representatives. Summarizing the decision in that case relating to the points with which we are here concerned, it was therein held (1) that presumptions are dispelled and disappear from the case when controverted by the uncontradicted testimony of the party relying upon the same, or of his witnesses, under circumstances which afford no indication that the testimony was the product of mistake or inadvertence, and the fact so proved is wholly irreconcilable with the presumptions sought to be invoked, citing Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; (2) that they are not dispelled and do not vanish from the case as a matter of law when contradicted or controverted by the party against whom they are invoked. "In such case," says the court, "their guiding and compelling effect is undermined and diminished or destroyed to the extent that they are controlled by the facts as found to exist"; and (3) "that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but [is] in favor of the party calling such adverse witness."

[7] As will be noted, in the present case the testimony given in contradiction of the inference that the truck was being operated within the scope of the driver's employment was elicited from Tashiro, whose deposition was introduced by plaintiff subject to the provisions of said section 2055, and the witnesses called by the defendants; consequently, under the law as stated in Smellie v. Southern Pacific Co., supra, such inference was not dispelled and did not vanish entirely from the case as a matter of law by reason of such testimony. It operated merely to create a conflict. True, in the case last mentioned the court was dealing with a presumption created by statute, as distinguished from an inference arising from the facts; but the situation is not affected thereby, for, as will be seen from an examination of that case as well as from all of the other decisions upon the subject, including the cases of Perry v. Paladini, Inc., Grantham v. Ordway, and Randolph v. Hunt, supra, the terms "inference" and "presumption" are used interchangeably, and the rule is applied alike to both. Another recent case adhering to the doctrine restated and approved in Smellie v. Southern Pacific Co., is Poncino v. Reid-Murdoch & Co., 298 P. 818, wherein the Supreme Court, after hearing and decision in the District Court of Appeal, held, contrary to the decision of the latter court, that as against an inference establishing the prima facie case the uncontradicted testimony of the employee and of the other witnesses produced by the defendants created only a conflict.

Since, therefore, under the foregoing authorities, the evidence relied upon by appellant to absolve it from liability created only a conflict, and did not as a matter of law dispel the inference establishing respondent's prima facie case, it is beyond the power of the reviewing court, on appeal, to interfere with the conclusion reached by the jury on that issue.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; WARD, Justice pro tem.

TRAXLER v. McLERAN.

Civ. 7769.

District Court of Appeal, First District, Division 2, California.

Aug. 21, 1931.

Rehearing Denied Sept. 19, 1931. Hearing Denied by Supreme Court Oct. 19, 1931.

1. Brokers 🔑86(1).

Acceptance of realty exchange offer ostensibly signed by offeree and acknowledged before notary *held* sufficient evidence of acceptance.

2. Brokers 🔑43(3).

In action for commissions, that broker did not sign contract for realty exchange and commissions *held* not determinative; exchanging parties being "parties to be charged" (Civ. Code, § 1624).

3. Brokers 🔑78.

Broker could sue for commissions before contract for realty exchange was rescinded.

4. Brokers 🔑49(1).

One employing broker to negotiate realty exchange *held* liable under contract when broker secured acceptance of offer.

> Contract expressly provided that, when broker had secured acceptance in writing of offer to exchange properties, offeror would pay to broker specified sum on demand for services rendered.

5. Vendor and purchaser 🔑135(2).

Improvements overlapping sidewalk and overlapping by three-fourths of an inch adjoining property, wall of which was in place, *held* de minimis, constituting no defect in title.

6. Brokers 🔑61(3).

That person authorizing broker to negotiate realty exchange does not own entire fee, and that wife refuses to join in deed, does not preclude broker from recovering commission.

7. Brokers 🔑52.

Although realty was not actually exchanged, trade *held* "consummated," within contract for broker's commissions, where broker procured acceptance of exchange offer.

> [Ed. Note.—For other definitions of "Consummate," see Words and Phrases.]

8. Brokers 🔑74.

Where contract authorizing broker to negotiate realty exchange contemplated commissions from both parties, administratrix of party failing to consummate exchange, thereby preventing other party's performance, *held* liable for both commissions.

Appeal from Superior Court, City and County of San Francisco; W. A. Anderson, Judge.

Action by Henry H. Traxler against Madeline McLeran, as administratrix with the will annexed of the estate of Ralph McLeran, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed on rehearing.

Superseding opinion in 300 P. 39.

William F. Humphrey, A. T. O'Connell, and Humphrey, Searls, Doyle & MacMillan, all of San Francisco (Edward I. Fitzpatrick, of San Francisco, of counsel), for appellant.

Theodore M. Monell, of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff sued to recover broker's commissions alleged to be due and owing to him from the defendant's testator. The defendant asserts that there is no testimony to support the finding that the plaintiff performed the contract under which he claims relief. She also asserts that there was no agreement employing the plaintiff. And she further asserts that the purported agreement was one of exchange and that there was found to be a material defect in the title to Ehrlick's property which was not removed and therefore no commission was earned. These several contentions we think may best be treated together.

On January 16, 1928, defendant's testator executed an instrument agreeing to exchange three several parcels of land together with $15,000 in cash for a parcel on the west line of Mission street which was entirely covered by buildings. The writing included, among others, these passages:

"Henry H. Traxler is hereby constituted my agent to negotiate this exchange and two days are allowed him to secure written acceptance hereof.

"15 days from the date of acceptance shall be allowed for search of titles and consummation, unless one or both titles are found to be defective. In the latter event the party or parties whose title is defective shall be allowed 60 days additional, after receipt by Henry H. Traxler of written notice of objections to title, within which to remedy defects.

"At the conclusion of 60 days, or before, if both titles are sooner made acceptable, this exchange shall be finally consummated in the office of Henry H. Traxler by each party delivering to the other all payments and instruments in writing required to comply with the terms specified and particularly to vest in each by grant, bargain and sale deed good merchantable title to all of the real property that is to go from one to the other under this agreement. * * * It is further agreed with the said agent that when he has secured an acceptance in writing of the above proposition that I will then pay to said agent at his office in San Francisco, the sum of one thousand and no/100 ($1,000.00) on demand for services rendered; and it is understood that said agent may also act as agent for the owner of the above secondly described property from whom he may also receive a commission. Time is of the essence hereof. (Signed). Ralph McLeran. The foregoing is hereby accepted and performance by me is agreed to this 17th day of January, 1928, and I agree to pay Henry H. Traxler at his office in San Francisco, California, the sum of thirty-six hundred twenty-five ($3625.00) dollars as agreed for services rendered; and it is understood that Henry H. Traxler may also act as agent for the owner of the firstly herein described property from whom he may also receive a commission.

"Commission to be paid upon consummation as follows: $1,725.00 in cash. Lot on 34th Ave. and 2 lots in Richmond City property. (Signed). Gustav Ehrlick."

The paper was not signed by this plaintiff. After it had been signed by Ehrlick, a survey was made, and it transpired that the improvements on Ehrlick's property overlapped the sidewalk on the east line of the property and that they overlapped to the extent of three-quarters of an inch the property adjoining on the north side. The overlapping was never cut off nor the overlapping property purchased, but further proceedings between the exchanging parties were, by stipulation, indefinitely postponed. Mr. McLeran died on August 21, 1928. The plaintiff presented a claim against the estate of the decedent. That claim was as follows: "To services rendered in securing acceptance of exchange proposition as per agreement, $1,000.00. To commission earned for services performed as real estate agent as per agreement, $3,625.00. Total $4,625.00." The judgment as rendered was for the full sum covered in the claim, together with interest.

[1] The contention that the evidence does not support the findings is based on the fact that no one was called as a witness to identify the signature of Ehrlick. Nevertheless, one copy of the contract, purporting to be signed by Ehrlick and his signature acknowledged before a notary public, was admitted in evidence. That evidence was sufficient to support the finding.

[2-4] The contention that there was no agreement of employment of Traxler rests on the fact that he did not sign the written instrument. That fact is not determinative. McLeran and Ehrlick both signed, and under the clear terms of the writing they were the ones "to be charged." The statute (Civ. Code, § 1624) was complied with. Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124. This plaintiff was entitled to sue thereon before it was rescinded. Lundeen v. Nowlin, 20 Cal. App. 415, 129 P. 474; Stanton v. Carnahan, 15 Cal. App. 527, 115 P. 339. In so far as the defendant was concerned her testator became liable under the terms of the contract when the plaintiff had "* * * secured an acceptance in writing of the above proposition. * * *" Darrow v. Houlihan, 205 Cal. 771, 774, 272 P. 1049.

[5-7] The defendant next asserts that there was a defect in the title to the property of Gustav Ehrlick—there was an overlapping. True, but it was slight and the wall of the adjacent property is in place. The courts will treat the slight overlapping as de minimis. Mertens v. Berendsen (Cal. Sup.) 1 P. (2d) 440; 39 Cyc. 1506; Macdonald v. Bach, 51 App. Div. 549, 64 N. Y. S. 831, 833. As shown above, the plaintiff held the written authorization of Mr. McLeran empowering him to negotiate the exchange. If Mr. McLeran did not own the entire fee and if his wife later refused to join in executing a deed to Mr. Ehrlick, such facts did not constitute a defense. 4 Cal. Jur. 596, 597. As the trade was not actually carried out, the defendant asserts it was not "consummated" within the terms of the contract and Mr. Ehrlick never became liable and therefore she is not liable. Under the facts the point may not be sustained. 4 Cal. Jur. 599.

[8] So far we have confined our discussion of the damages to that portion of the compensation which Mr. McLeran undertook to pay if the parties had exchanged deeds. It remains for us to take up and discuss the claim of the plaintiff that he was also entitled to be compensated for the loss of the commissions which Mr. Ehrlick had agreed to pay. The latter has not performed, and could not perform, solely because Mr. McLeran refused to perform. The plaintiff pleaded and the court found the special circumstances under which the contract was actually made were communicated by the plaintiff to Mr. McLeran and to Mr. Ehrlick. Indeed, such facts appear as a part of the written contract signed by those two parties. Pointing to these facts, the plaintiff then claims that he was entitled to ask damages in a sum equal to the amount Mr. McLeran promised to pay plus the amount Mr. Ehrlick promised to pay. Hunt Bros. Co. v. San Lorenzo, etc., Co., 150 Cal. 51, 56, 87 P. 1093, 7 L. R. A. (N. S.) 913; Klepper v. Am.-La France, etc., Co., 104 Cal. App. 249, 254, 285 P. 1048. Those cases are in point, except that they did not involve a sale or exchange

of real estate. In this state no case involving a sale or exchange of real estate presents the exact question. However, the rule contended for has been followed and applied in such actions by the courts of other jurisdictions. One of the latest cases, and probably the leading one on the subject, is Calkins v. Woolworth Co. (C. C. A.) 27 F.(2d) 314. On pages 318 and 319 of 27 F.(2d) are to be found the principal cases on the subject that have been decided in this country. An examination discloses that there is no substantial conflict. Where there was an apparent conflict it will be found that there was a difference in the facts. It follows that if this action had been brought against Mr. McLeran in his lifetime the amount of the damages should have been ascertained as claimed by the plaintiff. We do not understand the defendant to claim that any different rule should be followed in estimating the amount of the damages when, as here, the defendant is the executrix or administratrix.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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116 Cal.App. 112

In re MONTAGUE'S ESTATE.

Civ. 7958.

District Court of Appeal, Second District, Division 2, California.

Aug. 13, 1931.

Divorce 🔑255.

Where divorce complaint alleged there was no community property, and interlocutory divorce decree became final before filing of petition for distribution of deceased wife's estate, husband's claim that property was community property *held* without foundation (Civ. Code, § 169).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

In the matter of the estate of Nellie A. Montague. Frank P. Montague filed a first and final account as administrator of the estate of Nellie A. Montague, deceased, and Flora J. Benjamin and others filed a petition to determine heirship and distributive rights, and from that portion of the decree distributing part of estate to persons other than himself, the administrator appeals.

Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

Lewis H. Smith, Archie A. Smith, and Manley C. Davidson, all of Los Angeles, for respondents.

CRAIG, J.

Upon objection to the first and final account of the appellant as administrator of the estate of Nellie A. Montague, deceased, and a petition to determine heirship and distributive rights, filed by the sisters and a brother of said deceased, a decree was made and entered apportioning the estate to appellant and to the said petitioners. The administrator appealed from that portion of the decree which distributed a part of the estate to persons other than himself.

The appellant and Nellie A. Montague intermarried in 1915. On or about May 15, 1925, they ceased living together, and on April 21, 1928, appellant filed a complaint alleging desertion, and that "there are no children as the result of said marriage, nor is there any community property." An interlocutory decree was granted pursuant to personal service and the entry of a default in said action. By his petition for letters of administration in this proceeding appellant represented himself as the only heir at law of said deceased, and in his first and final account he averred that the whole thereof was community property, praying a decree "distributing all of the said estate to Frank P. Montague, surviving husband of the said deceased." However, upon the appearance of the respondents, and after hearing the evidence, the trial court awarded one-half of the estate to them. It is contended that this was error. That the parties to the divorce action had agreed upon a reconciliation, that a form of dismissal had been prepared, and other extraneous matters, are asserted by the appellant's brief, but they are not supported by the record, and in any event are immaterial.

The parties had not lived together as husband and wife for a period of at least three years, and about eleven months prior to the filing of said first and final account it was adjudged and decreed that all of the allegations of the complaint for divorce were true, that is, that there was then no community property, which is equivalent to a judgment based upon findings of fact that whatever property the decedent may then have had was her separate property. The findings and decree were introduced and are a part of the record in this matter. No appeal or order purporting to nullify the former decree was effected. Hence it becomes too obvious to require extended discussion that the claim that any part of said estate was community property is without foundation, for the reason that the interlocutory decree became final and conclusive six months from the date of its entry, and prior to the filing of the petition for distribution. Civ. Code, § 169; Brown v. Brown, 170 Cal. 1, 147 P. 1168; Id., 170 Cal. 8, 147 P. 1171.

The decree is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

JOHN P. MILLS ORGANIZATION, Inc., v. UNGER et al.*

Civ. 6968.

District Court of Appeal, Second District, Division 2, California.

July 28, 1931.

Rehearing Denied Aug. 27, 1931.

As Amended Sept. 12, 1931. Hearing Granted by Supreme Court Sept. 24, 1931.

Guaranty 🔑36(7).

Under contract whereby surety agreed to indemnify plaintiff if principal did not erect houses worth $3,000 each on lots principal purchased from plaintiff, giving plaintiff deeds of trust thereon, surety did not guarantee success or safety of principal's investment.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by John P. Mills Organization, Inc., against Robert Unger and the Guardian Investment Corporation of California. From an adverse judgment, the last-named defendant appeals.

Reversed.

Lewis Cruickshank and Donald Armstrong, both of Los Angeles, for appellant.

W. I. Gilbert and Howell Purdue, both of Los Angeles, for respondent.

CRAIG, J.

An action having been instituted against the purchaser of real property and his surety pursuant to the failure of the former to build thereon as agreed between the parties, judgment was rendered in favor of the plaintiff and against said surety, from which the latter appealed.

The instrument forming the basis of this action speaks for itself. Appellant and Robert Unger bound themselves to the plaintiff in the sum of $19,593, by an instrument in writing wherein it was recited that, whereas the respondent had sold to Unger certain real property, and Unger had given as a part of the purchase price certain promissory notes and agreed to complete ten houses thereon within 120 days, of the value of $3,000 each, "therefore, that if the above named Robert Unger, his heirs, executors and administrators do and shall well and truly complete within one hundred twenty (120) days from the close of said escrow, a dwelling house upon each and every one of the said ten (10) lots, which said dwelling house shall contain not less than five (5) rooms and shall cost and be reasonably worth not less than $3,000, and shall be approved by the undersigned surety, then the above written obligation shall be void; otherwise to run in full force and effect." The provisions of said undertaking were alleged in the complaint, and it was made a part thereof. The plaintiff further alleged, however, that the parties thereto all agreed and that it was by them contemplated that the improvements mentioned would preserve the plaintiff's interest and security, which was represented by trust deeds, and "would so far increase the value of the whole property that the trust deeds in favor of plaintiff would furnish ample security"; that "said undertaking stood as security for the difference between the value of the property without and the value of the property with dwelling-house"; that, without the agreed improvements, "plaintiff's interest in the property represented by said deeds of trust would be impaired"; and that the parties also contemplated "that by the performance of the terms of said undertaking, Exhibit 'A' hereof, defendant Robert Unger would be able to sell and transfer at a profit said lots and said dwellings thereon to purchasers who would assume all of the encumbrances against the same." The structures were not completed within the time specified, and the plaintiff alleged that each house was in fact of a value less than $2,400. And "that the value of each of said [ten] lots, together with the dwelling-house thereon as constructed * * * did not * * * exceed the sum of $4,000; that if a dwelling-house had been erected on each of said lots at a cost and of the reasonable worth of $3,000, each of said parcels at all times herein mentioned would have had a market value of $6,500"; that Unger had been unable to sell the lots at a profit, or to purchasers who would assume the incumbrances against them, by reason of which the plaintiff had been compelled to assume and pay certain specified obligations, and had been damaged in the sum of $19,593.

The plaintiff's theory of the case arose and was pursued upon the basis of appellant's guarantee that the value of the properties, when improved, would exceed the value of the vacant lots by a sufficient amount to assure sales of the improved properties at a profit

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 9 P.2d 833.

and to satisfy or guarantee incumbrances held by the plaintiff and others represented by deeds of trust and mortgages. The findings of fact conformed substantially to the allegations of the complaint, and the trial court specifically found and rendered judgment for the plaintiff in the sum of $9,186.17. This result included $311.97 expended in making certain repairs, and $1,745 as the cost of alleged encroachments, besides a damage in the sum of $6,928.70. The latter amount was arrived at through the following computation: Trust deeds on the property, held by the plaintiff, $19,088; value of the lots as adjudged by the court, after improvement, $47,159.30; first-mortgage incumbrances thereon, outstanding, $35,000; value of the plaintiff's equity, $12,159.30, which, deducted from the amount of the indebtedness represented by said deeds of trust, leaves a deficit in said sum of $6,928.70, in which amount the plaintiff was damaged by the erection of houses worth but $2,538.93 each, instead of $3,000, as originally agreed by the parties to the construction contract.

Although so alleged and found, it is apparent at once that neither fraud, mistake, nor ambiguity of appellant's contract of guaranty was claimed by the plaintiff, nor did it seek to reform the instrument. The effect of the complaint based upon the undertaking, and of the plaintiff's testimony at the trial, was not to recover for a failure to construct ten houses of a value of $3,000 each and to obtain judgment accordingly, but to read into the undertaking so providing a guarantee by the appellant surety that respondent's property as a whole would by improvement be a safe and profitable venture, and to recover for its breach. It is interesting to observe in this connection that appellant was not a party to the realty hazard alleged. Its contract made no provision for repairs, for encroachments, or for deficiencies in the event of foreclosure. No word or possible construction of its language can be made to embrace the value of the real property, or respondent's equity, or prospective loss arising from a failure of its appraisal at a satisfactory valuation to the respondent. It cannot be said, as the respondent's theory would tend to indicate, that appellant agreed to be bound in damages in the event of unprofitable valuation, even though houses worth $3,000 each were built; nor that appellant would not be liable if respondent profited by the deal, even though the houses were not worth $3,000 each. The limitations of the four corners of the undertaking defined the obligation of the Guardian Investment Company as follows, only: That, whereas, Unger had agreed to erect ten houses within a stipulated time, to cost and be reasonably worth $3,000 each, "now, therefore, if the above-named Robert Unger * * * shall well and truly complete * * * a dwelling house upon each * * * of said ten lots * * * reasonably worth $3,000, * * * then the above obligation shall be void." It cannot be successfully contended that Unger's failure to perform would constitute a breach of appellant's obligation rendering it liable in damages to the respondent, as the latter insists. It is in the nature of an undertaking which, upon Unger's failure to build or to furnish full value, may be enforced, in the manner and for the purposes therein prescribed, to the extent of the injury resulting only from such specified derelictions. The trial court found that each house was reasonably worth $2,538.93, or $461.07 less than the agreed value of the structures which Unger contracted to erect. Appellant's consent to insure the success of respondent's investment was requisite to a judgment for damages such as found by the trial court, whereas the express language of its contract excludes such contingency and liability.

From what has been said other points presented by the parties become immaterial to a determination of this appeal.

The judgment is reversed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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116 Cal.App. 316

LOS ANGELES BOARD OF ADJUSTERS v. BAILES et al.

Civ. 7990.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1931.

Rehearing Denied Sept. 25, 1931. Hearing Denied by Supreme Court Oct. 22, 1931.

Mechanics' liens ⟹157(1).

In action to foreclose mechanic's lien, excluding claim of lien because claimant inadvertently inserted therein amount identical with another account *held* error (Code Civ. Proc. § 1203).

Code Civ. Proc. § 1203 provides that no mistake or errors in the statement of the demand, or of the balance asserted to be due, shall invalidate the lien unless the court finds that such mistake or error was made with intent to defraud. It was proved without contradiction that the mistake or error was honest, and there was no claim or proof that the mistake resulted in any deception or injury.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by the Los Angeles Board of Adjusters against T. W. Bailes and others. From an order granting a nonsuit as to certain defendants, plaintiff appeals.

Reversed.

Derthick & Hull, Wm. J. Cusack, and Herbert Ganahl, all of Los Angeles, for appellant.

Arthur G. Baker, of Los Angeles, for respondent Mary A. Barry.

Lyle Pendegast, of Los Angeles, for respondents Helen C. Brown, Kitty A. Foulkes, and Thomas Foulkes.

NOURSE, P. J.

Plaintiff sued to foreclose a mechanic's lien. The cause was tried before the court, and, at the close of plaintiff's case, the trial court granted a nonsuit as to certain defendants. The plaintiff appeals on typewritten transcripts.

Plaintiff is the assignee of Union Tank & Pipe Company, a corporation. This company sold to defendant Bailes a quantity of oil well casing which Bailes used in sinking a well upon property owned by defendant Barry, and located at Huntington Beach, Orange county. The contract price with Bailes for the materials furnished was $1,945. When the company filed its claim of lien for these materials it entered the amount due as $2,949. On the trial it developed that this sum of $2,949 was due the company upon a separate account with Bailes for materials furnished him to be used upon property located at Signal Hill in Los Angeles county. Upon this showing, the trial court sustained objections to the offer in evidence of the claim of lien and the assignment thereof. If these rulings were sound, the order granting the nonsuit was proper because plaintiff had no evidence establishing the lien, which it sought to foreclose.

The evidence was without contradiction that four hundred and eighty feet of thirteen-inch casing, together with a shoe and guide, were furnished Bailes by the pipe company; that these materials went into the improvements on respondent's property; and that the agreed price therefor was $1,945. It was also shown that the pipe company had another charge against Bailes on account of pipe furnished him to be used on property in Signal Hill. This charge was for seven hundred and twenty feet of pipe, amounting to $2,949. In the claim of lien here at issue the company inadvertently inserted the figures $2,949 as the amount due. Because this charge was identical with another account on the books against Bailes, it is argued that no legal claim of lien was filed against the property in suit. Upon this theory the trial court excluded from evidence the claim of lien and the assignment.

We are unable to agree with this ruling. Section 1203, Code of Civil Procedure, provides that: "No mistake or errors in the statement of the demand, or of the * * * balance asserted to be due * * * shall invalidate the lien, unless the court finds that such mistake or error * * * was made with intent to defraud, or (matters not material)." Here there was no claim of fraud. Appellant alleged and proved without contradiction an honest mistake or error. There was no claim and no proof that respondents were misled or that they suffered any injury through the error.

A statute of this character demands that we give it full effect where applicable. The true purpose of the statute is to relieve a lien claimant from the consequences of an error of this nature. The fact that the amount erroneously inserted in the claim was identical with another account for goods sold does not affect the case. If the Legislature had intended an exception in such cases, it would have so declared. But the only exceptions made are those involving fraud and the rights of innocent third parties. We are satisfied that this case must be ruled by the statute.

Order reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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116 Cal.App. 240

PEOPLE v. FORRESTER.

Cr. 2088.

District Court of Appeal, Second District, Division 1, California.

Aug. 21, 1931.

Rehearing Denied Sept. 3, 1931.

Criminal law 🔑1201.

Statute forbidding mention to jury of previous conviction *held* repealed pro tanto by subsequent statute making prior conviction integral part of offense (Pen. Code, § 1025; St. 1923, p. 695).

> Pen. Code, § 1025, provides that when defendant who is also charged with previous conviction pleads not guilty, and answers that he has suffered the previous conviction, charge of such conviction must not be read to jury or alluded to at trial, and St. 1923, p. 695 (Deering's Gen. Laws 1923, Act 1970), which was enacted subsequently to Pen. Code, § 1025, relates to the possession of a firearm capable of being concealed on the person by one who has previously been convicted of a felony, thereby making it necessary to prove such conviction.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

John Forrester was convicted of violating St. 1923, p. 695 (Deering's Gen. Laws 1923, Act 1970), pertaining to the possession of firearms, and he appeals.

Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CONREY, P. J.

Pursuant to count 2 of an information duly filed, defendant was convicted of the crime of violation of chapter 339, p. 695, Laws of 1923 (Act 1970 of Deering's Gen. Laws 1923), "committed as follows: That the said John Forrester, on or about the 29th day of January, 1931, at and in the county of Los Angeles, state of California, did wilfully, unlawfully and feloniously have in his possession and custody and under his control a certain firearm, capable of being concealed upon the person, the said firearm having a barrel less than twelve inches in length, the said John Forrester having theretofore been duly and legally convicted of a felony, to-wit, burglary, on the 24th day of April, 1922, by and before the superior court of the state of California, in and for the county of Los Angeles." It was further alleged that before the commission of said offense defendant had been convicted of the crime of burglary, and judgment of said superior court pronounced and rendered on the 24th day of November, 1922, and that defendant served a term of imprisonment therefor in a penal institution. On arraignment on March 9, 1931, the defendant regularly entered his plea of not guilty and admitted the prior conviction. On April 8, 1931, the case was tried before a jury, which found the defendant guilty. Thereafter, on April 13, the date set for pronouncing of judgment and sentence, the defendant filed and presented a demurrer to the information, which demurrer was overruled and the cause further continued to April 17, for hearing defendant's motion for a new trial and motion for arrest of judgment. On April 17 said motions were denied and judgment pronounced by the court. The clerk's minutes show that after the jury had been sworn to try the cause: "Information is read and plea stated. Motion of defendant's counsel for dismissal, for reasons stated, is argued and denied." The reporter's transcript shows that after the jury had been sworn and the plea stated, defendant's counsel moved that an order of mistrial be entered "upon the ground that the reading of the information has violated the rights of the defendant in the allusion and in informing the jury of the fact that this defendant had been guilty of a prior conviction when this defendant has admitted that fact solely for the purpose of his protection against its influence upon the jury." The objection thus made was overruled by the court, and thereafter the court, notwithstanding objections on the part of defendant, admitted evidence establishing the fact of the former conviction.

Appellant contends that the admission of such evidence is prohibited by the terms of section 1025 of the Penal Code. That section provides as follows: "When a defendant who is charged in the indictment or information with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted or informed against, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered by the clerk in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. * * * In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." If the foregoing provisions of section 1025 of the Penal Code apply to the offense of which the defendant was convicted in this action, it would be impossible ever to convict the defendant on this charge. For the offense described in the indictment includes, as a substantive part of the offense, the fact that the person charged with having in his possession the prohibited firearm is a person "who has been convicted of a felony against the person or property of another," etc. Notwithstanding the fact that the defendant upon his arraignment admitted the prior conviction, as separately stated in the indictment, he pleaded not guilty to the principal offense and thereby put in issue the alleged fact that, at the stated time and place, he had in his possession the described firearm, he having been theretofore legally convicted of a felony, to wit, burglary, etc. Considering the two statutes together, we are satisfied that the provisions of section 1025 of the Penal Code were not intended to apply to a case where the fact of former conviction is an integral part of the present offense concerning which the defendant is brought to trial. If any additional ground of reconcilement of the two statutes should seem to be necessary, the fact may be noted that the Firearms Act of 1923 is of much later date than said section of the Penal Code, and is of necessity, pro tanto, a repeal of said section 1025, Penal Code.

Our decision upon the question hereinabove discussed practically disposes of all of the points raised on the appeal. The evidence is sufficient to sustain the verdict; the demurrer to the information was properly overruled; the court did not err in permitting the clerk to read the first paragraph of count two of the information; the court did not err in denying defendant's motion to stop the trial and enter an order of mistrial; the court did not err in overruling the objections to the evidence offered to prove that defendant had suffered said former conviction of burglary; the court did not err in denying defendant's motion for an advised verdict; and the verdict was not ambiguous. It was stipulated that, in reading the information to the jury, the clerk read only the first paragraph, and did not read the second paragraph, which separately charged the previous conviction of a felony.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

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116 Cal.App. 333

HYDE v. CITY OF SANTA CRUZ.

Civ. 7803.

District Court of Appeal, First District, Division 1, California.

Aug. 27, 1931.

Rehearing Denied Sept. 26, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

1. Municipal corporations 🔑360(6).

Municipal construction contract specifying completion date *held* not part of architect's agreement not limiting time of performance so as to entitle architect to additional compensation for inspecting during extension period (Civ. Code, § 1642).

This was so, since the architect's agreement did not incorporate into itself the terms of the construction contract, and therefore it could not be aided or enlarged by the terms of the construction contract.

2. Municipal corporations 🔑360(6).

That construction contract permitted municipality to declare forfeiture for delay in completion did not entitle architect to additional compensation for inspecting during extension period.

This was so, since the provision permitting the city to forfeit $100 per day as liquidated damages, representing in part additional engineering fees, was not expressly made for the architect's benefit, although its enforcement might incidentally benefit him.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Charles Gilman Hyde against the City of Santa Cruz. Judgment for defendant, and plaintiff appeals.

Affirmed.

H. C. Symonds, of San Francisco, for a pellant.

John H. Leonard, of Santa Cruz, and Lindsay & Gearhart, of Fresno, for respondent.

GRAY, Justice pro tem.

Respondent, by a written agreement employed appellant to design a sewerage and sewerage disposal works, to prepare all drawings and the contract for its construction, and to supervise and inspect such construction for a percentage of its cost, payable in progress installments, subject to final determination thirty-five days after completion. Although providing that time was of its essence, the agreement did not limit the time for performance of these services except as to require appellant to begin the engineering work on a specified date and to furnish the designs, drawings, and construction contract on a certain day "so that the work may be let and construction thereof may begin as much prior to January 1, 1927, as shall appear expedient and proper and so that the entire project shall be completed and accepted as far as possible in advance of December 31, 1927." The construction contract, furnished by appellant and executed by the successful bidder, set December 31, 1927, as the date of completion, defined avoidable and unavoidable delays, required the contractor to pay respondent $100 for each day, after date of completion, the work was uncompleted, as liquidated damages "representing the cost to the city of *additional engineering* and clerical hire and the loss of interest and of the use of the works caused by the delay," and provided that the contractor should pay such sum, if the city extended time of performance for a delay that appellant should determine was avoidable. The work was not completed by December 31, 1927, but was completed within the time extended by the city.

[1, 2] Appellant sued to recover compensation, additional to that provided in his agreement, for his services in supervising and inspecting during such time extension. To supply the lack of time limitation in his agreement for rendition of his services, appellant pleaded that the above-noted provisions of the construction contract were embodied in his agreement. The court rendered judgment against appellant, finding, among other facts, that these provisions did not form part of appellant's agreement with the city. Appellant appeals, questioning principally this finding. This finding is legally correct. The rule, as stated in section 1642 of the Civil Code, that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together," has no present applica-

tion because appellant's agreement and the construction contract differ as to parties, dates of execution, and subject-matter, and they must be regarded as separate contracts, and not as constituting one contract. Uhlhorn v. Goodman, 84 Cal. 185, 23 P. 1114; Pettibone v. Lake View Town Co., 134 Cal. 227, 66 P. 218. Appellant's agreement does not incorporate into itself the terms of the construction contract, and therefore it cannot be aided or enlarged by the latter's terms. Mannix v. Tryon, 152 Cal. 31, 91 P. 983; Kirkpatrick v. Pye, 59 Cal. App. 125, 210 P. 438. Nor is appellant's contention aided by the provision of the construction contract permitting the city to forfeit $100 a day as liquidated damages, representing in part additional engineering fees, since such provision was not expresssly made for his benefit although its enforcement might incidentally benefit him. Chung Kee v. Davidson, 73 Cal. 522, 15 P. 100. The same conclusions as our own were reached as to similar contentions under similar facts in Town of Decatur v. Jaudon, 136 Ga. 854, 72 S. E. 351.

Since this finding demolishes the foundation of appellant's case, it will be unnecessary to consider other findings questioned by him.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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116 Cal.App. 286

Ex parte HEINZE.

Cr. 1172.

District Court of Appeal, Third District, California.

Aug. 25, 1931.

1. Criminal law 🔑**245.**

Any irregularity of proceedings and insufficiency of evidence at preliminary examination to establish corpus delicti *held* waived by failure to move to set aside information prior to pleading not guilty (Pen. Code, §§ 524, 995).

2. Habeas corpus 🔑**117(2).**

Defendant discharged on prior application for writ of habeas corpus for defect of proof at preliminary examination, could be arrested and re-examined for same offense (Pen. Code, §§ 524, 995, 1496).

Application of Carl Frederick Heinze for a writ of habeas corpus prayed to be directed to the Sheriff of San Joaquin County to secure release of petitioner on ground that commitment was void for failure to establish corpus delicti.

Writ denied.

D. P. Eicke, of Stockton, for Petitioner.

Guard C. Darrah, Dist. Atty., of Stockton, for respondent.

R. L. THOMPSON, J.

This is a petition for a writ of habeas corpus.

It is contended the order of a magistrate holding the petitioner for trial in the superior court upon a charge of attempting to extort money contrary to the provisions of section 524 of the Penal Code is void for failure to have established at the preliminary examination the corpus delicti. It is asserted the record fails to show probable cause to believe the petitioner is guilty of the offense charged.

The petitioner is held by the sheriff of San Joaquin county pursuant to a commitment duly issued by a justice of the peace of Stockton township, based upon an order previously made by him holding the petitioner for trial in the superior court upon the charge of attempting to extort money contrary to the provisions of section 524 of the Penal Code. Upon proceedings duly had in the justice's court, an order of the above-named magistrate was made July 8, 1931, binding the petitioner over for trial for the offense last mentioned. The petitioner was thereupon held a prisoner upon said charge pending the trial thereof. On July 17, 1931, upon a previous petition for a writ of habeas corpus, the superior court of San Joaquin county discharged the prisoner. On the last-mentioned date a new complaint was filed against the petitioner in said justice's court charging him with the same offense in substantially the same language in which the first complaint was couched. The petitioner was again taken into custody by the sheriff. On July 20, 1931, another preliminary examination was held. Additional testimony was then adduced. This petition for a writ of habeas corpus alleges that the magistrate, on the last-mentioned date, "without reasonable or probable cause, or without the corpus delicti having been established, made an order holding said petitioner to answer to the superior court." August 3, 1931, an information was filed in the superior court of San Joaquin county charging the petitioner with the crime of attempting to extort money contrary to the provisions of section 524 of the Penal Code. Upon the last-mentioned date the petitioner was duly arraigned in open court and pleaded "not guilty" of the offense with which he was charged. The cause was then set for trial for September 1, 1931. No motion was made pursuant to section 995 of the Penal Code, to set aside the information on the ground that "before the filing thereof the defendant had not been legally committed by a magistrate." This petition for a writ of habeas corpus was thereupon presented to this court.

[1] The information having been filed, and the petitioner, without objection, having been arraigned thereon and having pleaded not guilty thereto, and failing to have moved to set aside the information under the provisions of section 995 of the Penal Code, waived his right to object to the irregularity of the proceedings or insufficiency of the evidence before the magistrate. Ex parte Moan, 65 Cal. 216, 3 P. 644, 646; In re Ephriam Northcott, 71 Cal. App. 281, 235 P. 458; People v. Bawden, 90 Cal. 195, 27 P. 204, 206. Upon the hearing of the petition for a writ of habeas corpus in the Moan Case first above cited, the court said: "When the defendant in this case was arraigned and pleaded not guilty, and did not move to set aside the information, he was thereby precluded from taking the objection that he had not been examined and committed in the manner required by law." In the Bawden Case last cited, the court said: "A defendant, upon arraignment, may move to set aside the information upon the ground 'that before the filing thereof the defendant had not been legally committed by a magistrate;' and if the motion be not then made, the defendant is precluded from afterwards taking the objection."

[2] It is asserted that since the petitioner in the present proceeding was previously discharged upon a writ of habeas corpus, he could not be again legally imprisoned for the same cause. Section 1496 of the Penal Code does provide that:

"No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases:

"1. * * *

"2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense."

Assuming that the superior court properly discharged the petitioner in the former application for a writ of habeas corpus "for defect of proof" at the original preliminary examination, clearly this section authorizes the arrest and re-examination of the accused for the same offense. If the petitioner was held for trial in the superior court in the present case upon insufficient evidence, that defect could be taken advantage of only upon motion to set aside the information pursuant to the provisions of section 995 of the Penal Code. It is unnecessary to pass upon the sufficiency of the evidence, since that want of evidence, if any such defect exists, was waived by failure to move to set aside the information prior to the entry of the petitioner's plea.

The petition for a writ of habeas corpus is denied.

I concur: PRESTON, P. J.

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116 Cal.App. 278

CLARK v. WALLMAN.

Civ. 7773.

District Court of Appeal, First District, Division 1, California.

Aug. 25, 1931.

1. Automobiles ⇨171(4).

Under statute, motorist approaching intersection at unlawful speed did not have right of way over vehicle on left traveling at lawful speed (St. 1923, p. 560, § 131 (a), as amended by St. 1925, p. 412, § 15).

It appeared that when plaintiff, who was driving at lawful speed, was about to enter intersection, he looked to the right and saw defendant's automobile 75 to 90 feet away approaching intersection at speed of 35 to 40 miles an hour, but plaintiff made no effort to stop. St. 1923, p. 560, § 131 (a), as amended by St. 1925, p. 412, § 15, provides that, when two vehicles approach intersection at approximately same time, vehicle approaching from right has right of way if traveling at lawful speed.

2. Automobiles ⇨171(13).

Although driver operating at lawful speed in approaching intersection may assume that others will exercise due care, he must do likewise.

3. Automobiles ⇨245(14).

Motorist's negligence at intersection *held* for jury (St. 1923, p. 560, § 131 (a), as amended by St. 1925, p. 412, § 15).

4. Negligence ⇨136(9).

Contributory negligence is question of law only when reasonable men can draw only one inference pointing unerringly to such negligence.

5. Automobiles ⇨245(44).

Question of motorist's speed *held* for jury which, if finding speed unlawful, should determine whether driver of vehicle approaching from left entered intersection carefully (St. 1923, p. 560, § 131 (a), as amended by St. 1925, p. 412, § 15).

6. **Appeal and error** ⚷930(4).

When contributory negligence is necessarily left to jury which returns verdict for plaintiff, court must assume that jury found adversely to defendant thereon; such finding being as conclusive as finding on issue of negligence.

7. **Trial** ⚷296(4, 5).

Instruction authorizing recovery, if plaintiff was not contributorily negligent, erroneously omitting question of defendant's negligence, *held* harmless; rule being stated correctly in six preceding instructions.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Herman Clark against Edith B. Wallman. Judgment for plaintiff, and defendant appeals.

Affirmed.

Lasher B. Gallagher, of San Francisco (Jack W. Hardy, of Los Angeles, of counsel), for appellant.

Frank Lee Crist, of Palo Alto, and Edward M. Fellows, of San Jose, for respondent.

WARD, Justice pro tem.

This is an action for damages for personal injuries alleged to have been sustained by the plaintiff, Herman Clark, under the following circumstances: On August 2, 1929, the plaintiff was driving a 1927 Dodge coupé automobile in a westerly direction on Addison avenue in the city of Palo Alto. At the same time and place the defendant was driving a 1930 Nash sedan automobile in a southerly direction on Emerson street. At the intersection of these two streets the cars of the plaintiff and defendant collided. As the result of that collision the plaintiff sustained injuries. The plaintiff in his complaint charged the defendant with negligence in the operation of her automobile. The defendant denied any negligence on her part, and, as a separate defense, pleaded contributory negligence on the part of the plaintiff. The case was tried before a jury, which returned a verdict in favor of plaintiff. Judgment was entered accordingly. A motion for a new trial was denied, and defendant appealed.

[1, 2] Plaintiff, about to enter the intersection, saw defendant's car 75 to 90 feet away approaching the intersection at a speed of 35 to 40 miles an hour. Plaintiff, driving on the right side of the street at a lawful speed, made no effort to stop. It is the contention of appellant that the conduct of the plaintiff and respondent at the time and place of the accident which gave rise to the respondent's injuries was negligence as a matter of law, and that such negligence proximately contributed to the happening of the accident. Appellants cite Kinney v. King, 47 Cal. App. 390, 190 P. 834, but that was a case in which an ordinance was introduced which in effect provided that, when vehicles approach simultaneously, the vehicle approaching from the right has the right of way. In the case at bar the statute provided: "When * * * such vehicle is traveling at a lawful speed." Defendant was not traveling at a lawful rate of speed, and hence did not have the right of way. Appellant's position in effect is that plaintiff, going at a lawful rate of speed, seeing defendant approaching at an unlawful rate of speed, should have given the right of way. To lay down such a rule would be an invitation to speed-mad motorists to violate the law, and, if an accident should occur, to place the blame, as a matter of law, upon the driver operating within a lawful rate of speed. It is the duty of one operating within a lawful speed in approaching an intersection to "use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him." Flores v. Fitzgerald, 204 Cal. at page 377, 268 P. 369, 371.

[3-6] This case is a question of fact and not a question of law. In a case such as this where a claim of contributory negligence becomes an issue, the rule is the same. "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 336, 208 P. 125, 128. Otherwise contributory negligence is a question of fact for the jury. Flores v. Fitzgerald, supra, 204 Cal. at page 376, 268 P. 369. Appellants also cite Donat v. Dillon, 192 Cal. 426, 221 P. 193, but in that case the court did not decide that there was contributory negligence as a matter of law, but that it was contributory negligence as a matter of fact. Grillich v. Weinshenk, 64 Cal. App. 474, 222 P. 160, also cited by appellant, is a correct interpretation under the provision of the statutes at that time. See section 20 (f) of the California Vehicle Act, Stats. 1919, p. 215. We are not dealing with the statute as amended in 1929 (St. 1929, p. 541, § 55), but the statute in effect at the time of this accident, which provided as follows: "When two vehicles approach an intersection of public high-

ways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." See section 131 (a), Stats. 1925, p. 412. In this case the plaintiff, driving westerly and the defendant southerly, approaching an intersection at approximately the same time, the defendant had the right of way provided his vehicle was traveling at a lawful speed. The question of his speed was a matter for the jury to determine, and, if the jury determined the speed to be unlawful, then it was their duty to determine if plaintiff approached and entered the intersection in a careful and prudent manner. By their verdict the jury determined these issues: "When therefore the issue is such that it must be left with the jury and the jury has returned a verdict for the plaintiff, we must assume that the jury found adversely to the defendant on the issue of contributory negligence. Such finding is just as conclusive on appeal as the jury's finding on the issue of defendant's negligence." Swartz v. Acme Express & Drayage Co., 102 Cal. App. 616, at page 619, 283 P. 358, 360.

[7] After the jury had been instructed on all legal questions appertaining to this case, the court made the following statement: "Those are the formal instructions, Ladies and Gentlemen, that I deem expedient to give you and which are applicable to the case. There are a few general instructions in regard to your duties as Jurors. * * * It seems to me the first thing that will be necessary to do would be, after electing a Foreman, that you will deliberate on the instructions given you with reference to contributory negligence. Did the alleged negligence of the Plaintiff in any way contribute to this accident, or was such alleged negligence the proximate cause of this accident? If nine of you should vote that it did, that the negligent driving of the plaintiff was the proximate cause of the accident, that ends the case, because then you cannot give any verdict for him against the defendant, if his contributory negligence was the proximate cause of the accident. If, however, nine of you should consider that his conduct and his actions in driving his automobile in this intersection, did not at all contribute or was not the proximate cause of the happening of this accident, then you will proceed to fix the damages, if any, that you think he is entitled to." Standing alone this instruction is clearly erroneous. It omitted and disregarded any question of negligence on the part of the defendant. However, other instructions stated the rule correctly, not once, but in six different instructions. This is the only instruction that appellant attacks. The whole charge taken together eliminates this one instruction as an accurate statement of the law applicable to this case. We do not believe that the jury was misled or that the erroneous instruction resulted in a miscarriage of justice.

Judgment and order are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

116 Cal.App. 243

PEOPLE v. FISHER.

Cr. 1627.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1931.

1. **False pretenses 🔑38.**

Proof of enough of false representations claimed to convince jury that those shown were material in inducing complainant to part with his money will sustain conviction.

2. **False pretenses 🔑9.**

To sustain false pretenses conviction, jury need not find that either of two false representations made was sole inducing cause.

3. **False pretenses 🔑49(1).**

Denial of recollection of conversation in which alleged false representation was made was not denial that false representation was made.

4. **Criminal law 🔑1159(3).**

In prosecution for grand theft by obtaining money by false pretenses, accused's denial that he made false representation testified to would merely raise conflict as to which verdict would be conclusive.

5. **False pretenses 🔑7(5).**

Statement that accused had order for barrel of oil was positive statement of existence of past fact, capable of being false pretense.

6. **False pretenses 🔑49(1).**

Evidence sustained conviction for grand theft by false pretenses regarding negotiations for sale of lease and order for barrel of oil.

7. **False pretenses 🔑49(1).**

In false pretenses prosecution, complaining witness *held* corroborated by similar representation to another, accused's admissions, conduct in face of accusatory statements, and evasive, contradictory, and impeached testimony (Pen. Code, § 1110).

8. Witnesses ⚷258.

Complaining witness could testify from notes made after event which were copies of entries made contemporaneously with event.

9. Witnesses ⚷255(3).

Notes made after event may be used by witness to refresh his memory, if made when fact was fresh in his memory (Code Civ. Proc. § 2047).

10. Criminal law ⚷696(7).

Where complaining witness used notes to refresh memory only in part of testimony, motion to strike out all his testimony was properly denied.

11. Criminal law ⚷698(1).

Motion to strike complaining witness' testimony, admitted without objection, because he used notes, *held* properly denied.

12. Criminal law ⚷706.

Alleged misconduct of district attorney in preventing accused's counsel from seeing that complaining witness was using notes *held* immaterial, since notes were properly used.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Herman Fisher was convicted of grand theft, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen. (Seibert L. Sefton, of San Francisco, of counsel), for the People.

GRAY, Justice pro tem.

Appellant was convicted upon ten counts of an indictment, each charging a separate crime of grand theft. His motion for a new trial was granted as to the first nine counts, but was denied as to the last. This tenth count accused appellant of the crime of grand theft by charging that on June 11, 1930, he unlawfully took the sum of $260, the property of the complaining witness. From the order denying a new trial and the judgment imposing sentence upon this count, appellant appeals, urging as grounds for reversal: (1) The insufficiency of the evidence to establish the commission of the crime formerly designated as obtaining money by false pretenses, (2) the lack of corroboration of the alleged false pretense, (3) the court's error in denying his motion to strike from the record all of the testimony of the complaining witness because the latter in testifying used notes made subsequent to the events recorded, and (4) misconduct of the district attorney in allowing such witness to so testify.

No attempt will be here made to detail the entire transaction between the parties covering a period of over six months and involving approximately $9,000 of complainant's money. Nor is it necessary to discuss several theories advanced by respondent upon which the judgment might be affirmed. But our attention will be confined solely to a consideration of the errors alleged by appellant, with a recital of only such evidence as is necessary to understand his contentions. Although there is merit in respondent's claim that the testimony would support a contrary finding by the jury, the correctness of appellant's statement, that he truthfully represented to complainant that he owned a valid and subsisting option to purchase a lease of oil and gas rights in certain Montana lands, will be conceded for present purposes. Appellant does not question that the evidence establishes the receipt by him from complainant of the sum of $260.

[1-6] In support of his first claim of error, appellant argues: (1) That the hereinafter quoted testimony contains the only representation upon which the count could be based, and (2) that such representation, being that he would ship a barrel of oil, was merely a promise to perform a future act, which legally is not a false pretense. But his first premise is incorrect because complainant, in a prior part of his testimony, testified that appellant had previously stated he was negotiating for the sale of the lease through Mr. Gilman to the Puget Sound Light & Power Company. The falsity of this representation was proven by Gilman's testimony denying such negotiations. It is unnecessary to prove all of the false representations claimed, provided that enough are proven to convince the jury that those shown were material in inducing the complainant to part with his money. People v. Fraser, 81 Cal. App. 281, 253 P. 340; People v. Griesheimer, 176 Cal. 44, 167 P. 521. Where two false representations are made, the jury is not compelled to find that either was the sole inducing cause. People v. Walker, 76 Cal. App. 192, 244 P. 94. The complaining witness testified: "On June 11, * * * Mr. Fisher told me that Mr. Gilman requested a barrel of oil sent from this property in Montana to Seattle to the Puget Sound Light and Power Company, where it was to be analyzed and tested to see if it was the oil the Puget Sound people wanted. He said the expense of sending this barrel of oil would be between $250.00 and $275.00. I gave him $260.00 for the purpose." Gilman testified he never made such request, and appellant on the stand admitted he never sent the oil. His denial of any recollection of such conversation was not a denial that he made such

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

statement and, if it were so considered, it merely raised a conflict as to which the verdict is conclusive. People v. Hennessey, 201 Cal. 568, 258 P. 49. There is nothing in this testimony that warrants appellant's statement that the only representation therein contained was his promise to ship in the future a barrel of oil, and hence there is no basis in fact for his second premise. But, in the first sentence, there is a positive statement of the existence of a past fact, to wit, that he had an order for a barrel of oil, which was a false pretense. People v. Rothstein, 180 N. Y. 148, 72 N. E. 999, 1 Ann. Cas. 978.

[7] Equally untenable is appellant's second claim, that there is a lack of the corroboration required by section 1110 of the Penal Code. This is furnished by the testimony of Scott, that appellant had also represented to him that he was negotiating the sale of the lease to the Puget Sound Light & Power Company. People v. Whiteside, 58 Cal. App. 33, 208 P. 132. It is also supplied by his admissions of misrepresentations, including that as to the sale to the Puget Sound Light & Power Company, made to complainant in the presence of the latter's brother-in-law; by his conduct when, under investigation, in face of accusatory statements of other victims (People v. Wymer, 53 Cal. App. 204, 199 P. 815); and by his evasive, contradictory, and impeached testimony given at his trial. People v. Harrington, 92 Cal. App. 245, 267 P. 942.

[8-11] Near the end of his direct testimony the complaining witness, when asked if he recalled giving appellant any money on March 1, 1930, inquired if he might look at some notes and was told by the district attorney to do so. Then he testified that he gave certain sums on specific dates to appellant. On cross-examination, he stated that the notes were copied, after appellant's arrest, from a book which he then produced and in which he had entered at the time the date and amount of each payment to appellant. Later in the same cross-examination the court, at the request of appellant's attorney, ordered him not again to refer to the notes. At the close of the evidence, appellant's attorney moved to strike out all of the testimony of this witness on the ground that he had testified from notes written subsequent to the event recorded. Appellant assigns the denial of this motion as error. The objection is untenable, because the notes, while made after the event, were copies of entries made contemporanously with the event. Assuming as correct counsel's misstatement of fact, notes made after the event may be used by the witness to refresh his memory, if they were made when the fact was fresh in his memory. Code Civ. Proc. § 2047; Paige v. Carter, 64 Cal. 489, 2 P. 260; 65 A. L. R. 1479, note. Since the notes were used in only part of the testimony, the motion to strike out all of the testimony was properly denied. 24 Cal. Jur. 778. The motion was also properly denied because the evidence was admitted without objection, although counsel had opportunity to object. 24 Cal. Jur. 780.

[12] Appellant's assignment of the district attorney's misconduct is supported only by his counsel's unsworn statement that the district attorney by standing between him and the witness had prevented him from seeing that the witness was using notes. But, even if this were so, counsel must have heard the witness' request to use the notes and was then advised that he was so doing. He also was advised early in his cross-examination as to the use of notes. However, the misconduct, if any, becomes immaterial as the notes were properly used.

Finding appellant's assignments of error untenable, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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116 Cal.App. 290

PHILLIPS v. PACIFIC LAND & CATTLE CO.

Civ. 405.

District Court of Appeal, Fourth District, California.

Aug. 25, 1931.

1. Mortgages 🔑372(4).

Purchaser on foreclosure of trust deed became owner of alfalfa on land from date deed was delivered and could recover for pasturage from such date.

2. Appeal and error 🔑927(7).

On appeal from directed verdict withdrawing issue of fact from jury, evidence on such issue must be considered most favorably to appellant.

3. Mortgages 🔑372(4).

Evidence that defendant pasturing cattle on land was informed of sale under trust deed and that purchaser would attempt to recover for pasturage *held* sufficient notice of sale and demand for payment.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by C. E. Phillips against the Pacific Land & Cattle Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

S. P. Williams and R. D. McPherrin, both of El Centro, for appellant.

Hickcox & Trude, of El Centro, for respondent.

MARKS, J.

Respondent instituted this action to recover the sum of $2,000 for the use of pasturage on property which he owned in Imperial county. The case was tried before a jury. The court gave a peremptory instruction to return a verdict in favor of respondent in the sum of $928.20, upon which verdict the judgment was entered. From this judgment an appeal was taken.

At the time of the trial the attorneys for the respective parties entered into a written stipulation by the terms of which they agreed upon all materials facts of the case except one upon which evidence was introduced. From this stipulation it appears that on and prior to August 2, 1927, the Imperial Holdings Company, Incorporated, was the owner and in possession of the land upon which pasturage was had by the cattle of appellant. Prior to this date the above-named corporation had executed its promissory notes to respondent secured by deeds of trust upon this property. These deeds of trust were duly recorded at some time prior to August 2, 1927. On February 14, 1928, the Imperial Holdings Company was in default in its payments of principal and interest on these promissory notes, and respondent recorded notices of default under the trust deeds and took the necessary steps to foreclose the same. The real property was sold to him on June 11, 1928, under the second deed of trust. The sale under the first deed of trust was postponed by the trustee and was not held. On June 18, 1928, the trustee made and executed his deed under such sale conveying the real property to respondent. This deed was accepted by him before June 27, 1928, and was duly recorded on that date. It was further stipulated that the sale was held and conducted in all respects according to law and that the trustee's deed conveyed the title of the real property to respondent.

It further appears from the stipulation that the real property in question was planted to alfalfa. On August 2, 1927, appellant, with the consent and under an agreement with the Imperial Holdings Company, went into possession of the real property and pastured stock thereon, the value of the pasturage to be credited upon a former and concurrently accruing indebtedness from the Imperial Holdings Company to appellant. Appellant advanced the total sum of $14,115.93 to the Imperial Holdings Company, and the value of the pasturage used to and including the 11th day of June, 1928, was $12,290.91, leaving a balance of $1,825.02 of the indebtedness unpaid on this last date.

It was further stipulated that on the 11th day of June, 1928, appellant had 442 head of cattle pasturing on the property, which cattle remained thereon up to and including the 7th day of August, 1928. It was further stipulated "that the reasonable value of such pasturage so used by defendant was $22.10 per day from June 11th, to and including August 7th, 1928."

It is apparent from the judgment rendered that the trial court concluded respondent entitled to $22.10 per day for the forty-one days from June 27 to August 7, 1928, both dates inclusive.

[1] It is evident from the stipulation that the trustee's deed was delivered to and accepted by respondent before June 27, 1928, and that he thereupon became the owner of the property upon which the pasturage used by appellant was growing. This deed conveyed to him the title to the real property together with the crops growing thereon. He thereupon became the owner of the alfalfa which was pastured by appellant's cattle.

A similar situation is presented in the case of Penryn Co. v. Sherman-Worrell Co., 142 Cal. 643, 76 P. 484, 100 Am. St. Rep. 150, which is decisive of the issue presented on this appeal. The case of Shamlian v. Wells, 197 Cal. 716, 242 P. 483, supports this conclusion.

In the Penryn Case it was held as follows: "The deed of trust is not wholly set forth, but we understand that it was the ordinary form of the trust deed commonly used in this state. * * * The crop in question was then growing on the trees, and was part of the realty, and the purchaser's title by relation took the date of the trust deed. The purchaser was at least in as good a position and had rights equal to those of a purchaser at foreclosure sale holding a deed, and having possession after the period of redemption had expired. Treating the sale here as a foreclosure where there is no right of redemption, and in view of the entry into possession under the sale by the purchaser, it is quite clear that neither the mortgagor—the grantor in the trust deed—nor his grantees under a crop mortgage executed subsequently to the trust deed would have the right to crops not severed at the time of the purchaser's deed and entry. * * * As we read the opinions in Huerstal v. Muir, 64 Cal. 450, 2 P. 33, and Dascey v. Harris, 65 Cal. 357, 4 P. 204, cited by appellant, the growing crops unsevered are part of the realty, and, while such crops are for some purposes treated as personal property, they remain part of the realty so long as unsevered. As between the mortgagor and mortgagee of a chattel mortgage, all that appellant claims may be true, but the giving of such chattel mortgage has not the effect claimed when the rights of a purchaser under foreclosure sale are brought in question. Plaintiff took its mortgage with knowledge of the deed of trust, and that under it the bank had the right to enforce its claim by sale of the premises, and that a purchaser at such sale would take an absolute title to the land as of the date of the trust deed—a date prior to plaintiff's chattel mortgage, and that such deed would be free from any incumbrance subsequently placed upon the land."

[2] Appellant maintains that as its possession of the premises was lawful and under color of right on the 11th day of June, 1928, it could not be held for the value of the pasturage used by it without and until notice of the sale was given and demand of payment for the pasturage was made by respondent. We think the record contains sufficient evidence to support the conclusion that such notice was given and demand was made. Two witnesses testified as to such notice and demand, one on behalf of respondent and one on behalf of appellant. As the court withdrew the issue of fact from the jury by giving an instruction to return a verdict for respondent, we must consider the evidence most favorable to appellant in order to determine whether or not there was sufficient evidence of such notice and demand, if such were necessary, to justify the trial court in giving the instruction.

F. L. Lathrop, one of the officers of appellant, testified that either on June 12th, or June 19th, one of the attorneys for respondent came to appellant's office and that the following occurred: "He (the attorney) said, 'Mr. Lathrop, I presume that you have learned that we bought in the 202 Ranch by our trust deed yesterday.' I said I didn't know it, but I took that much for granted that you were going to, and he said 'Yes, we did.' He said, 'How many cattle have you got out there at the present time on the 202 Ranch,' and I said 'Four Hundred and forty head.' He said, 'What pasture are you paying out there,' and I said 'One Dollar and fifty cents.' 'Well,' he said, 'of course from now on, Mr. Phillips will expect this pasture to be paid to him,' and I said, 'Well, that makes it kind of a tough deal out of it, we have advanced quite a good deal of money for the raising of crops and are short about two thousand dollars, and I am going to stay on the place and try to feed our money out.' Mr. Hickcox said, 'I don't know a thing about the cattle, but Mr. Phillips will be out here in the next two or three days, and you and Mr. Phillips can make your own deal.' I said, 'All right.'"

[3] It is evident from the foregoing testimony that appellant had notice of the sale and had notice that respondent would demand payment for the pasturage used by appellant. This evidence does not show any agreement as to the amount to be paid for this pasturage, but it is evident that some amount would be demanded by respondent. Appellant was informed in this conversation that if it continued to occupy the premises and use the pasturage respondent would attempt to recover for it. This was sufficient notice to appellant, and the parties having stipulated as to the value of this pasturage there was no issue of fact left to be submitted to the jury. In determining the number of days this pasturage was used, the court took the period most favorable to appellant; that is, from June 27 to August 7, 1928, inclusive. Respondent was entitled to recover the value of the use and occupancy of his premises for this period.

Judgment affirmed.

We concur: JENNINGS, Acting P. J.; ALLEN, Justice pro tem.

116 Cal.App. 252

TRADERS' CREDIT CORPORATION v. THYLE.

Civ. 7857.

District Court of Appeal, First Distı..
Division 2, California.
Aug. 24, 1931.

1. Usury ⚷119.

Whether loan is usurious is pure question of fact.

2. Appeal and error ⚷901.

Defendant must show that findings adverse to him have no substantial support in evidence.

3. Usury ⚷113.

Borrower claiming loan was usurious had burden of establishing affirmative issue that he delivered stock to lender as bonus or consideration for loan, and that true value of stock, with interest paid, constituted interest payment of money or value exceeding 12 per cent.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by the Traders' Credit Corporation against Irvin S. Thyle. Judgment for plaintiff, and defendant appeals.

Affirmed.

Bianchi & Hyman, of San Francisco, for appellant.

Bernard B. Stimmel and Morris M. Grupp, both of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for $3,500, the balance due on a promissory note. Defendant admitted the execution of the note and pleaded that the transaction was usurious. The cause was tried without a jury. Plaintiff had judgment as prayed, and defendant appeals upon a bill of exceptions.

On September 21, 1927, defendant wired plaintiff's assignor: "We will gladly pay you five thousand shares (stock in New England Consolidated Mines Company) as bonus for the loan of five thousand dollars for ninety days." Plaintiff's assignor wired back: "Company will make loan if you endorse note. Seven per cent interest after maturity." On the same day plaintiff's assignor wrote a letter to defendant in which he stated: "Just received your wire asking for loan of $5,000, for ninety days, without interest, but with a bonus of 5000 shares of your Mine Company's stock. * * * You will notice though that as I do not know anything about the financial complexion of the Mining Company, I am asking you to endorse the note, and to make it read 7% interest after maturity, should it not be paid in time." On September 23 following defendant mailed his personal note in conformity with these instructions and at the same time wired plaintiff's assignor to send him $2,000 through Western Union and to mail certified check for $3,000. This was done. Defendant received the full sum of $5,000 and plaintiff's assignor received the note in suit. On October 8, 1927, defendant mailed to plaintiff's assignor a certificate for 5,000 shares of the mining company without any further explanation or direction as to the purpose of sending it. The certificate was received and retained by plaintiff's assignor. Payments of $1,500 were made upon the note, together with one payment of interest in the sum of $90.43. Prior to the commencement of the action plaintiff's assignor tendered the return of the stock as worthless. The judgment covers the balance due on the note and interest and $350 as attorney's fees.

[1, 2] On this appeal the appellant states two points—that the transaction was usurious, and that in an action for the principal sum loaned the borrower may set off the value of the bonus paid in contravention of the usury statute. The second point may be conceded. The first is a pure question of fact. The findings on this issue are adverse to appellant, hence it is incumbent upon him to show that these findings have no substantial support in the evidence.

[3] The contract does not rest in the original offer of appellant because it was not accepted. The qualifications made by respondent's assignor were accepted by the appellant, and these form the contract. This was a simple contract to loan money at 7 per cent. interest. The subsequent delivery of the stock, whether given as a bonus, or as a security for the loan, was not part of the contract. Appellant did not prove his affirmative defense of usury by the mere showing that the stock was sent to and received by respondent's assignor. It was incumbent upon him to show the purpose of the delivery of the stock—that it was a consideration for the loan—and that its true value, taken with the rate of interest paid, completed an interest payment of money or value in excess of 12 per cent.

The trial court found that the stock was not given as a bonus or fee in consideration for the loan. Appellant's only evidence on this issue is found in his own testimony. Here we find him testifying that he sent the stock as a bonus for the loan; that he did not send it for that purpose; that he sent it in full payment of the note; that he did not send it for that purpose; and, finally, that the note was paid in full by the delivery of the stock. Upon this testimony we cannot say that the trial court erred in finding that appellant had not sustained the burden of proof which the law puts upon him to establish his affirmative issue.

Upon the second point there is a direct conflict in the testimony of the two witnesses called to prove the value of the stock. One testified that it was "worth par one dollar" a share; the other testified that it had no market value. Upon cross-examination of the first witness it was shown that he had no knowledge of the value of the stock, but was merely speaking of the paper value of the shares. Upon this issue as well the burden of proof was on the appellant. Having failed to prove any defense, he has failed to show any error in the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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116 Cal.App. 302

ANDERSON v. ADAMS.

Civ. 7492.

District Court of Appeal, First District, Division 1, California.

Aug. 26, 1931.

Rehearing Denied Sept. 25, 1931. Hearing Denied by Supreme Court Oct. 22, 1931.

1. Money lent 🔑7(3).

Evidence sustained finding that transaction constituted loan by stock subscriber to corporation's president individually to enable latter to take over excessive part of stock subscription, refused by subscriber, rather than agreement to resell excessive part of subscription.

2. Appeal and error 🔑1011(1).

Weight of testimony is exclusively for trial court, and its decision upon conflicting testimony is conclusive.

3. Appeal and error 🔑1010(1).

Trial court's conclusion that transaction constituted loan, founded on substantial evidence, *held* conclusive on appeal, notwithstanding evidence may have justified different conclusion.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Andrew Anderson against R. D. Adams. Judgment for plaintiff, and defendant appeals.

Affirmed.

Thomas R. White, of San Francisco, and C. H. McIntosh, of Los Angeles, for appellant.

Cross & Brandt, of San Francisco, for respondent.

Mr. Justice KNIGHT delivered the opinion of the court.

This is an appeal by defendant from an adverse judgment in an action to recover the sum of $2,000 which plaintiff claims was loaned by him to the defendant at the latter's request to enable defendant to purchase certain shares of stock in a mining corporation which the parties were organizing. The defendant denied that the money advanced by plaintiff constituted a loan, but the trial court, sitting without a jury, found otherwise, and in our opinion there is sufficient evidence to support such finding.

[1, 2] It appears from the record that plaintiff and others had contributed certain sums of money to a so-called prospecting fund to send defendant to Venezuela to examine certain mining properties in that country, the amount of the plaintiff's contribution thereto being $1,000. Upon defendant's return his report was submitted and an "equipment" fund was created by the same parties for the purpose of operating the property, to which plaintiff subscribed $5,000, half of which was paid at the time the subscription was made. A corporation was then organized under the laws of Nevada, of which defendant became the president; and at a meeting subsequently held in San Francisco certificates of stock were delivered to those who had contributed and subscribed to the funds above mentioned in proportion to the amount of their contributions and subscriptions. When plaintiff's certificates were handed to him he noted that they called for 5,000 shares of preferred stock and 35,000 shares of common stock in excess of the amount he had contributed and subscribed, which excess stock represented a value of $5,000. According to the testimony given by plaintiff and other witnesses called in his behalf he protested, stating that he had not subscribed for the amount of stock called for by the certificates, and that he would not accept it, and he demanded that the certificates be reissued for the correct amount. However, plaintiff and defendant were intending to proceed at once to Venezuela, and the process of obtaining corrected certificates would have delayed their departure because it would have been necessary to send the erroneous certificates back to Reno, Nev., and have new ones issued and signed by the resident secretary of the corporation. Defendant called attention to this situation, and in order to avoid the delay agreed with plaintiff, according to the testimony supporting the trial court's finding, that he would take over a portion of the excess stock called for by said certificates to the extent of $2,000, if plaintiff would lend him the money to pay for the same, stating that he would repay plaintiff after receiving three or four months' salary from the company. Plaintiff consented to do so, but before advancing the $2,000 insisted that defendant give him a "receipt showing the transaction." Thereupon defendant dictated, signed, and delivered to plaintiff an instrument reading as follows: "March 10th, 1925. Received from Andy Anderson the sum of two thousand ($2000) dollars in currency *to be applied on my subscriptions* to Venezuela Gold. [signed] Venezuela Gold, Inc. by R. D. Adams." (Italics ours.) Plaintiff objected to the form of the document, and particularly to the presence therein of the words "Venezuela Gold, Inc.," preceding defendant's signature, but in response to the objection defendant stated, in substance, according to plaintiff's witnesses, that the receipt was all right, that as friends they understood its meaning, which was all that was necessary, and that he would soon be able to take care of the matter. Thereupon plaintiff retained the certificates as issued and later paid the balance of $3,000 for his portion of the excess stock; but defendant refused to repay plaintiff the $2,000 which he had advanced for him under the circumstances above stated.

It is evident, we think, without discussion, that the foregoing evidence is legally sufficient to sustain the trial court's conclusion that the transaction constituted a loan. At the trial defendant admitted that a dispute arose over the contents of the certificates, but denied asking plaintiff to lend or advance him $2,000 or any other sum with which to purchase a portion of the excess stock, claiming that the proposition made by him was that, if plaintiff did not care to take the excess amount of stock, the company would relieve him of it later by reselling the same. His explanation for having given the receipt, however, was evidently unsatisfactory to the trial court; and in any event it is apparent that the testimony given by defendant tended only to create a conflict on the points to which it related; and, since it was within the exclusive province of the trial court to pass upon the weight of the testimony, its decision in the matter is controlling on appeal.

[3] Defendant further contends that at most the evidence as a whole establishes nothing more than an oral agreement between plaintiff and defendant for the purchase and sale of certain stock for a consideration of $2,000, and that therefore such agreement was invalid and unenforceable under section 1739 of the Civil Code, which requires agreements to buy and sell personal property for a price of $200 or more to be in writing, unless the buyer accepts part of the property or pays a portion of the purchase price. It is well settled, however, that, if the evidence is such that reasonable minds might fairly draw different conclusions therefrom, the conclusion reached by the jury, or the court sitting as such, is final and cannot be disturbed on appeal. 2 Cal. Jur. 934. Therefore, since, as pointed out, the trial court's conclusion in the present case that the transaction constituted a loan is founded on substantial evidence, it is conclusive on appeal, even though, as defendant contends, there was evidence which may have justified a different conclusion. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Brandes v. Rucker-Fuller Desk Co., 102 Cal. App. 221, 282 P. 1009; Cole v. Manning, 79 Cal. App. 55, 248 P. 1065. The remaining incidental points urged by defendant are likewise without merit.

The judgment is affirmed.

SCOTT et al. v. HOLLINGSWORTH.*

Civ. 4282.

District Court of Appeal, Third District, California.

Aug. 14, 1931.

Rehearing Denied Sept. 12, 1931. Hearing Granted by Supreme Court Oct. 9, 1931.

1. Assignments 🔑26.

Usury 🔑134, 140.

Treble interest collectible under usury law is statutory "penalty," not "debt"; hence cause of action therefor is nonassignable, precluding recovery by debtors' receivers (Usury Law [St. 1919, p. lxxxiii] § 3; Code Civ. Proc. § 564).

[Ed. Note.—For other definitions of "Debt" and "Penalty," see Words and Phrases.]

2. Usury 🔑140.

Receivers whose appointment was merely ancillary to pending action *held* not "personal representatives" within Usury Law imposing penalty and regulating its recovery (Usury Law [St. 1919, p. lxxxiii] § 3; Code Civ. Proc. § 564).

[Ed. Note.—For other definitions of "Personal Representative," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Joseph Scott and another, as receivers of the Julian Petroleum Corporation, against W. I. Hollingsworth. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Oscar Lawler and Laurence W. Beilenson, both of Los Angeles, for appellants.

Anderson & Anderson and A. G. Ritter, all of Los Angeles, amici curiæ.

J. Wiseman Macdonald, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

The original complaint in this action was filed in the office of the county clerk of Los Angeles county, on August 8, 1927. Three amended complaints were thereafter filed. Demurrers to all of them were sustained, with leave to amend. Failing to amend the third amended complaint, judgment of dismissal of the action was made and entered, and the plaintiffs have appealed from said judgment.

The third amended complaint alleges that the Julian Petroleum Corporation is a Delaware corporation, with its offices and principal place of business in the city of Los Angeles, county of Los Angeles, state of California; that on May 19, 1927, the Perkins Oil Well Cementing Company, a California corporation, commenced an action against the said Julian Petroleum Corporation, and the California Eastern Oil Company, another Delaware corporation, in the District Court of the United States, Southern District of California, Southern Division.

The complaint in said last-named action is made a part of the third amended complaint in the case at bar, and so far as it is necessary for a consideration of this appeal, it alleges that within two years last past the Julian Petroleum Corporation became indebted to the plaintiff in that action for services performed, in the sum of $5,554.85, and is unpaid and unsecured; that prior to the commencement of

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*For subsequent opinion see 9 P.2d 836.

said action and subsequent to the incurring of all of said indebtedness due the plaintiff, the defendant California Eastern Oil Company for a valuable consideration assumed and agreed to pay all of the indebtedness of every kind and character of the defendant Julian Petroleum Corporation, including the indebtedness owed by said company to the plaintiff; that the assumption of all of the indebtedness by the California Eastern Oil Company was for the benefit of all of the creditors of the defendant Julian Petroleum Corporation, and said assumption of indebtedness has not been revoked or set aside, and is now in full force and effect; that such assumption was made on April 23, 1927, by an instrument in writing.

That the said action was brought by the complainant therein, for and on behalf of all the other creditors of both the California Eastern Oil Company and the Julian Petroleum Corporation; that prior to April 23, 1927, the Julian Petroleum Corporation was engaged in business in California and other states in the oil and other allied industries; that the indebtedness of the Julian Petroleum Corporation assumed by the California Eastern Oil Company was in excess of the sum of $12,000,000; that the assets held by the Julian Petroleum Corporation are now owned by the California Eastern Oil Company and exceed in value the sum of $30,000,000, subject, however, to the said indebtedness; that most of said indebtedness is now due, and unless a receiver is appointed for both of said companies, there will be a multiplicity of suits and the assets of said two corporations will be irreparably lost.

It is further alleged therein that the California Eastern Oil Company issued and delivered to the Julian Petroleum Corporation, 1,828,436 shares of the capital stock of the said California Eastern Oil Company, which is a majority of the stock of the last-named corporation, and by virtue of the holding of said stock, the Julian Petroleum Corporation has control of the California Eastern Oil Company. It is then alleged in appropriate terms that the properties held by the said defendants require large sums of money to operate them and that the defendants are without funds or credit; and that it is necessary in order to save the property of said corporations that the operation of their business should continue without interruption, in order to comply with the conditions and obligations of certain leases and agreements, under which large portions of the property of said corporation are held.

There are further allegations concerning the business of the Julian Petroleum Corporation and the California Eastern Oil Company, showing the necessity for the appointment of a receiver to take charge of the properties of said defendants, and to administer the same for the purpose of preventing bankruptcy and irreparable loss. Among other things, it is asked that receivers be appointed to take charge of and operate the property of the defendant.

It is further alleged in the complaint in the case at bar, that the defendants in said action above referred to, the Julian Petroleum Corporation and the California Eastern Oil Company, filed answers admitting all of the allegations of the complaint in that action, and consented to all the relief sought by the complaint.

It is also alleged in the third amended complaint in the case at bar that a complaint in intervention by one Michael Harris, was filed in the other action, alleging that plaintiff therein is a stockholder in the Julian Petroleum Corporation and setting forth the transfer on the 23d day of April, 1927, by the Julian Petroleum Corporation to the California Eastern Oil Company, of all the physical assets of the Julian Petroleum Corporation, in consideration of the issuance to it by the California Eastern Oil Company of 1,828,346 shares of the common stock of the California Eastern Oil Company; that the California Eastern Oil Company has obligations in excess of $12,000,000 which will become due within a period of four months, and that said obligations are not permanently financed, and no part of said debts can be paid by said company, California Eastern Oil Company; that the disposition of the assets at forced sale will cause great and irreparable loss.

It is further alleged in the complaint in intervention in said action, that as to the capital stock of the Julian Petroleum Corporation, great uncertainty exists as to the amount issued and its ownership and as to whether the directors of said Julian Petroleum Corporation, in authorizing the transaction of the sale of its properties to the California Eastern Oil Company, were regularly and duly elected directors of said corporation. The relief sought in said action is that the creditors of the defendant, Julian Petroleum Corporation, and California Eastern Oil Company, be brought into court and required to set forth their claims against the said companies; that the complainant have judgment for $5,554.85, for the appointment of a receiver, the marshaling of the assets of the companies, and to do such other things as may be meet and proper in the premises.

It is further alleged in the third amended complaint in the case at bar, that an answer to the complaint, and, also, to the complaint in intervention in that action, was filed by the Julian Petroleum Corporation and, also, by the California Eastern Oil Company, admitting all of the allegations of said complaint, and the complaint in intervention, and consenting to the relief sought for by both the complaint and the complaint in intervention. It also appears from the third amended complaint in the case at bar, that on May 19, 1927, the District Court of the United States appointed the plaintiffs in this action, receivers of the properties of the defendant, Julian Petroleum Corporation, and California Eastern Oil Company, in that action.

It is further alleged in the third amended complaint in the case at bar that on July 1, 1927, the said United States District Court made an order that the receivers in that action, to wit, Joseph Scott and H. L. Carnahan, were "authorized, empowered and directed whenever it shall be deemed by them advisable or necessary or proper, so to do, to institute in the proper courts of the state of California any and all suits necessary to carry out their powers and duties as receiver, and necessary to subject and reduce to their possession, any properties, real, personal or mixed, of the Julian Petroleum Corporation or the California Eastern Oil Company; and the commencement of any such suits by the receivers, as such receiver, already commenced by them, is hereby ratified and approved."

On March 12, 1928, said United States District Court made and entered a nunc pro tunc order purporting to amend the order last recited, by giving to the said receivers the right to prosecute any action to recover any debt or penalty or obligation of any kind and character due or to become due the said corporations, under and pursuant to the Usury Law of the state of California, or growing out of, or pertaining to any act or acts in violation of the said Usury Law.

It is further alleged in the third amended complaint in the case at bar that the said action in the United States District Court is still pending and undetermined, and that the orders made as aforesaid, are still in full force and effect.

It is further alleged therein that the receivers appointed in said action have taken over and are now in full management of all of the properties of the Julian Petroleum Corporation and the California Eastern Oil Company, as such receivers, and are managing the same in such capacity, with full power and authority to do so, and with full power and authority to prosecute and maintain all actions to recover for the benefit of the said corporations, their stockholders and creditors, all the properties, assets, moneys due, or to become due, to the said Julian Petroleum Corporation, and are specifically authorized to maintain all and every action of every kind and character necessary to recover any debts or penalties or obligations of any kind or character, due or to become due the said corporation under or pursuant to the Usury Law of the state of California.

It is further alleged therein that on or about December 11, 1926, the Julian Petroleum Corporation became and was indebted to the defendant in the present action, W. I. Hollingsworth, in the sum of $100,000, and that the latter was then entitled to enforce the said indebtedness; that it was then and there a thing in action held by said defendant Hollingsworth against the said Julian Petroleum Corporation, and due and enforcible according to law; and that as a forbearance of the said W. I. Hollingsworth not to press and enforce his claim of $100,000 against the said Julian Petroleum Corporation and in consideration of an extension of time, the said Julian Petroleum Corporation agreed to pay and on or about the 11th day of December, 1926, did pay to said W. I. Hollingsworth the sum of at least $19,000; and that the said W. I. Hollingsworth then and there, knowingly, received and accepted from the said Julian Petroleum Corporation, the said sum of at least $19,000, for and in consideration of said forbearance for the said period of one month to press and enforce his claim for $100,000 against the said Julian Petroleum Corporation.

It is then alleged that by reason of said transaction, the Julian Petroleum Corporation is entitled to treble the amount of said money so paid to defendant, being the sum of $57,000.

It is alleged in a second and third count of the complaint the same state of facts, except that the Julian Petroleum Corporation paid, and the defendant received the sum of $19,000 for two additional extensions of time of thirty days each.

The fourth cause of action sets forth the same facts for another thirty days' extension of time, except that it is alleged that the Julian Petroleum Corporation agreed to pay and thereafter did pay to said W. I. Hollingsworth the sum of at least $19,000 in money, or the equivalent thereof.

The prayer is for the sum of $228,000, with legal interest thereon from the several dates of the receipt by the defendant of the usurious interest.

The demurrer to the third amended complaint sets forth many grounds wherein it is alleged that said complaint is insufficient as a pleading. According to the appellants, but two of them are worthy of consideration. These are, that no cause of action is stated in the complaint, and that the receivers have not the legal capacity to sue. We will consider these objections together. The Usury Law of California is found in Statutes 1919, page lxxxiii. Section 1 of said act first fixes the legal rate of interest at 7 per cent. per annum, with a proviso that parties may contract in writing for a rate of interest not to exceed 12 per cent. per annum. Section 2 provides that an agreement for interest in conflict with the foregoing section shall be null and void as to any stipulation to pay interest and no action at law to recover interest in any form shall be maintained and the debt itself cannot be declared due until the full period of time it was contracted for has elapsed.

[1] The first paragraph of section 3 reads as follows: "Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery." The second paragraph of section 3 makes unlawful certain acts which may be used as subterfuges to circumvent the purpose of the act. The first consideration before us is whether or not the treble interest which may be collected under the Usury Law is a debt or a statutory penalty. Since the argument of this case, we think the law has been definitely settled by the decisions of the Supreme Court that the treble interest provided for in said act, is a statutory penalty. This question has been so determined in Esposti v. Rivers Bros., Inc., 207 Cal. 570, 573, 279 P. 423, 424; it is held "that the right which the original maker of a usurious note and mortgage is given under section 3 of the Usury Act to recover such interest and to treble the same is in the nature of a statutory penalty, and, under the authorities from other jurisdictions, which we hereby approve, is not assignable." The cases cited from other jurisdictions which are approved are: Pardoe v. Iowa State Bank, 106 Iowa, 345, 76 N. W. 800; Lloyd v. First National Bank, 5 Kan. App. 512, 47 P. 575; Robinson v. St. Maries Lumber Co., 34 Idaho, 707, 204 P. 671; 21 R. C. L., p. 211, § 6; Wilson v. Shrader, 73 W. Va. 105, 79 S. E. 1083, Ann. Cas. 1916D, 886, 893, and notes; Allen v. Petty, 58 S. C. 240, 36 S. E. 586; First State Bank, etc., v. Bank of Jefferson, 112 Okl. 177, 240 P. 311. See, also, Peterson et al. v. Ball et al. (Cal. Sup.) 296 P. 291. That the interest and treble interest is in the nature of a debt and not a penalty, the appellant relies upon the case of Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725. But as we construe the Haines Case, it merely holds that the interest and treble interest provided for in the Usury Act partakes sufficiently of the nature of an action of debt to sustain offsets and counterclaims. In any event that such interest is a penalty and not a debt is the plain holding in Esposti v. Rivers Bros., Inc., supra.

The next question to be considered is whether a cause of action for a statutory penalty can be assigned or whether it is purely personal to the injured party. We think that a cause of action for a statutory penalty may not be assigned. Such is the holding in Esposti v. Rivers Bros., Inc., supra. In Peterson et al. v. Ball et al., supra, it is held that the cause of action which accrued in favor of the corporation and against the directors of said corporation, being in the nature of a statutory penalty, was not assignable and the plaintiffs, trustees by assignment for the benefit of the creditors of the corporation, were not entitled to recover against the defendants.

[2] The principle upon which this rule of law is founded is in the fact that the assignability of penalties encourages litigation and strife. The same principles of public policy forbid the conversion of penalties into commodities or assets. Wilson v. Shrader, 73 W. Va. 105, 79 S. E. 1083, Ann. Cas. 1916D, 886. We are therefore satisfied that the right of action to recover the treble interest was personal to the Julian Petroleum Corporation, and was not assignable, unless the plaintiffs, as receivers in the action of the Perkins Oil Well Cementing Company, Plaintiff, v. Julian Petroleum Corporation, and the California Eastern Oil Company, Defendants, are the "personal representatives" of the Julian Petroleum Corporation, within the meaning of the first paragraph of section 3 of the Usury Law. In volume 18, English and American Encyclopedia of Law (2d Ed.) p. 813, it is said: "The primary and ordinary meaning of the terms * * * 'personal representatives' * * * is executors and administrators, and in the absence of anything to show a contrary intent, they must be so construed." See, also, Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157. However, "the terms * * * 'personal representatives,' etc., are often used in statutes * * * in a broader sense, so as to include all persons who stand in place of and represent the interest of another, either by his act or by operation of law." 18 Am. & Eng. Ency. of Law, p. 814. It is a rule of universal application that trustees in bankruptcy are "personal representatives" and entitled to sue for penalties derived by virtue of a statute. Wright v. First National Bank (Circuit Court, D. of Indiana, Gresham, District Judge) Fed. Cas. No. 18078; Monongahela Nat. Bank v. Overholt, 96 Pa. 327. This rule seems to be based upon the law that the trustees of an estate of a bankrupt are vested by operation of law with the title of the bankrupt, Federal Bankruptcy Act, Vol. 11, U. S. Code Ann., § 110. Referring to the powers of receivers, it is said in Baldwin Century Edition of Bouvier's Law Dictionary, page 1025: "A receiver is a ministerial officer of the court, with no power but those conferred by his order of appointment and the practice of the court." In 23 Ruling Case Law, p. 9, it is said: "As a general rule, a receivership is a purely ancillary remedy and cannot be maintained in a proceeding instituted solely

for that purpose, to be finally disposed of as that court may direct. It is held to be a proceeding quasi in rem, and is classed as one of the provisional remedies, like the proceedings by information or in attachment, and bears a similar relation to courts of equity that proceedings in attachment bear to courts of law." In 22 California Jurisprudence, § 2, it is said: "He, (a receiver) is an officer or representative of the court, appointed on behalf of all the parties who may establish rights in the cause, to take the charge and management of property which is the subject of litigation, for the purpose of preservation and ultimate disposition, according to the final judgment therein."

It is also said in 22 California Jurisprudence, p. 429, § 3: "There is a clear distinction between a receivership in a liquidation proceeding and one which is but a provisional remedy. * * *" In the same book, page 433, section 8, it is further said: "There is in California no such thing as an action brought distinctively for the mere appointment of a receiver." Murray v. Superior Court, 129 Cal. 628, 62 P. 191; Ex parte Casey, 71 Cal. 269, 12 P. 118; In re French Bank Case, 53 Cal. 495; Hobson v. Pac. States Mercantile Co., 5 Cal. App. 94, 89 P. 866. "The subdivisions of section 564 of the Code of Civil Procedure prescribing the cases when a receiver may be appointed do not assume to create substantive rights of action where none existed before, but are designed to provide a more efficacious remedy in the conduct of actions, the right to bring which already exists and is elsewhere provided for. (French Bank Case, 53 Cal. 495.) Appointment of a receiver is not a special proceeding, but one in a pending action, auxiliary or ancillary to the action and a part of it." Murray v. Superior Court, 129 Cal. 628, 62 P. 191.

According to the third amended complaint, the main object of the action in which these plaintiffs were appointed receivers was as stated in respondent's opening brief, "to settle the intricate and involved question of ownership of stock in the (Julian Petroleum) Corporation; to determine whether the same was properly or improperly issued; to settle and validate the transfer of properties to the California Eastern Oil Co.; to quiet title of the California Eastern Oil Co., thereto, and to have the latter corporation pay all of the debts of the Julian Co., etc. Clearly, the extremely limited work of the receivers in caring for the few assets of the Julian Company is merely ancillary to a determination of the questions just outlined, and entirely independent thereof." It further appears from the said complaint that the Julian Petroleum Corporation is solvent. The principle decided in the case of Peterson et al. v. Ball et al., supra, is applicable to the case here. In that case, the five plaintiffs were trustees by assignment for the benefit of the creditors of the insolvent Bartlett Music Company; the defendants were at one time the directors of the said insolvent corporation, and while acting as such, contracted debts in excess of the subscribed capital stock thereof, and under section 309 of the Civil Code as it then stood, each one of said directors became "in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the * * * debt contracted. * * *" The trial court granted a motion for judgment on the pleadings in favor of the defendants. The Supreme Court held the action was for a statutory penalty, and therefore not assignable, and the trustees for the creditors by assignment were not entitled to maintain the action.

Two cases strongly relied upon by appellants to support their claim that receivers have a right to sue for a statutory penalty are National Bank v. Trimble, 40 Ohio St. 629, and Barboûr v. National Exchange Bank, 45 Ohio St. 133, 12 N. E. 5. In the former case it is stated: "If the payor of such interest, before action brought, was adjudged a bankrupt, his assignee in bankruptcy became his 'legal representative,' and as such was entitled to bring the action." In the latter case, the doctrine in National Bank v. Trimble, was affirmed. In both cases, the party payor was alleged to be bankrupt. Whatever the doctrine may be elsewhere, we are of the opinion that the facts alleged in the third amended complaint herein do not constitute the plaintiffs the "personal representatives" within the meaning of the Usury Law. Therefore, the said amended complaint does not state facts sufficient to constitute a cause of action.

Counsel for defendant has presented many other grounds of demurrer which he claims justified the order of the trial court in sustaining the demurrer. If we are correct in our conclusions as above set forth, it becomes unnecessary to discuss the other questions.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, Acting P. J.

116 Cal.App. 356

KING v. MORELAND.

Civ. 6700.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1931.

1. Sales ⚷479(15).

Conditional buyer placed in possession, and not attempting rescission after being dispossessed of part thereof, presumably ratified conditional sale contract, and tendering performance was not prerequisite to suing buyer thereupon.

2. Bills and notes ⚷97(2).

Partial failure of consideration for note is defense only pro tanto.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by W. J. King against Roland R. Moreland. Judgment for plaintiff, and defendant appeals.

Affirmed.

Derthick & Hull and W. J. Cusack, all of Los Angeles, for appellant.

F. H. Bowers, of Los Angeles, for respondent.

HOUSER, J.

From the record presented on this appeal it appears that for the sum of $4,250 defendant purchased from plaintiff's assignor a two-thirds interest in "one ambulance, all the furnishings and equipment located down stairs at 1011 North Wilmington street, Compton, California, and all outstanding contracts with any person, corporation, or municipality, the subject of which are the performance of duties connected with the undertaking business, which the said lessor has this day entrusted to the care of the undersigned." In payment thereof, defendant executed what is entitled a "purchase lease," which in effect was an installment promissory note for the sum of $4,000, to which was annexed a conditional sale contract of the property hereinbefore mentioned and which contract contained several statements and conditions, including the fact that the "lessor has agreed and promised that upon the payment of said note * * * it will sell and transfer" to defendant the ambulance and other property described in said instrument. Thereupon defendant paid a portion of the principal of said note and went into, and at all times thereafter remained, in exclusive possession of the property, with the exception that the ambulance, which was of the value of $475, and certain other personal property of the value of $100, were thereafter "repossessed" by other persons who asserted and apparently established title thereto. However, defendant never rescinded the contract. The balance remaining due on said obligation not having been paid, plaintiff (to whom said "purchase lease" had been assigned) brought an action against defendant, which resulted in a judgment in favor of plaintiff for said balance, interest thereon, and attorney's fees according to the terms of the contract, less a credit of two-thirds of the value of the ambulance and the other personal property of which defendant had been dispossessed as aforesaid. It is from such judgment that defendant has appealed to this court.

[1] Appellant contends that one who relies upon an agreement such as is the basis for the action here under consideration must both "allege and prove performance, or a tender of performance, of the contract." But, considering the fact that after the execution of the contract defendant was placed in possession of the property, in which situation, with the exception of that portion thereof of which he was dispossessed, he so remained without any attempt on his part to rescind the contract, it must be presumed that, notwithstanding such untoward existing conditions, he ratified the agreement between him and plaintiff's assignor. In such circumstances, as is indicated in the case of Arnois v. Bell, 70 Cal. App. 222, 232 P. 758 (syllabus), "the seller is not required to tender to the purchaser a bill of sale of the property sold as a condition precedent to demanding payment of the balance of the purchase price. * * *"

[2] Nor did the fact that there was a partial failure of consideration for the promissory note of defendant have the effect of voiding the entire contract. In 19 California Jurisprudence, at page 1002, occurs the following statement of the law: "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. This has long been the law in California"—citing cases.

And in 13 Corpus Juris, page 368, the law is thus declared: "Where there is a failure of a part of a lawful consideration the part which failed is simply a nullity and imparts no taint to the residue. * * *" To the same effect, see Easton Packing Co. v. Kennedy, 6 Cal. Unrep. Cas. 626, 63 P. 130; Knobloch v. Bader, 18 Cal. App. 421, 123 P. 341.

It follows that the judgment should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

BOXWELL v. SYLVIA et al. *

Civ. 454.

District Court of Appeal, Fourth District, California.

Aug. 20, 1931.

Rehearing Granted Sept. 11, 1931.

1. Judgment 🔑112.

By failing to answer complaint, defendant admitted all facts alleged therein.

2. Appeal and error 🔑127.
Judgment 🔑111.

Defendant, against whom default is entered, is out of court, and is not entitled to appeal or take any further steps in cause affecting plaintiff's right of action.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by William F. Boxwell against Frank F. Sylvia, Porter C. Blackburn, and others. Judgment for plaintiff, and defendant last named appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, in pro. per.

Frank Birkhauser, of El Centro, for respondent.

ALLEN, Justice pro tem.

The complaint is in the usual form, alleging title on a tax deed. Among the parties defendant it names Porter C. Blackburn, appellant herein. The complaint was filed with the county clerk and summons issued thereon on the 1st day of October, 1928, and was served on appellant on June 19, 1929. Thereafter and on February 21, 1930, the default of the appellant with others was entered by the clerk.

The only defendants answering were Robert Davis, commonly known as Bob Davis, and Annabell Davis. Subsequently they appeared in court by counsel and moved the court to have their answers stricken from the record, which motion was granted by the court.

A trial of the issues was had by the court on March 25, 1930, at which time the court rendered judgment for plaintiff, quieting title to certain lands in Imperial county, as prayed for.

[1, 2] Subsequently and on May 24, 1930, appellant filed his notice of appeal. The default of defendant having been duly and regularly entered, was conclusive of his rights in the case. By failing to answer the complaint he admitted all of the facts alleged therein. A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action. Christerson v. French, 180 Cal. 523, 182 P. 27; Title Insurance & Trust Co. v. King Land & Improvement Co., 162 Cal. 44, 120 P. 1066; Jones v. Moers, 91 Cal. App. 65, at page 69, 266 P. 821; Sheehan v. All Persons, 80 Cal. App. 393, 252 P. 337; Brooks v. Nelson, 95 Cal. App. 144, 272 P. 610.

Under these holdiings the appellant has no standing in court and it is unnecessary for us to consider the record further.

Judgment of trial court affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

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116 Cal.App. 274

SLAPPEY v. SCHILLER et al.

Civ. 7691.

District Court of Appeal, First District, Division 1, California.

Aug. 25, 1931.

1. Costs 🔑260(4).

Appeal based solely on claimed preponderance of evidence for defendants, notwithstanding finding on vital fact question was directly and substantially supported by plaintiff's testimony, *held* frivolous and taken for delay, warranting $50 penalty.

2. Automobiles 🔑242(2).

Res ipsa loquitur doctrine *held* applicable, where truck collided with parked automobile.

3. Negligence 🔑134(1).

Inference of negligence arising under res ipsa loquitur doctrine sustained finding of negligence regardless of supporting testimony, where defendants failed to maintain burden of showing ordinary care.

4. Appeal and error 🔑994(3).

In juryless trial, credibility of witnesses is within province of judge, whose decision controls on appeal.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Thomas G. Slappey against William T. Schiller and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edgar L. Martin, of Los Angeles, for appellants.

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*Superseded by opinion 4 P.2d 787.

Erwin P. Werner, of Los Angeles, for respondent.

KNIGHT, J.

The trial court, sitting without a jury, awarded plaintiff a judgment against the defendants for the sum of $1,853.59, in an action for damages based upon the alleged negligence of defendants in operating a motortruck, and defendants have appealed, contending as sole ground for reversal that the evidence is insufficient to support the trial court's finding on the issue of defendants' negligence.

In lieu of a reporter's transcript, the parties entered into a written stipulation setting forth the material portions of the evidence adduced at the trial, and incorporated the stipulation in the clerk's transcript. It appears therefrom without dispute that about 9:30 o'clock in the morning a motortruck owned and operated by defendants crashed into the rear end of plaintiff's touring car as it stood parked next to and parallel with the curb on the right-hand side of the street, hurling the car against plaintiff, who was standing on the curb next to his automobile, knocking him unconscious, breaking his collar bone, and inflicting other serious injuries upon his person. The driver of the truck and two men who were riding with him at the time of the accident testified in explanation thereof that they were compelled to turn sharply from their course into plaintiff's automobile to avoid colliding with an automobile driven by some woman, unknown to them, who swerved directly in front of their truck. But in direct contradiction of such explanation, the "plaintiff and his two witnesses testified," so the written stipulation states, "that at the time of the accident there was no traffic moving on said highway except the truck of defendants."

[1] It will be seen at once, therefore, that there is a sharp conflict in the testimony relating to the single question of fact controlling the determination of the case, namely, whether the presence of another automobile caused defendants suddenly to divert their course, as claimed by them. Indeed, defendants concede the existence of such conflict, but they argue that in deciding the disputed question of fact the trial court should have believed their witnesses instead of plaintiff and his two witnesses. In other words, the only foundation for the appeal is a claimed preponderance of evidence in favor of defendants, notwithstanding that the finding of the trial court on the vital question of fact in the case is directly and substantially supported by testimony adduced on the part of plaintiff. Such an appeal is held to be frivolous. Holcomb v. Breitkreutz, 180 Cal. 17, 179 P. 162; Brannigan v. Miller, 35 Cal. App. 292, 169 P. 696.

[2-4] Moreover, the undisputed facts of the case, showing among other things that plaintiff's automobile at the time it was struck was parked alongside of the curb, are amply sufficient to satisfy every essential element of the doctrine of res ipsa loquitur; and consequently the inference of defendants' negligence arising therefrom in itself is legally sufficient to sustain the trial court's finding on that issue, regardless of the supporting testimony given by plaintiff and his two witnesses. In this respect the case is identical in principle with Bauhofer v. Crawford, 16 Cal. App. 676, 117 P. 931, 932, wherein a passing automobile struck a milk wagon standing alongside of the street, injuring the driver of the wagon as he was alighting from the wagon to serve a customer; and in applying the rule of presumed negligence the court said: "The rule thus invoked [arising from the doctrine of res ipsa loquitur] is laid down in the case of Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, 40 P. 1020, 29 L. R. A. 718, and a number of other California cases as follows: 'When the thing which causes the accident is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in absence of explanation by the defendant, that the accident arose from the want of ordinary care by the defendant.' Under such circumstances, proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised." In the present case the defendants did not make such showing, the explanation offered by them as an excuse for having collided with plaintiff's automobile as it stood parked along the curb having been rejected by the trial court as being without foundation in fact. Therefore, since it is within the exclusive province of the trial court to pass upon the credibility of witnesses, its decision in the matter is controlling on appeal.

Finally, it may be stated that, aside from either of the two points above mentioned, the physical conditions existing immediately following the accident, as shown by the statement of facts, including the location of plaintiff's automobile, are legally sufficient to support the inference that the truck was not being driven in a prudent manner and with ordinary care.

In the state of the record above described, it must have been obvious to defendants from the beginning that the prospect of a reversal of the judgment was hopeless; and, since the appeal presents no question of law, it would appear that it was taken for the purpose of delay. The judgment was entered in May, 1928, and as a result of the appeal therefrom plaintiff, whose injuries were inflicted entirely without fault on his part, and which incapacitated him for several months from following his occupation as a sign painter, has been deprived of the benefit of his judgment for over three years. The circumstances are such, therefore, as call for the imposition of a penalty. Holcomb v. Breitkreutz, supra; Brannigan v. Miller, supra.

The judgment is affirmed, with damages added in the sum of $50 for a frivolous appeal.

We concur: TYLER, P. J.; MURPHEY, Justice pro tem.

116 Cal.App. 368

RICHMOND TERMINAL CORPORATION v. PARR TERMINAL CO. et al.

Civ. 7937.

District Court of Appeal, First District, Division 2, California.

Aug. 28, 1931.

Rehearing Denied Sept. 26, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

1. Conspiracy 🔑1.

Allegation that defendants conspired to do certain acts *held* insufficient in action for damages, unless some right of plaintiff has been violated.

2. Conspiracy 🔑5.

Conspiracy cannot be made subject of civil action unless something is done which, without conspiracy, would give right of action.

3. Appeal and error 🔑761.

Headings in appellant's brief should show points involved and should be stated to compel reversal if points stated in headings are well taken (Rules of Supreme Court and District Courts of Appeal, rule 8).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Richmond Terminal Corporation against the Parr Terminal Company and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

M. H. Peterson, of San Francisco, for appellant.

Thomas M. Carlson, City Atty., of Richmond, for respondent City of Richmond.

T. H. Delap and Tinning & Delap, all of Martinez, for respondents Chandler, Scott, Black, Plate, Hartnett, Ogborn, McVittie, and Cox.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (C. Coolidge Kreis, of San Francisco, of counsel), for respondents Parr Terminal Co. and Fred D. Parr.

SPENCE, J.

Defendants' demurrers to plaintiff's second amended complaint were sustained with leave to amend. Plaintiff failed to amend after notice and judgment was entered in favor of defendants. Plaintiff appeals upon the judgment roll.

[1, 2] The complaint in question is entitled "Action for Damages" and covers twenty pages of the transcript. It appears to be drawn upon the theory that a conspiracy existed between the defendants, for it is alleged in various places that defendants conspired to do certain acts. Such allegations are insufficient unless it appears that some right of plaintiff has been violated by some alleged wrongful act or acts of defendants for "conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action." Bowman v. Wohlke, 166 Cal. 125, 135 P. 37, 39, Ann. Cas. 1915B, 1011; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601; Menner v. Slater, 148 Cal. 285, 83 P. 35, 39; Dowdell v. Carpy, 129 Cal. 168, 61 P. 948. In our opinion plaintiff's complaint failed to show that any act of the defendants violated any of its rights.

[3] We have endeavored to ascertain appellant's theory from the brief on file, but it has not been helpful. It fails to comply with rule 8 of the Rules of the Supreme Court and District Courts of Appeal, which provides that, "The briefs must present each point separately under an appropriate heading showing the nature of the questions to be presented." The headings of the appellant's brief are "Statement of the Case," "Points and Authorities," "Point 1," "Point 2," "Point 3." Any points which appellant may have desired to urge are not presented in the headings at all and the body of the brief is not enlightening. The headings in appellant's brief should show the points involved in the appeal and should be so stated as to compel a reversal in the event that the points stated in the headings are well taken. Otherwise the difficulty of opposing counsel in answering the brief and of the court in ascertaining the points to be decided is at once apparent and the purpose of the rule is defeated. Although the appeal might be dismissed solely because of appellant's failure to comply with the rule (Hawkins v. Doolittle [Cal. App.] 298 P. 862), we have examined the second amended complaint and are satisfied that it failed to state a cause of action.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

116 Cal.App. 348

OWENS v. CARMICHAEL'S U-DRIVE AUTOS, Inc.

Civ. 7866.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1931.

1. Automobiles 🔑**192(6).**

Liability may be imposed on owner who is guilty of "negligence" in intrusting automobile to another.

The charge being that of "negligence," the standard by which the conduct of the owner is to be measured is the general one based on the care which an ordinarily prudent person would exercise under similar circumstances.

[Ed. Note.—For other definitions of "Negligence," see Words and Phrases.]

2. Automobiles 🔑**245(26).**

Whether owner's conduct in intrusting automobile to another measures up to care which ordinarily prudent person would exercise under similar circumstances is ordinarily question for jury.

3. Automobiles 🔑**244(25).**

Evidence that renter was unaccompanied as he drove automobile from owner's establishment about one hour before accident would justify finding renter was driving at time of accident (Code Civ. Proc. § 1963, subd. 32).

4. Automobiles 🔑**244(25).**

Evidence in action against automobile owner for personal injuries prima facie established renter did not have driver's license (St. 1923, p. 536 § 76; p. 532, § 63, as amended by St. 1927, p. 1428, § 17).

5. Evidence 🔑**586(3, 4).**

Slight proof makes out prima facie case when negative is to be proved.

6. Automobiles 🔑**244(25).**

Owner's violation of statute by knowingly intrusting automobile to unlicensed driver establishes prima facie case against owner in favor of one suing for injuries caused by driver's negligence (St. 1923, p. 536, § 76; p. 532, § 63, as amended by St. 1927, p. 1428, § 17).

7. Automobiles 🔑**245(26).**

Whether automobile owner was negligent in permitting renter, possessing temporary permit to drive when accompanied by licensed driver, to drive automobile when unaccompanied, *held* for jury (St. 1923, p. 536, § 76; p. 532, § 63, as amended by St. 1927, p. 1428, § 17).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Edgar Owens against the Carmichael's U-Drive Autos, Inc. Judgment for defendant, and plaintiff appeals.

Reversed.

A. A. Heer, of San Francisco, H. A. Frank, of Oakland, and Marvin C. Hix and Jos. T. Curley, both of San Francisco, for appellant.

Frank T. McGrath and Henry Heidelberg, both of San Francisco, for respondent.

SPENCE, J.

Plaintiff brought this action seeking to recover damages against defendant Carmichael's U-Drive Autos, Inc., for personal injuries inflicted upon plaintiff when struck by an automobile belonging to defendant. The trial court directed a verdict in favor of defendant, and from the judgment entered upon the directed verdict plaintiff appeals.

The accident occurred on the evening of August 7, 1928. The driver stopped the car a short distance from the scene, disappeared without being identified, and has not been seen since. It appeared that about one hour prior to the accident defendant had rented the car to a man who gave his name as Max Watson. It is conceded that there was ample evidence to show that the driver of the car negligently drove it over the curb and struck plaintiff while he was standing on the sidewalk, but defendant based his motion for a directed verdict upon the ground that the evidence was insufficient to go to the jury on the question of the liability of defendant as owner of the car.

[1, 2] At the time of the accident section 1714¼ of the Civil Code had not been enacted, and by his complaint plaintiff sought to impose liability on defendant as owner by alleging that defendant "negligently let and hired" the automobile to Watson; that defendant "negligently permitted Watson to drive and operate said automobile upon the highway"; that "defendant knew * * * that said Max Watson was not competent to operate" said automobile; and "that said Max Watson was not licensed to drive or operate any automobile upon such highway." In other words, the gravamen of plaintiff's cause of action was the alleged negligence in intrusting the car to Watson. These allegations of the complaint were sufficient, for it is well settled that liability may be imposed upon an owner who negligently intrusts his automobile to another. Rocca v. Steinmetz, 61 Cal. App. 102, 214 P. 257, and cases cited. Such negli-

gence is most frequently predicated upon the fact that an owner knowingly intrusts his car to an incompetent person, but we do not believe that the owner is liable solely in those cases where such showing is made. The charge being that of negligence, the standard by which the conduct of the owner is to be measured is the general one based upon the care which an ordinarily prudent person would exercise under similar circumstances, and the question whether a particular owner's conduct measures up to that standard is ordinarily a question of fact for the jury. 19 Cal. Jur., p. 729; 42 C. J., p. 1261.

[3-5] Appellant contends that the evidence introduced was sufficient to make out a prima facie case against respondent as owner, and in our opinion this contention must be sustained. Before discussing the evidence surrounding the renting of the car, we will first dispose of respondent's contention that there is no evidence to show that Watson was driving at the time of the accident, and the further contention that there is no evidence to show that Watson did not have a driver's license. With respect to the first contention it appeared that Watson rented the car and was unaccompanied as he drove it from respondent's establishment about one hour before the accident. From this evidence the jury would have been warranted in finding that Watson was driving at the time of the accident. Code Civ. Proc. § 1963, subd. 32; Sutton v. Tanger (Cal. App.) 1 P.(2d) 521. In an endeavor to prove that Watson did not have a driver's license, search was made in the files of the division of motor vehicles, which files contain some 4,000,000 names. Employees of the division testified giving the names and addresses of licensed persons bearing the name "Max Watson," and depositions of these persons were taken and introduced to prove that none of them had rented the car involved in the accident. It is true, as contended by respondent, that there was no testimony relating to persons licensed under names such as "M. Watson," "M. D. Watson," or other similar names containing the initial "M," but we do not believe this was essential. It is well settled that slight proof makes out a prima facie case when a negative is to be proved. 10 Cal. Jur. 789, 1158.

[6] Turning to the facts surrounding the renting of the car to Watson, the evidence showed that respondent was engaged in the business of renting cars without drivers; that Watson, who was unknown to respondent, applied for a car at about 7 p. m. on the night of the accident; that Watson had no driver's license but produced a "driver's temporary permit" issued that same day by the division of motor vehicles and designated by them as a "student's permit," which permit entitled the holder to drive motor vehicles for thirty days, but only when accompanied by a licensed driver; that Watson was unaccompanied at the time he rented the car as well as at the time of the accident; that, as Watson did not have "the customary operator's license," respondent's station clerk had him back the car "up and down the floor a couple of times," and then permitted him to take it after signing a 24-hour contract and making the required deposit.

Respondent argues that the fact that it violated section 76 of the California Vehicle Act (St. 1923, p. 536), by knowingly intrusting the car to an unlicensed person, is immaterial, citing Perry v. Simeone, 197 Cal. 135, 239 P. 1056, and Arrelano v. Jorgensen, 52 Cal. App. 622, 199 P. 855; but, as those cases were decided prior to the amendment in 1927 of section 63 of the California Vehicle Act (St. 1927, p. 1428, § 17), we do not believe that they are determinative. That section now requires the examination of all persons applying for licenses, and an operator's license is no longer merely a means of identification, but is in effect a certificate evidencing the fact that the holder had demonstrated his competency. Under these circumstances, we believe that the violation of the statute is material. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann. Cas. 1061; Andreen v. Escondido Citrus Union, 93 Cal. App. 183, 269 P. 556. The distinction between violations of statutes which are designed for the protection of the public and violations of statutes which have no such purpose is pointed out in Austin v. Rochester Folding Box Co., 111 Misc. Rep. 292, 181 N. Y. S. 275. In our opinion, where an examination is required to test the competency of the applicant before the issuance of an operator's license, and it is provided by statute that no person shall knowingly permit his motor vehicle to be driven by an unlicensed person, a showing of a violation of the statute by the owner makes out a prima facie case against him in favor of a person who has sustained injury through the negligence of such unlicensed driver. Correira v. Liu, 28 Hawaii, 145. As is said in the concurring opinion in that case at page 154: "The fact that Miller was unlicensed is evidence prima facie in the eyes of the law that Miller was incompetent and that Correira committed a breach of his common-law duty not to entrust his car to a driver who was known by him to be incompetent or who under the circumstances should have been known by him to be incompetent and was sufficient to put Correira upon inquiry as to Miller's competency or incompetency."

[7] In the present case, respondent knew that Watson had no driver's license but possessed merely a temporary permit allowing him to drive provided he was accompanied by a licensed driver. This knowledge was sufficient to put respondent upon inquiry as to the competency of Watson, and it was for the jury to determine whether under these circumstances respondent was negligent in permit-

ting Watson, after backing the car up and down the floor a couple of times, to drive the car upon the highway unaccompanied by a licensed driver.

For the foregoing reasons, we are of the opinion that the trial court erred in directing a verdict in favor of respondent.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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116 Cal.App. 102

JONES v. FOSTER.

Civ. 7697.

District Court of Appeal, First District, Division 1, California.

Aug. 13, 1931.

Rehearing Denied Sept. 12, 1931. Hearing Denied by Supreme Court Oct. 8, 1931.

1. Evidence 🔑442(4).

Parol evidence *held* inadmissible to show that realty broker was to receive commission in addition to "2½ per cent. on sale if a deal is made" called for by memorandum.

> Parol evidence was offered to the effect that the broker was to receive full commission as exclusive agent on the sale of the property, and in addition thereto 2½ per cent. in consideration of broker's services on the sale of the property to the owner by the former owners. At the time the memorandum was signed, the escrow instructions, whereby the owner agreed to purchase the property from the former owners, had already been signed and deposited, and the word "sale" could not be made to refer to some antecedent sale of the property without rewriting the entire agreement, nor was the word "deal" ambiguous, since the owner having already signed the agreement to purchase the property from the former owners, the only uncompleted deal for the sale of the property was a contemplated deal to be consummated at some future time.

2. Brokers 🔑46.

Owner can sell property himself, although he has exclusive agent to sell, without becoming liable for commission.

3. Brokers 🔑52.

Broker failing to bring minds of buyer and seller to agreement for sale and terms thereof is not entitled to commission, notwithstanding he made efforts to sell property and first called buyer's attention to it.

4. Appeal and error 🔑1010(1).
Brokers 🔑88(3).

Whether sale is primarily result of broker's efforts is fact question, and trial court's conclusions thereon, sustained by substantial evidence, are conclusive.

5. Brokers 🔑86(4).

As respects right to commission, finding that broker was not procuring cause of sale of realty *held* sustained by evidence.

6. New trial 🔑99.

Granting new trial for newly discovered evidence is largely discretionary.

7. New trial 🔑102(1).

New trial should not be granted for newly discovered evidence, where party has not shown due diligence in discovering and producing it.

8. New trial 🔑104(1).

New trial should not be granted for newly discovered evidence which is purely cumulative or does not render different result upon retrial probable.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by W. A. Jones against John B. Foster. From an adverse judgment, plaintiff appeals.

Affirmed.

Charles M. Easton and Clarke & Bowker, all of Los Angeles, for appellant.

W. I. Gilbert, Swanwick & Donnelly, and R. W. Proudfit, all of Los Angeles, for respondent.

MURPHEY, Justice pro tem.

[1] This is an action in which the plaintiff, the assignee of Mrs. N. E. McCann, alleges that on or about the 2d of March, 1926, the defendant entered into a contract with said Mrs. McCann by the terms of which he agreed to give to her the exclusive agency for selling certain property and to pay her the regular commission allowed to realtors on sales and, in addition thereto, to pay 2½ per cent. as consideration for certain services theretofore performed by Mrs. McCann in procuring the sale of said property to the defendant from the former owners thereof. This service it was alleged was performed by Mrs. McCann in securing the property from the former owners at the lowest net market price, which she alleges she succeeded in doing, waiving her commission on said sale. The complaint further alleges that on or about the said 2d day of March, 1926, Mrs. McCann became the exclusive agent of defendant for the sale of said

property, and pursuant thereto proceeded in due course at divers times to secure a purchaser or purchasers for said ranch property for the defendant at an advanced price over the purchase price, and that during that time she proceeded, as said exclusive agent, to negotiate with various parties with respect to the sale of said property, and to interest certain persons in the purchase of said property, and that thereafter in due course the defendant Foster completed the sale of said property to certain persons at a price materially in advance of the purchase price paid by him to the former owners, to wit, the sum of approximately $185,000. In support of her complaint, the plaintiff offered in evidence the following memorandum: "I agree to give Mrs. N. E. McCann exclusive agency on the Stockwell Ranch property also the Vitagliano property as follows 59 Acres and 40 acres—on Riverside Drive and Pacoima Lankershim Calif I am to pay her 2½ per cent on Sale of Said property if a deal is made—John B. Foster March 2–1926." No other writing of any kind or character was executed by either of the parties in connection with this transaction. In addition to the memorandum above set out, plaintiff offered parol evidence to the effect that she was to receive full commission as exclusive agent on the sale of said property purchased by Foster and, in addition thereto, 2½ per cent. in consideration of her services on the sale of said property to Foster by the former owner. The court sustained the objection to the introduction of this parol evidence on the ground that the agreement upon its face imports to be a complete expression between the parties and that the parol evidence is not admissible to vary its terms.

The court further found that Mrs. McCann, the assignor of appellant, was not the procuring cause of the sale and, therefore, was not entitled to any commission on the sale by Foster to Beesemeyer. This ruling was clearly correct and supported by an unbroken line of authorities. If there was any other agreement between the parties with respect to the payment of commissions, the time and place to evidence that agreement was in the writing providing for her compensation. In Thoroman v. David, 199 Cal. 386, 389, 249 P. 513, 514, the court says: "It is the contention of the plaintiff that the said escrow instructions did not constitute such a written contract as expressed the complete understanding of the parties, and that the oral evidence was admissible to supplement the written expression of their understanding. It is the position of the defendant that the said agreement was complete and fully expressed the intention of the parties, and that the admission of the oral evidence was in contravention of the well-established rule codified in sections 1625 and 1698 of the Civil Code and in section 1856 of the Code of Civil Procedure, and as approved in such cases as Harrison v. McCormick, 89 Cal. 327, 26 P. 830, 23 Am. St. Rep. 469," and several other cases cited in that decision. "In the Harrison Case the rule is thus stated: 'The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: "If it imports upon its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed."'" To the same effect Bradbury v. Higginson, 167 Cal. 553, 558, 140 P. 254, 256, wherein the court says: "The defendant relies upon section 1640 of the Civil Code, providing that 'when, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.' * * * Whatever may be the real scope of this enactment, it certainly cannot have the effect of authorizing a court, in the absence of a showing of a right of reformation, to find, upon oral testimony, that a written contract includes provisions which do not appear upon its face, and to enforce such provisions as a part of the written contract. This would not be an interpretation of the contract. It would be altering a written contract by proof of the parol agreement of the parties, a procedure which is contrary to the most elementary principles governing the effect of written instruments."

It must be remembered in this case that at the time this written memorandum of exclusive agency was signed, the escrow instructions whereby Foster agreed to purchase the property from the former owners had already been signed and deposited, and he made appellant's assignor his exclusive agent to sell this property, and agreed to pay 2½ per cent. commission on the *sale* price of that property if the deal was made. This language could not be made to refer to some antecedent sale of the property without rewriting the entire agreement.

It is appellant's contention that the agreement is not clear as to the word "deal," contending that just what "deal" was referred to in the memorandum is uncertain, and that the deal actually referred to was the deal whereby respondent agreed to purchase the property. Defendant having already signed the agreement to purchase the property from the former owners, the only uncompleted deal for the sale of the property was a contemplated deal to be consummated at some future time, and this we are satisfied is the only rational construction that can be placed on the language used in the memorandum.

[2] It was conceded in this action that the defendant himself consummated the sale of the property with Gilbert Beesemeyer as purchaser, and there was some contention at the time of the trial of this action, and we think from the language of the complaint, that it was the plaintiff's thought the crux of the action was that Mrs. McCann, as exclusive agent, was entitled to the commission under the agreement if a sale was made either by herself or by the defendant at a price in advance of the original purchase price of the property by the defendant from the former owner. In this court this position has been abandoned by the plaintiff, for we find in his reply brief this statement: "We have no quarrel with counsel as to the right of an owner to sell the property himself, notwithstanding the fact that he has an exclusive agent, without becoming liable for the payment of a commission." There is no question as to this being a sound proposition of law. Snook v. Page, 29 Cal. App. 246, 155 P. 107; Faith v. Meisetschlager, 45 Cal. App. 7, 187 P. 61.

[3-5] The sole question then remaining to be determined is as to whether the assignor of the plaintiff was the procuring cause of the sale from respondent to Beesemeyer. The respondent objected to any introduction of any testimony tending to show that Mrs. McCann had procured Beesemeyer, to whom respondent sold the property, on the ground that the allegations of plaintiff's complaint in this respect were insufficient. While there can be slight doubt that the complaint is vulnerable to this attack, nevertheless we do not deem it necessary in the determination of this controversy to enter into any discussion of that question. We are entirely satisfied that the evidence, contradictory though it may be in some respects, falls far short of establishing the right of plaintiff to recover on the theory that his assignor was the procuring cause of this sale. The fundamental law with respect to this matter is summarized in the following: "'The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue.' Sibbald v. Bethlehem Iron Co., 83 N. Y. 382 [38 Am. Rep. 441]. * * * If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called to it the attention of the party who subsequently made the purchase. * * *" Zeimer v. Antisell, 75 Cal. 509, 512, 17 P. 642, 643. "It is not enough that he contribute indirectly or incidentally to the sale by imparting information which tends to arouse interest, but it is sufficient if it be established that he set in motion a chain of events which without break in their continuity caused the buyer and seller to come to terms, that his efforts constituted the proximate cause of the meeting of the minds of the principals. * * * Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Sargent v. Ullsperger, 54 Cal. App. 384, 201 P. 934. It is necessary for the broker to prove therefore that he was the efficient or procuring cause of the sale; in other words, it must appear that his efforts had to do with the meeting of the minds of the seller and buyer. * * * In any event the question of whether or not the sale is primarily the result of the broker's efforts is one of fact, and the trial court's conclusions thereon will not be disturbed on appeal if there be substantial evidence to sustain them. Sessions v. Pacific Improvement Co., supra." Ball v. Glantz, 78 Cal. App. 49, 53, 248 P. 258, 259. The evidence on this issue may hardly be said to be contradictory as to the ultimate fact with respect to the purchase of the property by Beesemeyer from the defendant. Beesemeyer himself testified that he never did meet the assignor of plaintiff in connection with this transaction, never discussed the matter with her and did not know her in the deal at all. Under such circumstances we may not disturb the findings of the trial court.

[6-8] The motion for a new trial was properly denied. In O'Rourke v. Vennekohl, 104 Cal. 254, 256, 37 P. 930, the rule, succinctly stated, is clearly applicable to the facts of this case: "After a careful examination of the record, we are unable to say that the court erred in denying the motion for a new trial. The motion was based upon the ground of newly-discovered evidence. The granting of a new trial upon this ground is largely matter of discretion, an exercise of which will not be disturbed by this court except in case of abuse clearly disclosed by the record. It should not be granted in any case where the party has not shown due diligence in discovering and producing the evidence, nor where the evidence is purely cumulative, nor unless the newly-discovered evidence is such as to render a different result upon a retrial probable. Testing the showing made in this case by these rules, we certainly cannot say that there was any abuse of discretion in denying the motion. The new evidence was largely, if not entirely, cumulative, and conceding that appellants' view of the law be correct, that a new trial should not be refused merely because the evidence is cumulative, in a case where the cumulation is sufficiently strong to render a different result probable, we cannot say that the record presents such a case."

It follows that the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

116 Cal.App. 339

SALVO v. MARKET ST. RY. CO.

Civ. 7750.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1931.

Rehearing Denied Sept. 26, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

1. Street railroads 🔑114(14).

Evidence sustained verdict that motorist struck by street car was negligent, where he traveled 30 feet without looking toward left (St. 1923, p. 558, § 130, as amended by St. 1925, p. 398, § 15a).

Evidence tended to show that motorist, in attempting to make left turn, traveled in second gear at not more than five miles an hour, at which rate he could have stopped in four or five feet, for a distance of thirty feet or more without looking toward left, the direction from which danger might have been expected, and failed to see approaching street car until he was on tracks and car was about ten feet away.

2. Negligence 🔑82.

Where both parties were negligent, plaintiff whose negligence contributed proximately to injury cannot recover.

3. Appeal and error 🔑930(2).

Where jury, being instructed to find for defendant if plaintiff's negligence contributed proximately to injury, returned verdict for defendant, court must assume that jury found contributory negligence.

4. Appeal and error 🔑1001(1).

Where contributory negligence is properly submitted and jury finds for defendant, verdict supported by sufficient evidence cannot be disturbed, unless independent legal errors are shown.

5. Negligence 🔑117.

As plea of contributory negligence, allegation that plaintiff's negligence proximately caused and contributed to injuries is not to be commended.

6. Appeal and error 🔑171(3).

Where trial was conducted on theory that contributory negligence was properly alleged, allegation cannot be successfully criticized on appeal.

7. Trial 🔑296(4, 5).

Instruction precluding recovery if plaintiff's negligence contributed "in any degree" to injuries *held* not erroneous under instructions that no degrees of negligence or contributory negligence were involved.

It appeared that court had defined contributory negligence and proximate cause, and had instructed jury that there were no degrees of negligence or contributory negligence involved.

8. Appeal and error 🔑1066.

That instruction omitted last clear chance doctrine *held* not error, where doctrine was not presented by evidence or pleadings, or by requested instructions.

9. Street railroads 🔑85(1).

Street car has paramount, though not exclusive, right of way over tracks (St. 1923, p. 558, § 130, as amended by St. 1925, p. 398, § 15a).

10. Street railroads 🔑90(3).

Generally, even though motorist sees approaching street car, motorman is negligent in not sounding signal (St. 1923, p. 558, § 130, as amended by St. 1925, p. 398, § 15a).

11. Appeal and error 🔑1068(1).

Instruction that motorman was not negligent in not sounding signal when motorist saw street car *held* harmless, where jury found both parties negligent and based verdict on motorist's contributory negligence (St. 1923, p. 558, § 130, as amended by St. 1925, p. 398, § 15a).

12. Evidence 🔑121(1).

Generally, expressions of actors made during occurrence are admissible, especially if spontaneous and caused by event.

13. Evidence 🔑123(1).

Expressions of actors made after occurrence, no matter how shortly afterward, where there is attempt to explain event or to defend one's self, are inadmissible as res gestæ.

14. Evidence 🔑123(11).

Conversation between motorist and street car motorman *held* objectionable as hearsay and not part of res gestæ, where motorist failed to show statements were made during occurrence.

15. Witnesses 🔑379(7).

Where automobile guest testified for motorist who was suing street railway, cross-examination showing that guest, having sued both parties, charged motorist with negligence, *held* proper as impeachment (Code Civ. Proc. § 2052).

16. New trial ⟹104(1).

Denying new trial for newly discovered evidence which was merely cumulative and insufficient to demand different verdict *held* not abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by John Salvo against the Market Street Railway Company. From a judgment for defendant and an order denying a new trial, plaintiff appeals.

Affirmed.

John H. Crabbe, of San Francisco, for appellant.

Wm. M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for personal injuries resulting from a collision between a motor vehicle which he was operating and a street car operated by defendant. The cause was tried with a jury. A verdict was returned for defendant, and plaintiff appeals from the judgment on the verdict and from the order denying his motion for a new trial.

[1] At about 6:35 a. m. on May 1, 1929, plaintiff was driving his automobile easterly along Lakeview avenue, in San Francisco, and, as he approached the intersection of San Jose avenue, he stopped and took on a passenger. Lakeview avenue ends at the westerly line of San Jose. It is eighty feet in width from curb to curb; San Jose is seventy feet in width and meets Lakeview at right angles, running in a northerly and southerly direction. Plaintiff approached the intersection in second gear at a rate of speed of not more than five miles per hour and continued at the same rate of speed into San Jose avenue, attempting to make a left-hand turn into that avenue in order to proceed northerly to his destination. The defendant operates a double track line of street cars on San Jose avenue located approximately in the center of that thoroughfare. As plaintiff was making his turn upon the westerly, or south-bound tracks his machine was struck by a car operated by defendant proceeding southerly. The plaintiff and his passenger were both injured. They testified that they did not see the approaching street car until about the moment of impact and that they heard no bell or other warning of danger. The defendant denied negligence on its part and pleaded contributory negligence of plaintiff.

The foregoing facts, which are fully supported in the evidence, are sufficient to sustain the jury's verdict; hence it is not necessary to refer to the conflicting testimony of the eyewitnesses to the collision. It is sufficient to say that, if the jury believed the facts as related, they returned the proper verdict.

[2, 3] The case is controlled by general principles which are quite simple in their application to the particular state of facts appearing in the record. Appellant was attempting to make a left-hand turn into a widely used thoroughfare along which two lines of street railways were operated. He was thoroughly familiar with the intersection. His view of all traffic approaching from the north on San Jose avenue was clear for a distance of two or three blocks as soon as he reached the intersection. He was traveling in second gear at not more than five miles an hour, at which rate he could have stopped in a distance of four or five feet. He did not see the approaching street car until he was on the tracks and the car was about ten feet away. Thus, from the time he passed the intersection, and for a distance of thirty feet or more, he proceeded without looking to his left—the direction from which danger might be expected. Hence, in utter disregard of the provisions of the California Vehicle Act (St. 1923, p. 558, § 130, as amended by St. 1925, p. 398, § 15a) which required him to first see that a left turn could be made in safety and without the exercise of the slightest care or caution for his own safety, he put himself in a position of danger through his own negligence. The record discloses without doubt that this was the view taken by the jury when they returned to the court for further instructions on "whether the degree of negligence counts and what we should do in the event both are negligent." The trial judge correctly instructed them that, if they found that both parties were negligent and that plaintiff's "negligence contributed proximately to his injury, then plaintiff cannot recover." The jury retired and returned with a verdict for defendant, and we cannot but assume that they found plaintiff guilty of contributory negligence.

[4] Cases in which similar circumstances have been held to constitute contributory negligence are Hamlin v. Pac. Elec. Ry. Co., 150 Cal. 776, 782, 89 P. 1109; Stein v. United Railroads, 159 Cal. 368, 377, 113 P. 663; Read v. Pac. Elec. Ry. Co., 185 Cal. 520, 197 P. 791. We do not need to determine whether the facts of this case constitute contributory negligence as a matter of law. The rule controlling is that, when the issue of contributory negligence has been submitted to the jury under proper instructions, and the jury finds for the defendant, we may not disturb the verdict when we find that the evidence is sufficient to support it unless independent errors of law are shown.

[5, 6] The appellant states that the issue of contributory negligence was not properly

pleaded. The answer alleged as a separate defense that the injuries to plaintiff "were proximately caused by said carelessness and negligence (of plaintiff) and that said carelessness and negligence proximately contributed thereto." The form of the pleading does not merit judicial approval, but, though the pleading is open to criticism, the trial was conducted throughout upon the theory that this defense was properly alleged, and the objection cannot now be urged on appeal. Schuh v. R. H. Herron Co., 177 Cal. 13, 18, 169 P. 682; Jones v. Pac. Gas & Elec. Co., 104 Cal. App. 47, 50, 285 P. 709, where other authorities are cited.

[7, 8] Appellant criticizes the instruction which advised the jury that, if they found that he "was guilty of any contributory negligence which proximately *in any degree* contributed to cause the injuries, et cetera," they must find for the defendant. The trial judge had defined contributory negligence and proximate cause and had instructed the jury that there were no degrees of negligence or contributory negligence involved in the case. Appellant's criticism is without merit. Strong v. S. & P. R. R. Co., 61 Cal. 326, 328; Metcalfe v. Pac. Elec. Ry. Co., 63 Cal. App. 331, 334, 218 P. 486. As to the suggestion that the instruction omitted consideration of the "last clear chance" doctrine, it is sufficient to say that the appellant did not present that issue, did not propose an instruction to cover it, and that there is no evidence which would justify its application. New York Lub. Oil Co. v. United Railroads, 191 Cal. 96, 99, 215 P. 72.

[9] Appellant criticizes that portion of the instructions which advised the jury that a street car had a paramount, though not exclusive, right of way over ordinary vehicles upon that portion of the street upon which it can travel. The instruction was in harmony with all the authorities. In Shipley v. San Diego Elec. Ry. Co., 106 Cal. App. 659, 289 P. 662, 664, the court says: "The rights and duties of the users of the public streets are reciprocal, subject to the duty of free vehicles to yield a clear right of way to the operation of the street car over its tracks when necessary." Lawyer v. Los Angeles Pac. Co., 161 Cal. 53, 56, 118 P. 237; Haber v. Pac. Elec. Ry. Co., 78 Cal. App. 617, 636, 248 P. 741; Hamlin v. Pac. Elec. Ry. Co., 150 Cal. 776, 779, 89 P. 1109, are in accord.

[10, 11] The instruction which advised the jury that it was not negligence on the part of the motorman to fail to sound a warning signal when the approach of the car was seen by appellant is not generally a correct statement of the law. But in view of the record which discloses that the jury found both parties negligent and returned their verdict on the basis of appellant's contributory negligence, we cannot say that this instruction was prejudicial.

The instruction covering the duty of the motorman upon being confronted with a sudden emergency correctly stated the law. Bibby v. Pac. Elec. Ry., 58 Cal. App. 658, 662, 209 P. 387.

The instruction covering the duty of the operator of the motor vehicle was in full accord with the provisions of the State Vehicle Act and was properly given. As we have heretofore said, appellant's failure to obey these simple regulations was the proximate cause of the accident. The application of the statute to a case of this character is made plain in New York Lubricating Co. v. United Railroads, 191 Cal. 96, 100, 215 P. 72.

The foregoing instructions covered the subject-matter of those proposed instructions which were refused and which the appellant insists should have been given. For the reasons herein given relating to the instructions criticised, the proposed instructions were properly refused.

[12, 13] The appellant presents three assignments of error arising out of rulings upon the admission of testimony. First, the appellant was asked upon his direct examination whether he had a conversation with the motorman immediately after the impact. He answered yes, and then was asked to state the conversation. Objection was made on the ground that it was hearsay and no part of the res gestæ. This objection was sustained. Attacking the ruling appellant cites Lloyd v. Boulevard Express, 79 Cal. App. 406, 411, 249 P. 837, and similar cases holding such conversations admissible. To the contrary are Williams v. So. Pac. Co., 133 Cal. 550, 555, 65 P. 1100, 1102; Durkee v. Cent. Pac. R. R. Co., 69 Cal. 533, 535, 11 P. 130, 58 Am. Rep. 562; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 16, 151 P. 286; Zohner v. Sierra Nevada Life, etc., Co. (Cal. App.) 299 P. 749; and similar cases. The pith of these decisions (which, we may add, unquestionably represent the majority view) is found in the Williams Case where the Supreme Court say: "Expressions of persons who are actors, *made during the occurrence*, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, *no matter how shortly afterwards*, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as res gestæ." (Emphasis ours.)

[14] Applying this rule to the case at hand we find that appellant failed to present to the trial judge the surrounding circumstances which would have shown whether the conversation was had "during the occurrence." Ordinarily a conversation between those who are not parties to the action is hearsay and inadmissible for that reason. When a party seeks to present evidence of a conversation which is an exception to that rule, it is incumbent upon him to show to the court the reasons for the exception. Appellant failed to do this at the time the objection was made. On his motion for a new trial he filed an affidavit stating that he proposed to show that the motorman said he was looking at his watch and so failed to see appellant approaching the track. This was "an attempt to explain what has happened" and manifestly was not "made during the occurrence" but was made some time after both vehicles had come to a standstill and when the motorman and the appellant were standing in the street talking over the collision. Hence, the appellant having failed to lay the proper foundation for his question, the objection was properly sustained.

[15] Error is laid to the ruling permitting respondent on cross-examination of the witness Archini to bring out that she had a suit pending against the parties to this action based upon the same collision, and that in her complaint she charged this appellant with negligence. The witness was a guest riding with appellant at the time of the collision. She appeared as his witness and gave testimony favorable to him. The cross-examination was for the purpose of impeachment and was proper. This rule is statutory (Code Civ. Proc. § 2052).

Under the same section of the Code appellant's third objection to these rulings falls. He was asked in rebuttal what Dr. Bohm, a witness for respondent, had told him after the doctor's first examination of the appellant. It is now argued that this was asked for the purpose of impeaching Dr. Bohm. But no foundation was laid as required by the section cited.

[16] The motion for a new trial was made upon the usual grounds, including "newly discovered evidence." This new "evidence" consists of tests of speed of other street cars running on San Jose avenue subsequent to the date of the accident. If any admissible evidence of this character was found after the trial, it would have been cumulative of that offered at the trial to prove negligence on the part of the respondent. It would not have been sufficient to demand a verdict for the appellant, because there is ample evidence in the record upon which the jury could find against the appellant on the issue of contributory negligence. There was no abuse of discretion in denying the motion. Parker v. So. Pac. Co., 204 Cal. 609, 618, 269 P. 622.

We find no error in the record.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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119 Cal.App.(Supp.) 773

PHILLIPS v. WHITE.

No. Ca. 932.

Appellate Department, Superior Court, Los Angeles County, California.

Sept. 1, 1931.

1. Justices of the peace 🔑73, 74(1).

Statute relating to change of venue from municipal courts *held* applicable to civil action commenced in justice's court of township having population exceeding 30,000 (Code Civ. Proc. §§ 112, 832, 833, 831h, and § 831 as amended by St. 1929, p. 1692, § 1; St. 1929, p. 838).

2. Justices of the peace 🔑73, 74(1).

Venue of action for more than $300 commenced in justice's court of township having 30,000 population could not be changed where no municipal or justice court in which action was cognizable existed in township where defendant resided (Code Civ. Proc. §§ 112, 832, 833, 831h, and § 831 as amended by St. 1929, p. 1692, § 1; St. 1929, p. 838).

3. Justices of the peace 🔑75(1).

Where action was commenced in justice's court in Santa Monica township and there was no municipal or justice court having jurisdiction of action in La Crescenta township where defendant resided, case could not be removed to municipal court of Los Angeles county (Code Civ. Proc. §§ 112, 831a, 832, 833, 831h, and § 831 as amended by St. 1929, p. 1692, § 1, and § 831b as amended by St. 1929, p. 1694, § 2; St. 1929, p. 838).

Appeal from Justice's Court, Santa Monica Township; W. R. Garrett, Judge.

Action by Roy Phillips against John E. White. From an order denying motion for change of venue, defendant appeals.

Affirmed.

L. J. Meyberg and P. M. Joseph, both of Los Angeles, for appellant.

Richard K. Gandy, of Santa Monica, and Milan E. Ryan, of Los Angeles, for respondent.

McLUCAS, P. J.

Defendant appeals from an order made July 10, 1931, denying a motion for change of venue. The action was brought in the justice's court of Santa Monica township to recover the sum of $328.55 for services rendered and material furnished to the defendant.

The verified complaint alleges that the defendant is a resident of Santa Monica township, that the obligation sued on was incurred in Santa Monica township, and that the services were rendered and materials furnished within said township. The defendant was served with a copy of the complaint and summons in Santa Monica township. The population of Santa Monica township exceeds 30,000. Defendant filed demand for change of venue and filed a notice of motion for change of venue to the municipal court of the city of Los Angeles, on the ground that at the time of the commencement of the action, the defendant was, and ever since said time has continued to be, and still is, a resident of La Crescenta township, in the county of Los Angeles. In support of the motion, defendant filed his affidavit that he was a resident of La Crescenta township at all of said times. At the time of filing the notice of motion, defendant filed a demurrer, but did not file an answer as required by section 831, Code of Civil Procedure.

The population of La Crescenta township is less than 30,000, and consequently the justice's court thereof would not have jurisdiction of the action; the demand being in excess of $300. In a proper case both the justice's court of Santa Monica township, the population of that township being over 30,000 and the demand being less than $1,000 (section 112, Code Civ. Proc.), and the Los Angeles municipal court (St. 1929, p. 838), the demand being less than $2,000 and the action arising within Los Angeles county, would have jurisdiction. The respondent relies upon the provisions of sections 832 and 833, Code of Civil Procedure, relating to the place of trial in justices' courts. But these sections are not applicable to justices' courts in townships having a population of thirty thousand or more. Section 831h of the Code of Civil Procedure provides as follows: "Civil actions in justices' courts in cities, cities and counties, towns and judicial townships having a population of thirty thousand or more shall be commenced and prosecuted in the manner provided by law for the commencement and prosecution of civil actions in municipal courts of this state and the rules of pleading and practice applicable to the prosecution of civil actions and enforcement of judgments in the municipal courts of this state shall apply to and govern the prosecution and maintenance of civil actions and enforcement of judgments in said justices' courts." In People v. Justice's Court (Cal. Sup.) 299 P. 731, 732, it was held that section 848, Code Civ. Proc., relating to service of justices' court summons outside the county, was not applicable to justices' courts in townships of 30,000 or more. The court said: "We are of the opinion that by these sections the Legislature intended to provide that, in those justices' courts exercising the enlarged jurisdiction, the same status that had formerly existed in reference to such actions when they were triable in the superior or municipal courts should be retained."

[1] It follows that the provisions relating to change of venue from municipal courts are applicable to this case, it being a civil action in a township of thirty thousand population. Section 831 Code of Civil Procedure as amended in 1929 (St. 1929, p. 1692, § 1) provides that the municipal court in an action of this character must, on motion, based upon a demand of the defendant therefor in writing at the time he answers, change the place of trial of an action commenced in such court to another court in which such action is cognizable as follows: "To the municipal or justice's court, if the action be cognizable therein, established in the city or township, respectively, in which the defendants, or some of them, reside at the commencement of the action, if within the county in which the municipal court, in which the action is commenced, is situated; provided, that none of the defendants reside in the city where the action is commenced."

[2] It was impossible to so change the place of trial in this case, since there was no municipal or justice court, in which the action was cognizable, established in the township of La Crescenta, where the defendant resided at the commencement of the action. Only actions where the demand did not exceed $300 were cognizable in La Crescenta township; it being less than 30,000 population. Section 112, Code of Civil Procedure.

[3] While it is true that any municipal court established in Los Angeles county, either the Los Angeles or Long Beach municipal court, has jurisdiction concurrent with justice courts, where such justice courts have not been given exclusive jurisdiction, of all civil cases arising outside the city in which a municipal court is established and within the county in which such municipal court is established (St. 1929, p. 838; Southwestern Portland Cement Co. v. Cochrane [Cal. Super.] 300 P. 445), yet where the action arose in Santa Monica township, the action was commenced in Santa Monica township, and there is no court having jurisdiction of the action in La Crescenta township where the defendant resides, we see no reason or law for removal to the municipal court of Los Angeles.

In conclusion it should be noted that section 831a, Code of Civil Procedure, provides as follows: "Nothing contained in this chapter shall be construed to limit the power of the court to hear and determine any of the actions herein enumerated, arising, or where any of the defendants reside, within the jurisdictional limits of the court as established by law, and any such action may, notwithstanding any of the provisions of this chapter, be tried in the municipal court where commenced, subject to the power of the court to change the place of trial for cause as provided in sections 831b and 398 of this code, unless demand for change of place of trial is made as provided in this chapter." Section 831b, as amended in 1929 (St. 1929, p. 1694, § 2), Code of Civil Procedure, also provides that: "At the time of hearing of a motion for change of place of trial made under the provisions of the preceding sections of this chapter, the court, may on plaintiff's countermotion, order the action retained for trial therein, notwithstanding defendant's right to a change of place of trial."

The order denying change of venue is affirmed, with costs of appeal to respondent.

We concur: SHAW, J.; YANKWICH, Judge pro tem.

213 Cal. 575

In re BLOOM'S ESTATE.

S. F. 13712.

Supreme Court of California.
Aug. 31, 1931.

1. Wills 🔑**203.**

Proceeding for probate of will is one instituted for purpose of establishing status of written instrument.

2. Wills 🔑**427.**

Order admitting will to probate is not, except as to parties litigant or for purpose of proceeding itself, conclusive as to facts on which question of will or no will depends.

3. Wills 🔑**427.**

Order admitting will to probate is not conclusive as decree in rem as to mental condition of testator or other facts on which validity of instrument depends.

4. Wills 🔑**423.**

Order admitting will to probate is not conclusive as to matters incidental, though necessarily adjudicated therein.

5. Wills 🔑**423.**

Adjudication on question of testator's residence in proceeding for probate of will is not conclusive on strangers in matter not involving validity of order.

6. Wills 🔑**423.**

Decree admitting will to probate is, as to all persons interested in will, conclusive for purposes of administration as decree in personam.

7. Judgment 🔑**812(3).**

Judgments in rem are binding on person not party to, or participant in, proceeding only so far as status, title, or other res is adjudicated.

8. Taxation 🔑**856.**

Tax imposed by inheritance tax law is on right to succeed to property of estate rather than on property itself.

9. States 🔑**191(1).**

State, without its consent, express or implied, cannot be sued.

10. Wills 🔑**423.**

Right of state to collect inheritance tax cannot be prejudiced by findings of court in proceeding for probate of will.

11. Wills 🔑**423.**

Executor, as respected liability of estate for inheritance tax, was not estopped by his testimony relating to residence of deceased on hearing of petition for probate.

12. Judgment 🔑**666.**

Estoppel of judgment is operative only when it is mutual.

13. Estoppel 🔑**58.**

Essential element of "estoppel by conduct" is that party asserting it was injured or misled by conduct of opponent.

[Ed. Note.—For other definitions of "Estoppel in Pais," see Words and Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of David Bloom, deceased. On objections by Ray L. Riley, as State Controller, and by Jonas Bloom, executor of the estate of David Bloom, to a report filed by the inheritance tax appraiser, fixing the amount of estate tax. From an order that no inheritance tax was due, Ray L. Riley, as Controller, appeals.

Affirmed.

For opinion of District Court of Appeal herewith adopted, see 293 P. 633.

Herbert Kaufman and W. Urie Walsh, both of San Francisco (W. H. H. Gentry and A. W. Brouillet, both of San Francisco, of counsel), for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

PER CURIAM.

A petition for hearing in this case after decision by the District Court of Appeal, First Appellate District, Division 1, was granted by this court. After further consideration we are satisfied with the opinion of the District Court of Appeal and hereby adopt the same as and for the opinion of this court, as follows:

This is an appeal by the state controller from an order entered in the above matter determining that no inheritance tax was due the state of California, and directing a refund of the inheritance tax previously paid.

David Bloom died testate in the city and county of San Francisco on September 16, 1925. On September 25, 1925, Jonas Bloom, the executor and respondent herein, filed his petition for an order admitting the will to probate, and on October 8, 1925, the same was duly admitted to probate. The petition alleged, and the court found, that the decedent at the time of his death was a resident of said city and county. In due course of administration of the estate, the inheritance tax appraiser appointed by the court filed his report fixing $64,268.81 as the amount of the tax, of which $57,145.24 was charged against the distributive share of respondent, and finding that the decedent died a resident of the city and county of San Francisco. On September 7, 1927, the state controller filed objections to the report, alleging that certain corporate stock owned by decedent had been undervalued by the appraiser and that a copartnership interest of decedent had not been included in the report. On December 13, 1928, objections to the report were filed by respondent, following which amended and supplementary objections thereto were filed on his behalf individually and as executor. These objections alleged that the report was incorrect in finding that the decedent died a resident of the above city and county, and that he was a resident of San Salvador at the time of his death; that consequently the stocks and bonds foreign to the state of California and which were owned by decedent were not subject to an inheritance tax in this state. The parties stipulated as to the value of the property in question, and also that the decedent had an interest in certain partnership accounts which were not mentioned in the report. After a hearing, the court found upon the evidence that decedent died a resident of San Salvador, and the order appealed from was entered accordingly. The evidence sufficiently supports the finding that decedent was a resident of San Salvador, but, as stated, the order admitting the will to probate contained a finding that the decedent died a resident of the city and county of San Francisco, and the controller contends that respondent is conclusively bound thereby. The parties also stipulated that the only matter to be determined on appeal is the legal effect of the order in the above respect, but appellant makes the further contention that respondent by reason of his testimony in support of the petition for the probate of the will is also estopped to assert that decedent was not a resident of the said city and county.

[1-5] A proceeding for the probate of a will is one instituted for the purpose of establishing the status of a written instrument. State of California v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Estate of Parsons, 196 Cal. 294, 237 P. 744. While the order admitting the same to probate is conclusive in subsequent proceedings as to the ultimate fact of the will, it is not save as to parties litigant (Clapp v. Vatcher, 9 Cal. App. 462, 99 P. 549), or for the purpose of the proceeding itself (Estate of Relph, 185 Cal. 605, 198 P. 639), conclusive as to the facts upon which the question of will or no will depends (Gridley v. Boggs, 62 Cal. 190), or, quoting from Freeman on Judgments (5th Ed.), § 1524: "When the same issues arise with respect to a different subject matter." As was said in Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265, with regard to such decrees, "strangers though bound to admit the title or status which the judgment establishes are not bound by the findings of fact." Thus it has been held that an order admitting a will to probate is not conclusive as a decree in rem as to the mental condition of the testator or other facts upon which the validity of the instrument depends (Gridley v. Boggs, supra), or as to matters incidental, though necessarily adjudicated, such as to relationship of the parties to decedent (Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455), or the fact of the death as against strangers in a collateral proceeding (Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314; Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144; In re Rowe, 197 App. Div. 449, 189 N. Y. S. 395, affirmed 232 N. Y. 554, 134 N. E. 569; Day v. Floyd, 130 Mass. 488; Steele's Unknown Heirs v. Belding [Tex. Civ. App.] 148 S. W. 592). It has also been decided in numerous cases that an adjudication upon the question of residence of the testator in a proceeding for the probate of the will is not conclusive upon strangers in a matter not involving the validity of the order granting letters testamentary. Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224; Colvin v. Jones, 194 Mich. 670, 161 N. W. 847; Matter of Horton, 217 N. Y. 363, 111 N. E. 1066, Ann. Cas. 1918A, 611; Smith v. Smith's Executor, 122 Va. 341, 94 S. E. 777; Thormann v. Frame, 176 U. S. 350, 20 S. Ct. 446, 44 L. Ed. 500; Overby v. Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. Ed. 741; Dunsmuir v. Scott (C. C. A.) 217 F. 200. In Tilt v. Kelsey, 207 U. S. 43, 28 S. Ct. 1, 4, 52 L. Ed. 95, the court, in passing upon this question, said: "Upon principle and authority, that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicile, nor even evidence of it in a collateral proceeding."

[6] Appellant, in support of his contention, has cited certain California cases. In Estate of Dole, 147 Cal. 194, 81 P. 534, and Estate of Davis, 151 Cal. 327, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105, orders admitting wills to probate were attacked on the ground that the testator was a nonresident of the county, and in Estate of Parsons, supra, a petition for partial distribution was opposed upon the ground that a portion of the will, the whole of which had been admitted to probate, had been revoked by the testator. Also in Estate of Relph, supra, the proceeding was in effect an attack upon an order granting letters of administration made upon the ground that the decedent was resident in another county. In each of these cases it was held that the orders could not be questioned collaterally, and none is an authority for the proposition that the findings upon which the orders were based were conclusive upon strangers in proceedings not involving the validity of the orders. In Estate of Barton, 196 Cal. 508, 238 P. 681,

the testator died in San Diego county, where his will was admitted to probate, the finding in the order being that he was a resident of that county at the time of his death. The will was executed in Rhode Island, where the testator was then domiciled. He owned certain foreign corporate stock which by the terms of the will was bequeathed to one Charles E. Blake, a resident of Rhode Island, but who predeceased the testator. Under section 1343 of the Civil Code this legacy lapsed upon the death of Blake. Upon the filing of the petition for distribution, Blake's heirs filed objections to the distribution of the stock to the residuary legatee, alleging that the testator, contrary to the above finding, was domiciled in Rhode Island at the time of his death and that under the laws of that state the legacy did not lapse. A demurrer to the objections filed was sustained, and the stock distributed to the residuary legatee. On appeal from the decree it was held following Estate of Relph, supra, that the findings of jurisdictional facts supporting the order were final adjudications in all subsequent stages of the administration; also that, while the fact that the testator died in San Diego county leaving estate therein was sufficient to give the court jurisdiction to make the order (Code Civ. Proc. § 1294, subd. 2), nevertheless Blake's heirs were privileged to appear and oppose the admission of the will to probate on the ground that the testator was a resident of the county, and, having failed to do so after due notice, were concluded by the finding. While a decree admitting a will to probate as a judgment in rem is conclusive only as to the status adjudicated, it is, nevertheless, as to all persons interested in the will who, being notified to appear at the probate, might come in, or who, had they come in, would have been heard on any question which the court might properly determine at the hearing, as conclusive for the purposes of administration as a decree in personam. Garwood v. Garwood, 29 Cal. 514; Estate of Allen, 176 Cal. 632, 169 P. 364; Freeman on Judgments (5th Ed.) § 1524; 15 Cal. Jur. Judgments, §§ 180, 181, pp. 117, 118. This was the gist of the decision in the Estate of Parsons, supra, on this question, and all that is necessary to support that decision.

[7, 8] The above cases make it plain that judgments in rem are binding upon persons who are not parties to or participants in the proceeding only so far as the status, title, or other res constituting the subject-matter is adjudicated. Estate of Blake, 157 Cal. 448, 108 P. 287. It is well settled that the tax imposed by the Inheritance Tax Law (St. 1921, p. 1500, as amended) is on the right to succeed to the property of the estate rather than upon the property itself. Estate of Letchworth, 201 Cal. 1, 255 P. 195. The statute makes no provision for notice to the state or any officer thereof of hearings upon petitions for the probate of wills or for letters of administration, and before the appointment of the inheritance tax appraiser the state is a stranger to the proceeding. Any other rule would afford opportunity for fraud, of which unscrupulous persons would not be slow to take advantage.

[9, 10] While the state may be concluded by a judgment in rem as to the res with respect to which the judgment was rendered, as, for example, the validity of the organization of irrigation districts (People v. Linda Vista Irr. District, 128 Cal. 477, 61 P. 86; People v. Perris Irr. District, 132 Cal. 289, 64 P. 399, 773), or the genuineness of a will duly admitted to probate (State v. McGlynn, supra), nevertheless it has been held that judgments of this character do not conclude the state or its agencies unless the law authorizing the proceeding contemplates such result, since the state, without its consent, express or implied, cannot be sued (Berton v. All Persons, 176 Cal. 610, 170 P. 151), and also that the right of the state to collect an inheritance tax cannot be prejudiced by the findings of the court in a proceeding for the probate of a will (Estate of Holt, 61 Cal. App. 464, 215 P. 124).

[11-13] We find no merit in appellant's further contention that as between the state and the executor the latter is estopped by his testimony at the hearing of the petition for the probate of the will. The estoppel of a judgment is operative only when it is mutual (34 Cor. Jur. Judgments, § 1407, p. 988), which was not the case as to the state. Moreover, it is an essential element of an estoppel by conduct that the party asserting it was injured or misled by the conduct of his opponent (10 Cal. Jur. Estoppel, § 20, p. 636), which is not contended to be the fact here.

The conclusions of the trial court are supported both by the facts and the law, and its order should therefore be affirmed.

The order is affirmed.

213 Cal. 301

JARDINE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 12757.

Supreme Court of California.
July 31, 1931.

Rehearing Denied Aug. 27, 1931.

1. Appearance 🔑24(13).

If, after denial of motion to quash service, defendant answers and goes to trial on merits, it waives right to raise jurisdictional question on appeal.

2. Prohibition 🔑3(5).

Existence of remedy by appeal does not prevent use of prohibition, where remedy by appeal is not adequate or speedy.

3. Prohibition 🔑10(1).

Objection to jurisdiction over defendant's person *held* properly raised by application for writ of prohibition.

4. Statutes 🔑64(7).

Part of statute relating to service of summons on unincorporated association and part making individual property of parties served with process subject to judgment *held* severable as regards constitutionality (Code Civ. Proc. § 388).

> Code Civ. Proc. § 388, provides that when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability.

5. Associations 🔑2.

Constitutional law 🔑309(1).

Statute providing that jurisdiction over unincorporated association doing business should result from service on one or more of its members *held* not unconstitutional as denial of due process (Code Civ. Proc. § 388; Const. art. 1, § 13).

6. Exchanges 🔑14.

Los Angeles Stock Exchange *held* "association engaged in business," within meaning of statute permitting service on unincorporated association by service on members (Code Civ. Proc. § 388).

[Ed. Note.—For other definitions of "Association," see Words and Phrases.]

7. Associations 🔑2.

Statute relating to service of summons on unincorporated association should receive liberal construction (Code Civ. Proc. § 388).

RICHARDS, J., dissenting on rehearing.

In Bank.

Application for writ of prohibition prayed to be directed to the Superior Court of Los Angeles County, Clair S. Tappaan, Judge, to restrain further proceedings in certain actions. Writs denied.

Application by J. Earl Jardine, president of the Los Angeles Stock Exchange, on behalf of the Exchange, for writ of prohibition to be directed to the Superior Court in and for Los Angeles County, to restrain further proceedings in an action brought by Arthur M. Loeb and others, alleging themselves to be minority stockholders of the Sunset Pacific Corporation and acting on behalf of such corporation in a representative suit against the Los Angeles Stock Exchange.

Application denied.

Superseding in part (Cal. App.) 293 P. 117.

Rehearing denied.

Loeb, Walker & Loeb, O'Melveny, Tuller & Myers, and Lyon, Fleming & Robbins, all of Los Angeles, Sloss & Ackerman, of San Francisco, and Hickcox & Thomson, of Los Angeles, for petitioner.

Joseph L. Lewinson and Hewitt, McCormick & Crump, all of Los Angeles, for respondents.

LANGDON, J.

This is an application for a writ of prohibition. On or about October 8, 1929, Arthur M. Loeb and others, alleging themselves to be minority stockholders of Sunset Pacific Corporation and acting on behalf of said corporation in a representative suit, brought an action in the superior court of Los Angeles county against various defendants. It was alleged in the complaint that on April 15, 1929, all property and assets of Julian Petroleum Corporation were assigned to Sunset Pacific Corporation upon its purchase of the same at a sale held by the United States District Court on October 15, 1928, pursuant to a plan of reorganization of the company. It was further alleged that the defendant Jacob Berman formed a general scheme to defraud the Julian Petroleum Corporation and its stockholders by the issuance and sale of void certificates of stock; and that he did so with the aid of other defendants, who had notice of the fraudulent character of his acts. The prayer was for an accounting of all profits realized from the sale of such securities and for general equitable relief.

The complaint and summons named as defendants "Los Angeles Stock Exchange, a nonprofit and unincorporated association," and a number of individuals, some of whom were members of the association and others were not. Of the total membership of the exchange, only a small group were named, and they were specifically alleged to have individually participated in the fraudulent acts. Copies of the complaint and summons were served upon the association and its president, various individual defendants named in the complaint and summons, and some members of the exchange who were not named in the complaint or summons. All of the defendants made special appearances, to object to the jurisdiction of the court by motion to quash the summons. A hearing was had on affidavits and exhibits offered by the parties, and all of the motions were denied. Thereafter applications for writs of prohibition were made to the District Court of Appeal, Second Appellate District, Division 2. That court denied the applications made on behalf of the exchange and individuals who were named in the complaint and summons; and granted the writ as to those persons who, as members of the exchange, were served with process though not named in the complaint or summons. 293 P. 117. No attack is made upon the decision of the said District Court of Appeal in so far as it applies to the individual defendants. A hearing in this court was granted, however, to consider further the application made by petitioner, J. Earl Jardine, president of the Los Angeles Stock Exchange, on behalf of the exchange. It may be noted that the exchange itself appeared in its association name to file its motion to quash summons, but upon the denial of said motion, took no further steps on its own behalf. However, we attach no significance to this circumstance. The sole problem before us is whether the lower court has acquired jurisdiction over said defendant Los Angeles Stock Exchange.

The solution of the problem depends upon the meaning and validity of section 388 of the Code of Civil Procedure, which reads as follows: "When two or more persons, *associated in any business, transact such business under a common name*, whether it comprises the names of such persons or not, *the associates may be sued by such common name*, the summons in such cases being *served on one or more of the associates;* and the judgment in the action shall bind the *joint property* of all the associates, and the individual property of the party or parties served with process, *in the same manner as if all had been named defendants* and had been sued upon *their joint liability.*"

Petitioner contends that the Los Angeles Stock Exchange does not come within the terms of this statute; and further contends that it is an unconstitutional denial of due process of law.

[1-3] Before proceeding to a consideration of these contentions, it is necessary first to determine whether they are properly raised in this application for a writ of prohibition. It is argued by counsel for the plaintiffs in the original action, who appear herein as counsel for respondent superior court, that the nature of the activities of the exchange was a question of fact which was presented to the trial court on motion to quash summons; that the said court had before it affidavits and exhibits describing the work of the exchange and containing conflicting statements and conclusions; and that on this conflict as to the facts the court rendered a decision which is conclusive and not subject to attack by writ of prohibition. We cannot view the situation in this light. The questions of fact relate to jurisdiction over the defendant, and are connected with a question of law—the meaning and constitutionality of a statute. The trial court necessarily considered facts, but also made a determination of the legal question, which determination is obviously not conclusive. Respondents' chief objection to this proceeding is, however, that for any supposed error in the trial court's decision, the petitioner has an adequate remedy by appeal. This would, of course, require that judgment be permitted to go by default in the lower court; for if, after denial of the motion to quash, the defendant association answered and went to trial on the merits, it would waive its right to raise the jurisdictional question on appeal. If "a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection." Olcese v. Justice's Court, 156 Cal. 82, 87, 103 P. 317, 319. "By answering and going to trial on the merits, the defendant made a general appearance and submitted itself to the jurisdiction of the court. It thereby waived any right it may have had to insist that jurisdiction of its person had not been obtained." Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 801, 164 P. 792, 793. Hence, respondents' contention amounts to this: Petitioner must either give up the right to contest jurisdiction or to defend on the merits of the case; that while both rights are given by the law, only one can be exercised. Curiously enough, there are a number of decisions in this state which hold that the remedy of a defendant who attacks jurisdiction over his person is by appeal only. See Germain Seed, etc., Co. v. Justice's Court, 41 Cal. App. 397, 182 P. 784; Lumas Film Corporation v. Superior Court, 89 Cal. App. 384,

264 P. 792; Bullard v. Superior Court, 106 Cal. App. 513, 288 P. 629, and cases cited. These cases fail to distinguish between jurisdiction over the subject-matter and the person, and seem to overlook the dilemma in which their holdings place the defendant who objects to jurisdiction over his person. There was a time when such a rule would have been perfectly reasonable, for the view of some of the earlier cases in this state was that a defense on the merits was not a waiver of the right to raise the jurisdictional question on appeal. These cases were disapproved in later decisions, of which Remsberg v. Hackney Mfg. Co., supra, is typical, and there is now no sound basis for the view contended for by respondent. The correct rule is, we think, set forth in Westinghouse Electric & Mfg. Co. v. Justice's Court, 79 Cal. App. 759, page 761, 250 P. 1104, 1105, where the court, after distinguishing and criticizing other cases, said: "It is apparent, therefore, that if prohibition will not lie in this case, the petitioner here must waive either the lack of jurisdiction and submit to the jurisdiction of the court, or stand upon the defense of lack of jurisdiction and waive the defense on the merits. We do not think that the rule requires the petitioner to do either." Moreover, the existence of a remedy by appeal does not prevent the use of prohibition where the remedy by appeal is not adequate or speedy. The writ is sought here not only for the reason just discussed, but for the additional reason that a decision in favor of petitioner on the jurisdictional question would avoid the delay and expense of a protracted trial. This factor has frequently influenced this court to determine a jurisdictional point on petition for writ of prohibition. Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076; A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926; Davis v. Superior Court, 184 Cal. 691, 195 P. 390. See, also, Chaplin v. Superior Court, 81 Cal. App. 367, 253 P. 954; Knox v. Superior Court, 100 Cal. App. 452, 280 P. 375.

We conclude that the jurisdictional question was properly raised by this petition; and since this conclusion is in direct conflict with the group of cases to which reference has been made (Bullard v. Superior Court, supra, and others cited supra), we are compelled to overrule them in so far as they purport to hold that an objection to jurisdiction over the person of a defendant cannot be raised by an application for a writ of prohibition.

[4] This brings us to the argument of petitioner, and we direct our inquiry first to the constitutionality of section 388 of the Code of Civil Procedure. This section was enacted as a part of the original code, and is substantially the same as section 656 of the Practice Act. It provides that the judgment in an action brought under it against members of an association shall bind (1) the joint property of all the associates, and (2) the individual property of the party or parties served with process. This latter provision as to individual property was added by amendment of the statute in 1907. Petitioner contends that both parts are unconstitutional, and respondent makes no argument as to the validity of the 1907 amendment, on the ground that if the first part be sustained, a valid judgment can be rendered and the extent of the enforcement of that judgment is of no consequence at this time. We are satisfied that the provisions are severable, and that respondents' position is sound. A discussion of the power to enforce such a judgment against individual property of members served with process is wholly immaterial in this proceeding, and we express no opinion on the point.

The only authority which has been cited to the point that section 388 is unconstitutional is Tay, Brooks & Backus v. Hawley, 39 Cal. 93, where the court made certain statements with respect to the constitutionality of section 32 of the Practice Act. The particular provision was that in an action against "defendants jointly indebted upon a contract," where summons was served on one or more, but not all of them, the judgment might be enforced against "the joint property of all." The court was of the opinion that to take even the joint interest in property of a defendant not served was a denial of due process of law. It may be observed that the case deals with section 32 and not section 656 of the Practice Act. Section 32 now appears, without the provision commented upon, as section 414 of the Code of Civil Procedure. In Davidson v. Knox, 67 Cal. 143, 7 P. 413, it was said that this provision was eliminated as a consequence of the declaration in Tay v. Hawley. But no similar change was made when section 656 of the Practice Act became section 388 of the Code of Civil Procedure, and there is an obvious and decided difference between an attempt to bind the joint property of *joint debtors under a contract*, and that of *members of an association.* Whether the conclusion of the court in Tay v. Hawley as to joint debtors is correct, is a question which does not bear upon the problem involved in the instant case, though it may be remarked in passing that the case apparently stands alone in the United States in its expressions on this point. Warren, Corporate Advantages Without Incorporation, p. 243. Moreover, the facts of the case did not even present the problem discussed by the court, for only one defendant was involved, and he was served with process. The court made this clear when it said (39 Cal. 97): "This case might, perhaps, have been disposed of without noticing the question. * * *"

The validity of section 388 has not been directly passed upon in any case that we have found in our reports, although it has been frequently applied, as will hereinafter appear. A study of its origin and purpose should, however, remove any doubts which may have existed. For a long time the established rule was that in the absence of statute, an unincorporated association could not sue or be sued in its common name; all the members thereof had to appear in their own names as parties plaintiff or defendant. The basic reason was that the association was not, in the eyes of the law, a legal unit or entity, and had no legal capacity to become a party to an action. Baskins v. United Mine Workers, 150 Ark. 398, 234 S. W. 464; Karges Furniture Co. v. Amalgamated Woodworkers' Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; St. Paul Typothetae et al. v. St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695; Warren, Corporate Advantages Without Incorporation, pp. 542, 668; Wrightington, Unincorporated Associations (2d Ed.) pp. 136, 425; Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L. J. 383; 5 C. J. 1365, 1369. The difficulty was only one of procedure, and the objection was purely technical. The liabilities or rights of the members were in no way involved, and were not, in theory, impaired by the operation of the rule. They might have brought actions if they all joined as plaintiffs, and they might have been held to any liability imposed upon them by law, if sued and served individually. But where associations with large membership were involved, the operation of the rule frequently had inconvenient and unjust consequences, and various exceptions came to be recognized. Thus, it is generally held that failure to raise the question of capacity is a waiver of the objection. And in suits in equity, courts have taken jurisdiction over all of the association members, though not all were made parties to the action, on a theory of representation. Likewise, where statutory recognition of the association as an entity has been found, suits have been permitted without any specific statute on the right to sue. See United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 390, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; Warren, supra, pp. 664, 669; Sturges, supra, 33 Yale L. J. 383; Dodd, Dogma and Practice in the Law of Associations, 42 Harv. L. Rev. 977, 1001.

The many inconveniences of the rule were not wholly evaded by these exceptions, and statutes were widely adopted for the purpose of eliminating this procedural obstacle by permitting suits to be brought against the associates in the common or association name. In most instances, they did not give the association the right to appear as a *plaintiff*. These statutes dealt solely with the manner of bringing actions, and were not intended to effect any change in the substantive law. Members of associations had the same rights and were subject to the same liabilities as before, only now they could be sued by a less complicated and cumbersome process. The various state acts are classified and discussed in detail in Professor Warren's treatise. Corporate Advantages Without Incorporation, p. 542 et seq.

Such statutes, whenever subjected to constitutional attack, have been uniformly sustained, not only as to partnerships but as to other unincorporated associations, including those not organized for profit. United States Heater Co. v. Iron Molders' Union, 129 Mich. 354, 88 N. W. 889; Appeal of Baylor, 93 S. C. 414, 77 S. E. 59; F. R. Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 A. 938. See, also, Sugg v. Thornton, 132 U. S. 524, 10 S. Ct. 163, 33 L. Ed. 447; Kittredge v. Grannis, 244 N. Y. 182, 155 N. E. 93; Esteve Bros. & Co. v. Harrell (C. C. A.) 272 F. 382; Thomas v. Nathan, 65 Fla. 386, 62 So. 206; Brooks & Ellis v. McIntyre, 4 Mich. 316; Wrightington, Unincorporated Associations, pp. 137, 436; note, 20 Harv. L. Rev. 58. The court, in United States Heater Co. v. Iron Molders' Union, supra, spoke briefly and to the point when it said (129 Mich. 354, 88 N. W. 893): "The law deals with conditions as they exist. It recognized that there may be unincorporated voluntary associations, clubs, and societies in this state * * * and also that it may be necessary or desirable to make them defendants in an action at law or proceeding in chancery. * * * It is for the legislature to determine who may sue and be sued, so long as it does not interfere with vested rights or deny any remedy. 'As a general rule, every state has complete control over the remedies which it offers its suitors in its courts. * * * And any rule or regulation in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation.' Cooley, Const. Lim. (6th Ed.) 442."

[5] In California, section 388 has been frequently applied without any questioning of its validity. The leading case is Artana v. San Jose Scavenger Co., 181 Cal. 628, 185 P. 850, 851, which involved an action against a partnership in its common name, and the court said that a partnership was, for the purposes of the statute, "regarded as a legal entity distinct from its members." In Armstrong v. Superior Court, 173 Cal. 341, 159 P. 1176, the court briefly expressed the view that it was applicable to a labor union. A number of well-considered cases, hereinafter discussed, have dealt with its application to unincorporated associations of various kinds. They have all tacitly recognized the validity of the statute. Whether, for the purpose of the suit, the *unincorporated association* is to be considered an entity, or whether the statute merely permits an action to be brought against the *associates* in the name of the asso-

ciation, is a point upon which the decisions from other jurisdictions are not in agreement. In California, the entity theory has been established by a number of decisions. Artana v. San Jose Scavenger Co., supra; John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 590, 117 P. 690, 122 P. 835; Craig v. San Fernando Furniture Co., 89 Cal. App. 167, 264 P. 784; Ferry v. North Pacific Stages et al. (Cal. App.) 296 P. 679; see, also, Gardiner v. Eclipse Grocery Co., 72 Mont. 540, 234 P. 490; Brotherhood of Railroad Trainmen v. Cook (Tex. Civ. App.) 221 S. W. 1049; Warren, supra, p. 249 et seq. We think that it was unquestionably competent for the legislature to enact section 388, and that it is perfectly consistent with due process to provide that jurisdiction over an association doing business shall result from service upon one or more of its members. So far as constitutionality is concerned, we see no distinction between such a statute applied to partnerships and to other unincorporated associations. Const. art. 1, § 13.

[6] We thus arrive at the problem of construction. We must determine whether the provisions of section 388 apply to the Los Angeles Stock Exchange. In brief, the question is whether the association transacts business.

The work of the Los Angeles Stock Exchange was described in the affidavits and exhibits filed with the trial court. The record before us is somewhat meager, but it appears to cover the important facts. From this record we learn that the exchange is a voluntary unincorporated association of about sixty members, who pay dues to the association for the privilege. The personnel of the membership is constantly changing. The exchange functions through trustees elected annually by the members. Members have no interest in the property of the association prior to its dissolution. The purposes of the exchange, set forth in the constitution and by-laws, are, in part, to furnish rooms, and other facilities for the transaction of their business by its members, as brokers; to operate a general stock exchange for the listing, calling, trading in, buying, and selling of stocks, bonds, and securities of all kinds, and for the sale and transfer of membership rights and privileges; to conduct a clearing house for the proper completion of any purchases or sales and the proper transfer and delivery of shares of stock, bonds and securities; to develop and extend the market for stocks, bonds, and securities; to borrow and loan money, give and take security therefor, and to acquire by purchase or otherwise, own, hold, lease, enjoy, sell, convey, and otherwise deal in and with real estate and interests therein and personal property; and generally to do any and all things necessary and proper in the conduct of the "business" and in the carrying out of the purposes of the association. In pursuance of these objects, property of considerable value has been acquired by the exchange, title to which is vested in the trustees. It appears that it has organized and controls "Los Angeles Stock Exchange Building Corporation," which was, at the time of this action, constructing an office building in Los Angeles, for the occupation of which rentals are to be charged and collected by the corporation. This and other activities are not limited to dealings between members. Thus, an escrow department is maintained, which is available to outsiders transferring securities upon payment of the required fees. A charge is made to the corporations whose securities are listed on the exchange. Memberships are sometimes sold by the association. An insurance fund is maintained for members. Through these various means the exchange has collected and expended large sums of money, and now has, according to an affidavit on file with the trial court, an accumulated surplus of over a million dollars.

The above description sufficiently indicates the nature of the association involved herein. In its organization it is similar to other stock exchanges, since practically all were modeled after the New York Stock Exchange. The nature of such organization has been described in a number of cases. See, generally, Belton v. Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495; Wilson v. Commercial Telegram Co. (Sup.) 3 N. Y. S. 633; People v. Feitner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698; Citizens' National Bank v. Durr, 257 U. S. 99, 42 S. Ct. 15, 66 L. Ed. 149; Swift v. San Francisco Stock & Exchange Board, 67 Cal. 567, 8 P. 94; Clute v. Loveland, 68 Cal. 254, 9 P. 133; Hassey v. Ruggles, 30 Cal. App. 19, 156 P. 989; Lowenberg v. Greenebaum, 99 Cal. 162, 33 P. 794, 21 L. R. A. 399, 37 Am. St. Rep. 42; Meyer, The Law of Stockbrokers and Stock Exchanges, p. 37. But a glance at the earlier cases shows that much of the activity we find in the modern exchange is newly developed, and the old view of the institution as being merely a place where the members met to transact their business is far from correct today. For this and other reasons which will hereinafter appear, these cases are of little aid in dealing with the precise question before us. Our inquiry must necessarily extend to unincorporated associations generally. And at the outset, it will be well to bear in mind the basic contention of petitioner, namely, that section 388 was designed to apply only to trading associations, engaged in some business for profit, the members of which incur joint liability in the transaction of the business, and that the stock exchange engages in no business, the business which goes on under its direction being solely the business of the individual members.

The decision upon which petitioner most strongly relies is Swift v. San Francisco Stock & Exchange Board, 67 Cal. 567, 8 P. 94, 97, supra. In that case a suit was brought against the defendant association under section 388, and the lower court found that the exchange was not an association engaged in business. Upon appeal, Mr. Justice McKee expressed his approval of the finding as follows: "* * * It is unquestionable that the main objects of the association are the establishment of a mart for the sale and purchase of stocks and exchange by the members for their individual gain or loss, and the creation of a trust fund for the benefit of surviving wife or children, etc., of deceased members. * * * The collection of these fees, fines, or dues does not constitute a business in which the members participate in the way of profit or loss as partners or otherwise. * * * There are no profits earned to be divided among its members, nor are there any losses to be borne arising out of the acts of the joint body. * * * I therefore think that the acts performed by the association in carrying out the purposes for which it was established are not done in the transaction of a business carried on in the name of the association for the profit or loss of its members. * * * But all these things, although in the nature of business, do not in themselves constitute a business for the transaction of which the members have associated themselves in the name of the association. They are merely incidental to the primary objects of the association."

Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce, 34 Cal. App. 37, 166 P. 856, 857, is another case involving a suit against an unincorporated association, and contains similar language: "The association in this case was not one from which the members derived any specific individual profit, or profit different from that which would accrue to the municipal community. Its purpose was to promote the common welfare, and it had no 'business,' in the sense of being engaged in a private commercial enterprise."

In Cuzner v. California Club, 155 Cal. 303, 100 P. 868, 869, 20 L. R. A. (N. S.) 1095, a suit was brought against the defendant, a social club, by a member thereof, to enjoin the selling of liquor in its clubrooms as a violation of an ordinance requiring the licensing of persons "conducting, managing or carrying on the business of a retail liquor dealer." An injunction was refused on the ground that the defendant was not engaged in that "business." After describing the organization and pointing out that the privilege was confined to members and their guests, and that the profits were used only for the social purposes of the club, the court said (page 311 of 155 Cal., 100 P. 868, 871): "* * * In its transactions with its members in the carrying on of the clubhouse looking simply to the giving to them such privileges in the property devoted to bona fide club purposes as they are all, in common, entitled to under the constitution and rules of the club, it is not engaged in business at all in the commercial or trade sense, as ordinarily understood."

St. Paul Typothetae et al. v. St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695 (quoted approvingly in Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce, supra), was an action by one unincorporated association against another. The defendant was a labor union and the plaintiff was an employers' association. The court, construing the statute permitting suit in the common name, said (94 Minn. 351, 102 N. W. 727): "Its purpose was to authorize the courts to take jurisdiction over unincorporated associations engaged under a common name in some sort of business in which property is bought and sold, debts contracted—concerns owning and holding property, and incurring pecuniary liability. * * *"

The foregoing decisions are the strongest that have been found in support of petitioner's contention. To them may perhaps be added the case of Lowenberg v. Greenebaum, 99 Cal. 162, page 164, 33 P. 794, 795, 21 L. R. A. 399, 37 Am. St. Rep. 42, which says of the San Francisco Stock Exchange: "* * * It does not itself do any stock business, but its purpose is to afford facilities for its members doing such business, each individually for himself." Petitioner cites also the cases of Hopkins v. United States, 171 U. S. 578, 19 S. Ct. 40, 43 L. Ed. 290, and People v. Feltner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698.

An examination of these decisions shows that they are not all concerned with the power to sue unincorporated associations, and those which are not tend rather to confuse than to clarify the issue before us. The word "business" is a broad term which may be variously interpreted. See Easterbrook v. Hebrew Ladies' Orphan Society, 85 Conn. 289, 82 A. 561, 41 L. R. A. (N. S.) 615. This is made clear by the case of Cuzner v. California Club, supra. The holding was simply that the activities of the club did not constitute the carrying on of business as a retail liquor dealer, within the meaning of an ordinance imposing a tax upon such business. Moreover, Mr. Justice Angellotti uses language which is, we think, quite damaging to petitioner. He says (page 311 of 155 Cal., 100 P. 868, 871): "A bona fide social club, if permitted by its articles of incorporation or association, may, of course, so engage in business, either by transactions with its members, or members of the public, as, for instance, by *letting for a consideration rooms* not used for the ordinary purposes of the clubhouse, or by *engaging in some outside enterprise for the purpose of realizing profits to be devoted to club purposes;* and, so far as it does such things, *even incidentally* for the purpose of realizing profit to be devoted solely to club purposes, it would be *engaged in business in the commer-*

cial sense as fully as any person could be." (Italics ours.)

The case of Lowenberg v. Greenebaum, supra, held that the seat of a member of the San Francisco Stock Exchange was not taxable property. The same holding was made in People v. Feitner, supra. Hopkins v. United States, supra, held that the Kansas City Live Stock Exchange was not engaged in interstate commerce within the meaning of the federal regulatory statute. On the other hand, Citizens National Bank v. Durr, 257 U. S. 99, 42 S. Ct. 15, 66 L. Ed. 149, held that the state of Ohio could levy a property tax on a resident, based upon his ownership of a membership in the New York Stock Exchange; and Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. Ed. 839, held that the plaintiff, an incorporated grain exchange, doing no buying or selling of grain on its own behalf, was nevertheless conducting "a business affected with a public national interest" and subject to national regulation as such. In State ex rel. Griffith v. Knights of the Ku Klux Klan, 117 Kan. 564, 232 P. 254, 37 A. L. R. 1267, the defendant, a corporation with avowed benevolent and social purposes, was held subject to ouster as a foreign corporation doing business in the state. The same result was reached in Knights of Ku Klux Klan v. Com., 138 Va. 500, 122 S. E. 122. Pacific Typesetting Co. v. International Typographical Union, 125 Wash. 273, 216 P. 358, 360, 32 A. L. R. 767, held that the defendant association, a labor union, the purpose of which was to secure better hours and working conditions for its members, was when actively carrying out this purpose doing business within the state. In re Tidewater Coal Exchange (C. C. A.) 280 F. 638, held that a commodity exchange was an "unincorporated company" within the meaning of the Bankruptcy Act, and could be adjudicated a bankrupt. The court, after a discussion of its activities, decided that although it did no trading itself, it was nevertheless engaged in business. Wrightington (Unincorporated Associations, p. 294) remarks that the opinion in the Tidewater Coal Exchange Case "implies the existence of a distinction between non-profit associations which are *adjuncts of commercial enterprise* and those whose functions are charitable, religious, educational or social," and that "for purposes of statutory regulation the distinction here foreshadowed will prove helpful." This brief review of cases discussing the general meaning of "business" emphasizes the necessity of construing our procedural statute in the light of the purpose of its enactment. See Superior Oil & Refining Syndicate v. Handley, 99 Or. 146, 195 P. 159; Dimond v. Minnesota Savings Bank, 70 Minn. 298, 73 N. W. 182.

Of the above-mentioned cases, even those which deal specifically with the power to sue an association do not, after careful study, stand as controlling authorities. Swift v. San Francisco Stock & Exchange Board, supra, was concerned with an action by executors of the estate of a deceased member of the exchange to recover a sum of money provided as part of a system of insurance for members. For reasons not material here, the court decided that the executors were not entitled to recover, and Mr. Justice McKee's discussion of the power to sue the association was unnecessary, as appears from the brief concurring opinion by the other members of the court: "We concur in the judgment, on the ground that the executors of the deceased, Swift, cannot sustain the action. Whether or not any other person or persons can do so, it is not necessary, we think, to decide." Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce, supra, is still less convincing. The objects of the defendant association were "to secure attractions and public entertainments, to foster and encourage commerce, stimulate home trade, secure manufactures, improve and beautify streets and parks, attract tourists, induce immigration, and to obtain the organized efforts of our citizens for the better promotion of the best interests of Redondo Beach." Assuming that these purposes can in any way be compared with those of the Exchange, there is presented the same situation as in the Swift Case; the power to sue was not an essential issue. The court said (page 41 of 34 Cal. App., 166 P. 856, 857): "The first proposition discussed is determinative of the appeal. * * *" St. Paul Typothetae et al. v. St. Paul Bookbinders' Union, supra, upon which the preceding case leans heavily, is very illuminating, both on its facts and in its discussion. The court said (94 Minn. 351, 102 N. W. 726): "The Typothetae is not a business association within the proper meaning of the term. * * * Its exclusive occupation, as disclosed by the complaint, is that of promoting and protecting the persons, firms, and corporations composing it in controversies with their employees. * * * So far as the complaint discloses, *it has no capital stock and no property.* The union is an association of employees or workmen organized for similar purposes; *it has no capital stock or property.* * * *" The court later says, significantly (94 Minn. 351, 102 N. W. 728): "The defendant union is wholly unlike the associations involved in Cornfield v. Order Brith Abraham, 64 Minn. 261, 66 N. W. 970, Steinert v. United Brotherhood of Carpenters & Joiners of America, 91 Minn. 189, 97 N. W. 668, and Taylor v. Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684. The associations there before the court were engaged in the *business of insuring their members*, a distinct and well-established line of business. * * *" (Italics ours.)

Neither in these nor in other cases which we have found is there any unequivocal holding, necessary to the decision of the case, to the effect that an association with objects and activities similar to those of the Los Angeles Stock Exchange, cannot be sued in its association name. We are not, however, limited to this negative treatment of the question, for there are several pronouncements which suggest the propriety of such a suit, two of which are by the courts of this state. In Camm v. Justice's Court, 35 Cal. App. 293, 170 P. 409, 411, an action on a book account was brought against Sonoma County Good Roads Club, an unincorporated association, the purpose of which was the promotion of public interest in the improvement and maintenance of the streets, roads, and highways of Sonoma county. It is true that the complaint alleged that it was "doing business," and that there was no record before the court containing facts to contradict the allegation; so the discussion by the court is, perhaps, not more necessary to the decision than in the Swift and Warman Steel Casting Co. Cases. Nevertheless we find the language persuasive. The court said: "* * * We do not think it was necessary, to authorize the maintenance of the action against the members of the club by their common name, to show by the complaint the specific purpose or purposes for which the members of the club had so associated themselves together, nor is it important whether it was a voluntary association and not organized and conducted for pecuniary profit to its projectors or members. Armstrong v. Superior Court, 173 Cal. 341, 342, 159 P. 1176. By this we mean to say that section 388 has reference to an association of two or more persons who thus band together for the purpose of transacting as a single body *any kind of business, whether for profit to themselves or for charitable or philanthropic purposes*, and that, where persons so associated, to effectuate the specific objects of their association and for the benefit thereof, create liabilities against themselves as such associates, such persons, as such associates, may be proceeded against by their common name in any action to enforce the liabilities so created." (Italics ours.) The later case of Herald v. Glendale Lodge, 46 Cal. App. 325, 189 P. 329, contains what we believe to be the most satisfactory discussion of this subject, and reaches a conclusion which appears to us to be eminently sound and reasonable. A member of the defendant lodge brought an action to enjoin it from serving liquor in violation of an ordinance. Although the case might perhaps have been decided on the theory of waiver by general appearance, the court did not place its decision solely on that ground. Mr. Justice Sloane first reviewed the prior conflicting decisions in this state, and then said (page 330 of 46 Cal. App., 189 P. 329, 331): "We are inclined to hold with the ruling in Camm v. Justice's Court, 35 Cal. App. 293, 170 P. 409. We see no sufficient reason for restricting section 388 of the Code of Civil Procedure to associations formed for commercial business. As already pointed out, the term 'business' has a common and general application to all sorts of enterprises which engage people's attention and energies. When a number of persons are associated under a common name in an undertaking in which the associates incur obligations for which they are legally liable, why should they not be sued in the common name which they have adopted, whether it is a money-making concern or otherwise? Indeed, the question of profit is the only distinction that exists between the two classes of associations suggested. If a number of persons were associated together, furnishing to their patrons for pay precisely the same accommodations, entertainment and service that the Elks' lodge furnishes its members, there would be no question but that they were engaged in a 'business.' Why should a different rule of liability exist because the associates happen to contract their liabilities in an enterprise in which they are catering to themselves? The word 'business,' in its broad sense, embraces everything about which one can be employed; and in its narrower sense it signifies a calling for the purposes of livelihood or profit. Easterbrook v. Orphan Society, 85 Conn. 289, 41 L. R. A. (N. S.) 615, 82 A. 561. Where the sense in which the word is used is open to construction, it should be accepted with the meaning most in harmony with the context."

One other decision seems worthy of quotation here. In Fitzpatrick v. International Typographical Union, 149 Minn. 401, 184 N. W. 17, the defendant union, an unincorporated association, was sued, and service of process was made upon a member thereof. The court considered its earlier holdings in St. Paul Typothetae v. St. Paul Bookbinders' Union, supra, and Taylor v. Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684, and decided that the latter case was controlling. In doing so, it reversed the judgment of the trial court, which had made an order vacating the service. The opinion states (149 Minn. 401, 184 N. W. 18): "* * * We find that its activities embrace many having no necessary connection with its activities as a union and quite apart from 'the promotion of the interests and welfare of their members. * * *' The constitution provides for dues. It provides for a union printers' home. It provides for an old age pension fund. It provides for death benefits. * * * The home is in the name of a distinct corporation. The defendant functions not only as a labor union, having the welfare of its members as trade unionists in view, but as an organization which through dues coming from its members gives old age pensions, death benefits, and a home for eligible infirm and invalid members."

The conclusion to which we are led by these authorities is that the Los Angeles Stock Exchange is an association engaged in business within the meaning of section 388 of the Code of Civil Procedure. It is unquestionably engaged in business in the broad sense of the term, and, we believe, in any other reasonable sense of the term as well. It is, of course, true that the main business transacted in its quarters is the business of others, the individual members. We might even concede, perhaps, that the business transacted by the exchange is incidental to its main purpose, and that its main purpose is not the transaction of business. Such is the contention that petitioner makes. But that these activities are incidental in no way alters the fact that they constitute the doing of business. There is nothing in the statute which requires that the associates be exclusively engaged in business, or in any one business to the exclusion of all others. It is sufficient if they associate together for the purpose of transacting business. Whether they have additional noncommercial purposes is immaterial. This is what we conceive to be the meaning of the statute, and the prevailing view of the authorities.

We have already summarized the purposes and activities of the exchange. It has sold seats, charged and collected listing fees, acted as escrow holder, and from the proceeds of its enterprises is constructing a building to bring in more revenue. Petitioner points out that these profits do not accrue to the members, and that they have no rights in any of the property of the association until dissolution. This statement is undeniably true as far as it goes, although there seems to be no reason why the members, at any time, could not agree to dissolve the association, in which case they would divide these assets. But apart from this possibility, we differ with petitioner as to the conclusion to be drawn from this statement. The question is not whether the members secure for themselves any profits, present or prospective, but whether there is a business. Here we have a business, and one which earns large profits. If they are not the profits of the members individually, they must be the profits of the association itself, and such is, indeed, the fact. No amount of theoretical argument can escape the fact that money is being received for services rendered, and that the money so received and the property purchased with it is held by trustees for the association.

[7] Only by disregarding the normal meaning of its language could we adopt the narrow interpretation of section 388 which petitioner urges. But the history of the statute, already discussed, suggests the opposite interpretation. Since it establishes no substantive liability, and merely provides a convenient method of suit to enforce an existing liability, there is certainly no reason to restrict its application to any one class of associations doing business. It abrogates a rule unsuited to present conditions, and should receive a liberal construction.

We have given due consideration to the argument of petitioner that the use of the words "joint liability" was intended to limit suits brought under the statute to those against associations, the members of which were jointly liable for its obligations; and that such liability only attaches to the members of a "trading association." The case of McCabe v. Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204, cited to this point, held that the members of a "law and order association" were not liable for certain debts contracted by the president. The case is doubtless correct in its statement of the principles upon which liability might or might not be enforced in the situation before the court, but it does not deal with the question of suit, and hence can hardly be of assistance in construing our statute. Moreover, we are not sure that we perceive the relevancy of the subtle distinction between a "trading association" and one transacting business, with respect to the problem before us here. We may concede that the statute was enacted so that suits might be brought to enforce an established liability, and that it does not contemplate the bringing of actions where no liability exists. In this it is similar to every other statute whch provides a remedy for the enforcement of a right. But that the court should test this procedural statute in each case, by attempting to determine in advance of a trial whether a joint liability actually exists on the facts, was plainly not the legislative intention. It would be highly improper for us to express an opinion as to the liability of the associates under the facts and the law. That is a matter upon which there is neither evidence nor proper pleadings before us. Of course, if the associates engage in business under a common name, they would normally incur joint liabilities in the conduct of that business. But that issue must first be presented to the trial court. In determining the question of jurisdiction, there is no need for us to decide anything except that they are so engaged in business. As one court bluntly remarked: "Whether the plaintiff can get anywhere with his case does not interest us; or whether his judgment, if he gets one, will be of use." Fitzpatrick v. International Typographical Union, 149 Minn. 401, 184 N. W. 17, 19, supra; see, also, Embree v. McLennan, 18 Wash. 651, 52 P. 241.

The application by petitioner for a writ of prohibition on behalf of Los Angeles Stock Exchange is denied.

We concur: **CURTIS, J.; SEAWELL, J.; PRESTON, J.; SHENK, J.**

DOUGERY v. BETTENCOURT et al.*

Sac. 4411.

Supreme Court of California.
Aug. 31, 1931.

Rehearing Granted Sept. 28, 1931.

1. Levees and flood control 🔑28.

Reclamation district tax deed *held* valid as against persons not subsequent purchasers or incumbrancers, notwithstanding recorder placed duplicate sale certificate in desk drawer and entered sale memorandum in "Irrigation District Tax Sales" certificates book (Pol. Code, § 3480; Civ. Code, §§ 1170, 1213).

While neither the filing of the instrument in the drawer nor the entry of the memorandum constituted "recordation" in its ordinary meaning of copying the instrument in the proper book, Pol. Code, § 3480, providing that the treasurer shall execute to each purchaser, including himself as trustee, a certificate of sale, and shall record a duplicate in the county recorder's office, is indefinite in its requirements, and it can hardly require a literal compliance, there being no indication of what book shall contain the record, nor is the county of recordation specified.

[Ed. Note.—For other definitions of "Record," see Words and Phrases.]

2. Mortgages 🔑154(4).
Vendor and purchaser 🔑231(6).

Instrument recorded in wrong book would not constitute constructive notice to subsequent purchasers or incumbrancers (Civ. Code, § 1213).

3. Levees and flood control 🔑28.

Purchaser of reclamation district tax deed before 1927 statutory amendment took free of existing irrigation district lien, but not free of future assessments under outstanding bond issue (Pol. Code, § 3480).

Pol. Code, § 3480, at the time of the sale, provided that the county treasurer, after one year, should execute a deed to the purchaser conveying the property free of incumbrance except state, county, and municipal taxes, and the unpaid balance of the assessment, which clearly covered irrigation district tax liens already assessed.

4. Taxation 🔑727.

Legislature can authorize sale of tax titles free of irrigation district's assessment lien (Pol. Code, § 3480).

5. Waters and water courses 🔑230(6).

Irrigation district's bond issue is general obligation upon all district lands, but lien upon specific property arises only after assessment.

In Bank.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by James C. Dougery against Frank J. Bettencourt and others. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

Joseph E. Bien, and Werner Olds, both of San Francisco, and Duard F. Geis, of Willows, for appellant.

Hankins & Hankins, of San Francisco, for respondent Glenn-Colusa Irr. Dist.

Sans & Hudson, of Watsonville, and W. T. Belieu, of Willows, for respondent Frank J. Bettencourt.

Harry Bell, of Willows, for respondent David E. Hughes.

PER CURIAM.

This is an action to quiet title to a tract of land of about 215 acres situated in Glenn county. Plaintiff's claim of title is based upon a tax deed of J. J. Ossenbriggen, county treasurer of Colusa county, as trustee of the bond fund of reclamation district 2047. The record shows that the said reclamation district was organized in 1920, to include lands in Glenn and Colusa counties, and pursuant to its statutory authority levied an assessment on the lands, including the tract involved herein. Bonds were issued and sold, and to meet the interest due thereon an installment of the assessment was called. For failure to pay this installment the tract was placed on sale on June 29, 1926, and, no bidders appearing, the county treasurer sold it to himself as trustee. Thereafter, upon the expiration of the one-year period of redemption, he resold it to plaintiff and executed and delivered a deed to him on August 12, 1927, which was recorded in Glenn county on August 13, 1927. This action to quiet title was subsequently brought. The defendants are Frank J. Bettencourt, the original owner of the land; David E. Hughes, holder of a mortgage on it; and Glenn-Colusa Irrigation District. The last-named defendant claims liens originating in three assessments on 80 acres of the land which is included within its boundaries.

The lower court found against the claim of plaintiff and rendered its judgment, decreeing that defendant Bettencourt was the owner of the property, subject to the Hughes mortgage, but requiring said defendant to reimburse plaintiff in the sum of $299.03, paid by the latter to the county treasurer as the purchase price thereof, and any other sums paid for taxes or assessments, together with interest. The said sums to be repaid to plaintiff are made a lien upon the property superior to the mortgage.

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*For subsequent opinion see 6 P.2d 499.

[1] The ground upon which the court drew its conclusion as to the invalidity of the deed was stated as follows: "There was not recorded in the office of the County Recorder of the County of Glenn, State of California, being the county in which said real property is situate, any duplicate or copy of the certificate of sale to the purchaser, as required by the provisions of section 3480 of the Political Code of the State of California." The correctness of this conclusion is the chief question on this appeal.

Section 3480 provides that the treasurer "shall execute to each purchaser, including himself as trustee, a certificate of sale, and shall record a duplicate in the county recorder's office." In this case the treasurer issued such a certificate of sale to himself, and on July 19, 1926, deposited a duplicate thereof in the office of the county recorder of Glenn county. The recorder wrote upon it the words "Recorded at request of J. J. Ossenbriggen," together with the time. The instrument was then placed by the recorder in a desk drawer, and a memorandum of the sale was entered in a book devoted to certificates of "Irrigation District Tax Sales." Neither the filing of the instrument in the drawer nor the entry of the memorandum constituted recordation in its ordinary meaning of copying the instrument in the proper book. See Cady v. Purser, 131 Cal. 552, 63 P. 844, 82 Am. St. Rep. 391. Nevertheless, we do not think that this fact invalidates the deed. The statute can hardly require a literal compliance, since it is indefinite in its requirements. There is no indication of what book shall contain the record, nor is the county of recordation specified. The county recorder accepted such certificates and did note them in a book which was open to inspection, and likewise kept the documents themselves available. In the absence of statutory direction as to how and where to record, we cannot hold that the circumstances disclose a fatal defect in the proceedings.

[2] Moreover, section 1170 of the Civil Code provides: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record." Plaintiff fully complied with the provisions of this section. It has been held that the error of the recorder in copying an instrument so deposited in the wrong book does not make the recordation wholly ineffective. Watkins v. Wilhoit, 104 Cal. 395, 38 P. 53. Of course, an instrument thus improperly recorded would not constitute constructive notice of its contents under section 1213 of the Civil Code, but this section is for the protection of subsequent purchasers or incumbrancers, and cannot be invoked by others. Watkins v. Wilhoit, supra; Cady v. Purser, supra. We find nothing in section 3480 of the Political Code to suggest the proper content of the certificate or the purpose of its recordation, and defendants Bettencourt and Hughes are not subsequent purchasers nor incumbrançers. Doubtless it was intended in some way to give notice to the owner (see Lewis v. Tulare, etc., Dist., 56 Cal. App. 52, 204 P. 421), but that intention does not necessitate a compliance with the terms of section 1213 of the Civil Code. Particularly is this true in a case like the present where the absence of a statutory direction makes it impossible to determine what type of record is contemplated.

[3-5] The only other point which requires discussion is the effect of the sale on the rights of the defendant irrigation district. At the time of the sale section 3480 provided that the treasurer, after one year, should execute a deed to the purchaser conveying the property "free of encumbrance except state, county and municipal taxes, and the unpaid balance of said assessment." The purpose of such a provision was to attract buyers at tax sales, and its language clearly covers liens such as are claimed by defendant irrigation district. Several sections of the Political Code have been amended to include within the exceptions taxes of irrigation, conservation, water storage districts, etc. (see Pol. Code, §§ 3466, 3787), but no such change was made in section 3480 until 1927 (St. 1927, p. 1449, § 2), after the sale in question took place. The lien of said defendant district attached prior to that of the reclamation district, and, under the express provision of the statute, was wiped out. The Legislature has power to make such a provision. California Loan & Trust Co. v. Weis, 118 Cal. 489, 50 P. 697. Plaintiff's contention that this also discharges the land from liability for all future assessments of defendant district under its outstanding bond issue is unaccompanied by any citation of authority, and is, on principle, untenable. The bond issue is a general obligation upon all lands in the district, but a lien upon a specific piece of property arises only after an assessment has been levied. See Clark v. Demers, 78 Mont. 287, 254 P. 162. The only effect of the delivery of the deed was, we think, to discharge existing liens which attached by the levy of prior assessments.

The judgment is reversed, with directions to the trial court to enter its decree quieting the title of plaintiff against the claims of defendants.

213 Cal. 474

WOLPERT v. GRIPTON et al.

Sac. 4391.

Supreme Court of California.
Aug. 27, 1931.

Rehearing Denied Sept. 24, 1931.

1. Appeal and error 🔑907(3).

On appeal from judgment roll alone, evidence must be deemed sufficient to sustain findings.

2. Chattel mortgages 🔑84.

Unrecorded chattel mortgage is good as between parties thereto (Civ. Code, §§ 2957, 2959).

3. Chattel mortgages 🔑197(1).

Mere general creditor of chattel mortgagor cannot attack validity of unrecorded chattel mortgage (Civ. Code, §§ 2957, 2959).

4. Bankruptcy 🔑184(2⅛).

Bankruptcy trustee of mortgagor being placed in position of lien creditor may attack alleged void chattel mortgage (Civ. Code, §§ 2957, 2959, Bankruptcy Act [11 USCA]).

5. Chattel mortgages 🔑192.

One month's delay in recording chattel mortgage in county where property was situated *held* not to affect validity of mortgage, where none of creditors' claims were created before recordation (Civ. Code, §§ 2957, 2959, 2973).

6. Chattel mortgages 🔑192.

Unrecorded chattel mortgage is not void as to those not acquiring rights or becoming creditors of mortgagor either prior to or during period of time between execution and recordation (Civ. Code, §§ 2957, 2959, 2973).

7. Chattel mortgages 🔑192.

Five months' delay in recording chattel mortgage in county of mortgagor's residence *held* not to affect validity of mortgage, where creditors became such knowing of existence of mortgage (Civ. Code, §§ 2957, 2959, 2973).

8. Appeal and error 🔑931(1).

All intendments and presumptions are in favor of findings and judgment of trial court.

9. Bankruptcy 🔑304.

Finding that it was not true that none of creditors of chattel mortgagor had knowledge of existence of mortgages *held* to mean that creditors became such knowing of mortgages (Civ. Code, §§ 2957, 2959, 2973).

10. Bankruptcy 🔑298.

Failure of bankrupt's trustee of chattel mortgagor with full knowledge of facts to seek adjudication of validity of mortgages for period in excess of two years constituted laches under circumstances.

11. Equity 🔑72(1).

In addition to mere lapse of time, there must exist some circumstances from which defendant may be prejudiced or lapse of time must be sufficient that prejudice may be reasonably supposed to establish laches.

12. Equity 🔑67.

Laches is question of fact to be determined by consideration of all circumstances of each particular case.

13. Usury 🔑76, 80.

Provision for usurious interest *held* not to invalidate principal sum due or mortgage securing same.

In Bank.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Suit by F. C. Wolpert, trustee in bankruptcy, in the matter of the California Lumber Products Company, against Walter A. Gripton and others. Judgment for defendants, and plaintiff appeals. During pendency of case the defendant named died, and Dorothy L. Gripton, as executrix of the last will and testament of Walter A. Gripton, deceased, was substituted in his stead.

Affirmed.

Charles Kasch, of Ukiah, and John V. Filippini, of San Francisco, for appellant.

Keith C. Eversole, of Ukiah, for respondent.

WASTE, C. J.

[1] This is an appeal from a judgment in favor of the defendant Walter A. Gripton, a chattel mortgagee, and against plaintiff, the trustee in bankruptcy of the mortgagor corporation, in an action brought by such trustee to have certain chattel mortgages declared invalid, for an accounting, and for the return of the property covered by the chattel mortgages, or the value thereof. The cause was tried by the court sitting without a jury, and, the appeal being on the judgment roll alone, it must be assumed that the evidence, not now before us, is ample to sustain the findings of the court below.

A complete résumé of the findings seems necessary. Among other things, the court found that the insolvent corporation, whose principal place of business is in the city and County of San Francisco, was created and organized under the laws of this state on February 10, 1923; that 2,201 of its 2,329 shares of issued stock were issued to the defendant Claude D. Plum, who, with his wife and a named third person, constituted the board of directors of the corporation; that on May 5, 1923, the corporation and the respondent Walter A. Gripton entered into an unrecorded agreement in writing, wherein and whereby the latter agreed to loan and advance to the corporation the sum of $30,000 and, in the event the corporation needed further money, an additional $10,000, if and when requested, in consideration for which the corporation agreed to execute and deliver to the respondent its promissory note in the principal sum of $30,000, together with chattel mortgages as security therefor on its lumber mill, machinery, equipment, and all logs and lumber cut and manufactured by it; that, pursuant to the terms of said agreement, Gripton advanced and loaned $30,000 to the corporation, whereupon the latter did, on May 5, 1923, execute and deliver to respondent its promissory note in that sum, secured by two duly executed chattel mortgages on the personal property above described; that said two chattel mortgages were thereafter, and on June 5, 1923, duly recorded in the county of Mendocino, the situs of the property covered thereby, and were, on October 9, 1923, duly recorded in the city and county of San Francisco, the principal place of business of the corporation-mortgagor; that thereafter, and from time to time between July 5, 1923, and August 5, 1923, Gripton advanced and loaned to the corporation various additional sums aggregating $10,000, all of which future advances were also provided for and secured by the chattel mortgages theretofore executed and delivered; that in addition to the secured loans of $40,000, Gripton, between August 5, 1923, and September 27, 1923, advanced and loaned to the corporation various other and unsecured sums of money totaling $10,600; that from time to time, and as the loans were made, the corporation had duly executed and delivered to respondent its several promissory notes covering both the secured and unsecured loans; that on October 9, 1923, and with the consent and authorization of the corporation acting through its president and general manager, and not by reason of any fraud or conspiracy or attempt to secure a preference, Gripton peaceably and lawfully entered upon and took possession of the mortgaged property; that the agreement of May 5, 1923, wherein provision was made for the loans and evidences of indebtedness thereafter given and made, is valid, save and except a portion thereof relating to a certain bonus to be paid to respondent; that the notes and mortgages executed and delivered by the corporation pursuant to the terms of the agreement with Gripton are, and each is, valid as to the principal thereof, but not as to the interest therein provided for; that, at the time respondent entered upon and took possession of the mortgaged property, the corporation mortgagor was in default and respondent was acting solely to protect his security, and not by reason of any desire to secure a preference; that this present action, though purporting to be for the benefit of the corporation's creditors other than respondent, was in fact instigated by the defendant Plum, president and general manager of the corporation and its principal stockholder; that, with the exception of $3,535 paid in by the stockholders of the corporation, $1,464.13 received for lumber sold, and $15,782.42 advanced by unsecured creditors, the $50,000 advanced and loaned by Gripton to the corporation constituted its entire capital investment, assets, and operating resources up to and including October 9, 1923; that on said date, and solely by reason of the corporation's default, and under and pursuant to the terms of the agreement between the parties, the respondent, upon due notice, declared the principal of the loans due and payable, and on the following day noticed for sale the property covered by the chattel mortgages; that five days thereafter, and on October 15, 1923, an involuntary petition in bankruptcy was filed against the corporation, and the proposed sale under respondent's chattel mortgages was thereupon restrained until further order of the bankruptcy court; that on November 3, 1923, the corporation was duly adjudged a bankrupt; that at the time of the filing of the petition in bankruptcy the assets of the corporation did not approximate the amount of respondent's secured loan; that no equity, therefore, exists in favor of the corporation or its trustee in bankruptcy; that the restraining order remained in force from October 15, 1923, to August 28, 1925, during all of which time the trustee in bankruptcy represented to respondent that he would secure a purchaser for the property and would pay respondent the amount ($40,000) of his secured loan; that such payment was never made, whereupon the respondent, Gripton, on August 21, 1925, filed before the referee in bankruptcy his petition for leave to foreclose his chattel mortgages; that the plaintiff, as successor to the original trustee of the bankrupt corporation, resisted and opposed respondent's application, and the referee in bankruptcy thereafter made his order authorizing respondent's foreclosure of the mortgage liens, the order reciting the absence of any equity in the trustee by reason of the insufficiency of the mortgaged property to fully pay and discharge respondent's secured loans, and the expiration of approximately one and a half years without the trustee having secured a purchaser of the property at a sum equal to or in excess of respondent's lien upon the property; that on September 10, 1925, and upon due and legal notice, respondent caused all of the mortgaged property to be sold at public auction, and, being the highest and best bidder therefor, respondent himself bought in the property for the sum of $5,750, its reasonable worth, giving the corporation credit for this amount upon its promissory note for $30,000. The findings further recite that all of the respondent Gripton's transactions with the corporation, up to and including the foreclosure sale and buying in of the property, were had in good faith and without any intent or design to hinder, delay, or defraud the corporation's creditors; that all during respondent's possession of the property he has properly cared for and maintained it, paying all accrued taxes, etc.; that it is true that on November 3, 1923, the corporation was indebted to unsecured creditors in the sum of $15,782.42, and to employees in the sum of $8,410, all in addition to respondent's secured loan of $40,000 and his unsecured loan of $10,600, but that *it is not true* that any debts were contracted by the corporation between May 5, 1923, and June 5, 1923, and it is "not true that none of the creditors of said [corporation] had any knowledge of the existence of said chattel mortgages or either thereof or of any advances made by said Gripton [respondent]"; that at all of the times from October, 1923, to December, 1925, the predecessor of the appellant trustee "had full knowledge of each and all of the matters which are herein found as facts which occurred or existed prior to said 10th day of December, 1925, when and as the same occurred, and that such knowledge upon the part of said [predecessor trustee] was the reason that he instituted no proceedings during his said trusteeship for the purpose of recovering any of the property which is herein described." Upon these findings, the court concluded, as matter of law, that the agreement for the loans, together with the several notes and chattel mortgages executed and delivered pursuant thereto, are and each is valid as to the principal sum, but not as to the interest; that the respondent was not guilty of fraud, but at all times acted in good faith and without any design to hinder, delay, or defraud any of the corporation's other creditors; that the appellant trustee is guilty of laches; that respondent is the owner and entitled to the possession of the property sold upon the foreclosure of the chattel mortgages; and none of the corporation's acts constituted a preference. Judgment for respondent was accordingly entered, from which this appeal has been taken by the trustee, whose principal contention is that respondent's mortgages are void because of the delay intervening between their execution and recordation. Defendant Walter A. Gripton died since the entry of judgment, and Dorothy L. Gripton, executrix of his last will, has been substituted, and the title of the cause ordered amended accordingly.

[2-4] Our law provides that a mortgage of personal property is void as against creditors of the mortgagor unless it is recorded in the office of the county recorder of the county in which the mortgagor resides, if the mortgagor be a resident of this state, and in the county in which the property mortgaged is situate. Civ. Code, §§ 2957, 2959. However, since an unrecorded chattel mortgage is good as between the parties thereto, a mere general creditor of the mortgagor is not in a position to attack its validity. Loosemore v. Baker, 175 Cal. 420, 422, 166 P. 26; Lemon v. Wolff, 121 Cal. 272, 275, 53 P. 801. Only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing seizure of the property, can question its compliance with the formalities prescribed by the Code. Lemon v. Wolff, supra. In the case of Noyes v. Bank of Italy, 206 Cal. 266, 269–270, 274 P. 68, we held that under the Bankruptcy Act (11 USCA) a trustee in bankruptcy is placed in the position of a lien creditor, and is thus entitled to attack an alleged void mortgage, thereby enabling him to protect the interests of general creditors against invalid liens and unlawful transfers. There can, therefore, be no question as to appellant's right to prosecute an action of this character. His right of recovery, however, is dependent on matters to be presently considered.

The recordation of a chattel mortgage has been designed as a substitute for and the equivalent of the immediate delivery and continued change of possession made essential by section 3440 of the Civil Code to effect transfers of personal property in other cases. Ruggles v. Cannedy, 127 Cal. 290, 296, 53 P. 911, 59 P. 827, 46 L. R. A. 371. Recordation should, therefore, be had immediately upon execution, or as soon thereafter as practical, in order to give notice to and bind third parties, otherwise the mortgage is void as to those persons enumerated in section 2957, supra. Ruggles v. Cannedy, supra, page 298 of 127 Cal., 53 P. 911, 59 P. 827; Williams v. Belling, 76 Cal. App. 610, 245 P. 455. An unrecorded chattel mortgage, or one whose recordation has been unduly delayed, has been held to be void both as to antecedent creditors and those who became creditors of the mortgagor during the period of time between execution and recordation. Noyes v. Bank of Italy, supra, page 272 of 206 Cal., 274 P. 68; United Bank & Tr. Co. v. Powers, 89 Cal. App. 690, 694–695, 265 P. 403. However, sections 2957 and 2959, supra, are qualified by and are to be read with section 2973 of the same Code, which latter section provides, in part, that unrecorded mortgages of personal property "are nevertheless valid between the parties * * * and persons who, before parting with value, have actual notice thereof." In this connection, see Ronning v. Way, 18 Cal. App. 527, 530, 123 P. 615, and Old Settlers' Inv. Co. v. White, 158 Cal. 236, 240, 110 P. 922.

[6-9] The findings show that the recordation of the mortgages here assailed was delayed for a period of one month in the county where the property was situate, and for a period of five months in the county where the corporation mortgagor had its residence, assuming for present purposes that the principal place of business of a mortgagor corporation is its residence for purposes of recordation under section 2959, supra. Gallup v. Sac., etc., Drainage Dist., 171 Cal. 71, 74, 151 P. 1142; Wright v. Bundy, 11 Ind. 398. The one month's delay in the county where the property was situate does not affect the validity of the mortgages, for the reason that the court below found, and the appeal being on the judgment roll it must be assumed the finding is sustained by the evidence, that none of the claims of the other creditors of the corporation, whom the appellant trustee represents, had been created or had arisen prior to June 5, 1923, the date of recordation in Mendocino county, the situs of the property. We have already pointed out that, under the authorities, a chattel mortgage is not void as to those who did not part with or acquire any rights or become creditors of the mortgagor either prior to or during the period of time between execution and recordation. United Bank & Tr. Co. v. Powers, supra, page 694 of 89 Cal. App., 265 P. 403. Nor do we think the five months' delay in the county of residence is fatal to the validity of respondent's mortgages. Among other things, appellant's complaint alleges that the creditors of the corporation, other than respondent, were without knowledge of the existence of respondent's chattel mortgages, or of any loans or advances made by him to the corporation. This allegation is found to be untrue, the trial court declaring that it is "not true that none of the creditors of said [corporation] had any knowledge of the existence of said chattel mortgages or either thereof or of any advances made by [respondent]." All intendments and presumptions being in favor of the findings and judgment of the court below, the foregoing finding may fairly and reasonably be construed to mean that the other creditors of the corporation had become such well knowing of the existence of respondent's mortgages. Under section 2973, supra, and the cases construing that section, such actual notice of the existence of respondent's mortgages precludes the other creditors or their representative (the appellant trustee) from challenging their validity.

[10-12] There is a further and additional ground determinative of this appeal. The court below has found that the appellant is precluded from prevailing in this action by reason of laches. In this connection, it is found that from October, 1923, to December, 1925, a period in excess of two years, the original trustee (appellant's predecessor in office) had full knowledge of all the facts now relied on as a basis for the claim of invalidity in respondent's mortgages, and during all of that time had done nothing toward securing an adjudication of the question, other than causing the bankruptcy court to temporarily restrain respondent's threatened foreclosure of the mortgages. This action was not filed until April 9, 1926. Equity abhors stale claims. There is no hard and fast rule, either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. In addition to mere lapse of time, there must exist some circumstances from which the defendant may be prejudiced, or there must be such a lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed. Cahill v. Superior Court, 145 Cal. 42, 47, 78 P. 467. Laches is a question of fact, on the evidence, and must be determined by a consideration of all the circumstances of each particular case. Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516. It is a question to be determined primarily and very largely by the trial court, and an appellate court will not interfere with its discretion in this respect unless manifest injustice has been done, or unless its conclusion cannot reasonably be held to find support in the evidence. Suhr v. Lauterbach, 164 Cal. 591, 594, 130 P. 2; Pratt v. Pratt, 43 Cal. App. 261, 271, 279, 184 P. 956. As we have not the evidence before us in this case, we are not in a position to declare the trial court's finding and conclusion in this regard to be unwarranted. The circumstances disclosed by the findings are, in our opinion, sufficient to justify the application of the doctrine of laches to appellant's claim.

[13] The provision for a usurious rate of interest on the loans secured by respondent's mortgages does not affect the validity of the principal sum due or the mortgages securing the same. Haines v. Commercial Mortgage Co., 200 Cal. 609, 622, 254 P. 956, 255 P. 805, 53 A. L. R. 725. Moreover, no part of the principal sum or interest has ever been paid to the respondent. In this opinion we have given no consideration to the real property mentioned in the complaint, for in appellant's opening brief it is stated that the real property "is not any part of the subject matter of the present litigation."

The findings of fact set out at length in this opinion negative all claim of actual fraud. Walter A. Gripton advanced substantially all of the funds available to the corporation during the period of its solvency. He was never reimbursed. There is now owing to his executrix, the substituted respondent, approximately $44,850, which is undoubtedly uncollectible. To deprive the estate and respondent not only of this sum of money, but also of the meagre security the executrix holds therefor, would, under the circumstances disclosed by the findings, be highly inequitable. The conclusion of the court below is a proper one. Our examination of the appellant's briefs discloses nothing suggesting a different determination.

The judgment must be, and it is, therefore, affirmed.

We concur: PRESTON, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

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213 Cal. 535

PALMER v. WELLS FARGO BANK & UNION TRUST CO.

S. F. 13806.

Supreme Court of California.

Aug. 31, 1931.

Rehearing Denied Sept. 28, 1931.

1. **Appeal and error** 🔑**1011(1).**

Finding based on controverted evidence is conclusive on appeal.

2. **Banks and banking** 🔑**315(3).**

Finding that assignment, by which bonds deposited with trust company were obtained from it, was forged, *held* supported.

3. **Banks and banking** 🔑**315(3).**

Where trust company surrendered bonds deposited with it on forged assignment, evidence *held* not to show owner and trust company were in pari delicto so as to preclude owner from recovering value of bonds from trust company (Civ. Code, § 3543).

4. **Appeal and error** 🔑**1056(1).**

That court unduly limited examination of witnesses *held* not prejudicial error, where testimony if admitted could not have changed result of court's decision (Code Civ. Proc. § 2055).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Florence Elizabeth Palmer against the Wells Fargo Bank & Union Trust Company. From judgment for plaintiff, defendant appeals.

Affirmed.

Superseding 293 P. 93.

Redman, Alexander & Bacon, of San Francisco, for appellant.

Sullivan & Barry and Theo. J. Roche, W. S. K. Brown, Theo. J. Roche, and Walter H. Linforth, all of San Francisco, for respondent.

SEAWELL, J.

This appeal was first passed upon by the District Court of Appeal, First Appellate District, Division 2, Presiding Justice Nourse writing the decision in affirmance of the trial court's judgment. 293 P. 93. A petition for hearing by this court was granted and the appeal is now before us for decision. Said District Court of Appeal affirmed the judgment upon the ground that the issue as to whether appellant had been guilty of negligence, as found by the trial court, in making delivery of the securities involved in the action to a party who embezzled the same, was one of fact and the trial court's finding thereon, by reason of conflicting evidence, could not be disturbed.

Plaintiff sued for the market value and accrued dividends of certain stocks and bonds which had been deposited with the Union Trust Company prior to its consolidation under the name it now bears. The cause was tried without a jury and judgment went for the plaintiff in the sum of $17,967.47. The appeal was taken on a bill of exceptions.

On December 1, 1916, plaintiff's mother, Nelly C. Mason, deposited with the Union Trust Company thirty-nine $1,000 bonds of the United Railroads of San Francisco, subject to the terms of a reorganization agreement. The trust company issued to her a certificate or receipt for the bonds, which provided that the interest of the depositor was assignable by transfer on the books by the holder in person or by agent upon surrender of the certificate properly indorsed. On October 31, 1917, plaintiff's mother, through her attorney in fact, Theodore Gray, sold and transferred her interest in this certificate to the plaintiff, and in 1919 said attorney in fact presented the assigned certificate to the trust company and made demand for delivery of the bonds. The trust company refused to make delivery when it was developed that plaintiff's mother died on February 12, 1918, the objection of the trust company being that the question might be raised as to legal delivery and also as to whether the assignment as presented by Mr. Gray, attorney in fact, was made after the death of his principal, who was a resident of England, for the purpose of avoiding the administration of her estate and the payment of inheritance taxes. Some time between this date and March 3, 1926, the trust company received in exchange for the thirty-nine bonds of the United Railroads other securities, as it was authorized to do under the reorganization agreement.

The request of Mr. Gray to make said transfer in 1919, one year after his principal's death and upon a power of attorney executed several years prior thereto, fully warranted the trust company and its attorneys in adopting precautionary measures in the circumstances of the situation, and the suggestion that the estate of Mrs. Mason be probated and plaintiff prove her claim or that proof be made in some satisfactory manner was not unreasonable. During the lifetime of Mrs. Mason, Mr. Gray had made no request for a transfer of said certificate and the trust company did not know of its existence. No move was made to take out letters of administration, and the matter remained quiescent as between the trust company and Mr. Gray, with the exception of one other request made in 1921, until November 5, 1925, a period of six years, when he delivered the original certificate issued to Nelly C. Mason by the Union Trust Company, and assigned by himself, as her attorney in fact, to plaintiff, Florence Elizabeth Mason Palmer, unindorsed by any one, so it is claimed, to one James R. Ewing, Jr., with whom said Theodore Gray had bargained to reduce to possession.

Mr. Ewing, who appeared at this stage of the proceeding, was a stranger to Theodore Gray. He called upon him at his home, and made known to Mr. Gray that he had obtained knowledge of Mr. Gray's attempt to gain possession of said securities some years prior thereto from friends connected with the Union Trust Company. He assured Mr. Gray that he had correspondents in New York City whose standing with the Equitable Trust Company of New York, which was a depositary jointly named in the reorganization agreement with the Union Trust Company, was such that they could induce the Equitable Trust Company, which in turn was able to control said Union Trust Company, to interest itself in the proposition to the end that said securities could be obtained from the Union Trust Company's possession without even an indorsement.

Mr. Gray, whose version of the transaction is as herein stated—Ewing not being produced at the trial—said he did not believe that Ewing would be able to obtain said securities from the possession of said Union Trust Company and so informed Ewing. Nevertheless he placed in his possession said certificate or receipt issued by said Union Trust Company, dated December 1, 1916, together with the transfer from Nelly C. Mason to Florence Elizabeth Mason Palmer, bearing date October 31, 1917, and executed by Theodore Gray, as attorney in fact of Nelly C. Mason. Beneath the date of execution and the name "Theodore Gray, attorney in fact" appears the name "Florence Elizabeth Mason Palmer." This signature is not, it is admitted on all sides, in the hand of the person it purports to be in, and was designed by the person who wrote it to deceive the officials of the Union Trust Company or some other financial institution into the belief that the name as written was the indorsement of Florence Elizabeth Mason Palmer, the owner of said securities. Mr. Gray denied that it was written by him or that it was on the assignment when he delivered the certificate to Ewing. On the other hand, the appellant offered an expert witness whose testimony tends to identify said indorsement as the handwriting of Mr. Gray, and cites as an exemplar the same name admittedly written by Gray into the body of the assignment, as evidence of the claim. It would seem that Mr. Gray at the trial acquitted Ewing of having committed the forgery. Ewing made no attempt to acquire possession of said securities and collateral through the offices of his said New York correspondents or the Equitable Trust Company of New York, but shortly after it came into his hands attempted to sell the certificate to McDonnell & Co., but failed because there was no assignment of the certificate to him. A proper form of transfer was submitted to him, but Ewing said that it would be of no use because the owner of the certificate was in England. He then set about to obtain said securities from the custody of the Union Trust Company. In his plan he prepared an assignment of said certificate in type form, except his own name as transferee, which appears in his own hand. The purported transferror's name, Florence Elizabeth Mason Palmer, is signed at the proper place, but the day on which the spurious signature was written is in doubt, inasmuch as two witnesses, J. Kempson Smith and W. H. Taplin, officers of the American Bank, who had occasion to inspect the paper on which the assignment was written, on November 17, 1925, under circumstances hereafter related, were not in accord as to whether said name appeared on the assignment at the time they jointly observed it. Mr. Smith is quite sure it did not, while Mr. Taplin is of the impression that it did. The circumstances under which said assignment to Mr. Ewing came to the attention of Mr. Smith and Mr. Taplin was in the preparation by Ewing of his plan to deceive the Union Trust Company into the belief that the Ewing assignment bore the indicia of verity. Whether the assignment, which was typed on the upper half of the sheet of paper which it occupied, was folded so as to conceal the name of the transferor, is not certain. Be this as it may, James R. Ewing, Jr., had a business acquaintance at The American Bank, and he presented to it the paper upon which said assignment appears and upon which his name appears on the lower half, directly under and approximately a quarter of an inch below the name Florence Elizabeth Mason Palmer. He requested Mr. Smith to witness his signature and the latter complied with his request. He then suggested that it would better suit his purposes if the bank would place its stamp as a guaranty of his signature. Accordingly he was directed to Mr. Taplin, the assistant cashier of said bank, who complied with his request by impressing the stamp of the bank directly under the signature, "James R. Ewing, Jr.," in words as follows: "Signature Guaranteed. The American Bank, San Francisco. W. H. Taplin." Mr. Taplin's signature was in ink. Upon the assignment as presented to the Union Trust Company, and done no doubt for the purpose of giving the paper the appearance of having passed scrutiny, in front of the signatures of the purported assignor, assignee and the American Bank, an X inclosed with a circle was placed. Both Mr. Smith and Mr. Taplin are positive that no such check marks appeared upon the paper at the time it came to their attention.

Immediately after the word "signature" in the line "signature guaranteed," as it appears from the impress of the bank's stamp, was inserted in ink the letter "s," making the line read "signatures guaranteed." Thus converting the word into the plural gave the appearance of the bank having guaranteed all the signatures contained on the purported document of transfer. Thus prepared, Ewing presented said certificate of deposit which was issued to Nelly C. Mason December 1, 1916, ten years prior to its presentation by Ewing. Upon the authority of said purported assignment and the guaranty of signatures thereon by the American Bank, the moneys due upon the principal of said bonds and moneys on deposit with the Union Trust Company were paid to him, and all interest past due was paid to him by the United Railroads. Ewing appropriated the entire sum which came into his hands. The bonds had been "called" in 1924, and consequently did not bear interest thereafter. Mr. Gray, as attorney in fact and the agent of Mrs. Mason during her lifetime, and as the attorney in fact and agent of her daughter, Florence Elizabeth Mason Palmer, since 1917, took no reasonable steps looking to the establishment of ownership and possession of said securities. The only move made by him consisted in entering into an absurd scheme, proposed by Ewing and assented to by Gray, whereby Ewing, without the semblance of competent authority, according to Gray's own narrative of the transaction, was supposed to obtain from a trust company securities and valuable property which had been placed with it in another person's name. The conduct of Mr. Gray becomes even more surprising when it is recalled that his training as a business man and accountant was exceptional, and his business experience as a confidential adviser to a leading San Francisco firm continued through a number of years. His acquaintance with Ewing was recent and he entrusted him with valuable securities belonging to another in circumstances that should have suggested caution, seemingly without making reasonable inquiry as to his business reputation. His conduct in the transaction, as related by himself, from first to last is culpable and indefensible measured by the most liberal standard that may be applied in a case involving trust relations or ordinary business methods. If his dereliction alone could be held sufficient to relieve appellant of its failure of duty which it owed to the owners of said securities in its trust and depositary capacity, in the circumstances of this case, there can be no doubt but that it would compel a reversal of the case, but the further fact that had the Union Trust Company made a reasonable investigation and an examination of its records as to the authority of Ewing to withdraw said securities and funds, the obvious forgeries would have been disclosed and all the parties to the transaction, including the Union Trust Company, Gray, and perhaps the owner of the stock, would have been furnished with indubitable proofs of the general dishonesty of the person offering the forged papers, presents the counterside of the question and contains the strength of respondent's case.

[1-3] Much space is given in the briefs to a discussion of the transactions had between Gray and Ewing. We think much of this evidence is not relevant to the issues. That Gray's unusual acts were largely if not wholly responsible for opening the opportunity for Ewing's criminal act is plain, but that he did not intend that said Ewing should endorse any names upon the certificate or assignment than appeared upon it when delivered to him, or that it was understood that he should prepare a fictitious assignment made to himself, are facts found in his favor. Impliedly the trial court found that Gray placed the securities in the hands of Ewing with the view of enabling him to negotiate for their delivery to him. In other words, he had no criminal intent and the securities or proceeds were to be delivered to him and not to Ewing. This, though sounding somewhat weak, has some support in the evidence. The other important finding which rests upon controverted evidence, but which is conclusive upon this court, reads:

"That in truth and in fact, said purported assignment of said certificate and receipt was not signed by plaintiff, or by her attorney in fact, Theodore Gray, or by anyone with her or his authority, knowledge or permission, and the endorsement in plaintiff's name at the bottom of the reverse side of said certificate or receipt likewise was not signed by plaintiff, or by said Theodore Gray, or by anyone with her or his authority, knowledge or permission.

"The court further finds that plaintiff never appointed the said James R. Ewing, Jr., as her agent to receipt and accept, or receipt or accept, from said defendant the said stock, bonds or money, or any thereof."

Appellant invokes the aid of section 3543, Civil Code, which provides that: "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." We doubt its application to the instant case. A duty rests upon every bank and trust company to protect its depositors against forged instruments. In this case Gray was the attorney in fact of the owner of the securities which were subjected to forgery, but he was not the author of the forgery, nor did he aid and abet its commission. His unwise conduct made the forgery possible, but such an act could not relieve the trust company of the duty of comparing respondent's signature with her signature as written on her signature card which it had in its files for the purpose of guarding against forgeries, which are a common menace to depositors. It had no special acquaintance with Ewing, and had it used the same caution it used when the matter came to its attention in the first instance the forgery would have been frustrated. The fact that it was content to rely upon the purported guaranty of signatures by the American Bank was the assumption of a risk which it should not have assumed in view of its ready means of detecting the fraud. We think the parties were not in pari delicto in a legal sense.

[4] Appellant complains that its examination of two witnesses, Gray, who was not a party to the action, but who was beneficially interested in the result, and respondent, a party, was unduly circumscribed by the trial court. Appellant undertook to show by these witnesses, on cross-examination of one and by calling the other as his witness, that Mrs. Mason left a large estate which had not been probated in California, and that Gray declined to follow the suggestion of the trust company for the reason that the proceeding would bring to light the fact that a large estate had escaped the payment of the income tax and also that it would put him to the test of disproving to the court that the assignment executed by him as attorney in fact of the mother in favor of the daughter was in fact not executed or delivered until after the death of the mother, and if legally made it was a gift. While this testimony, although somewhat remote, may have had some bearing upon the good faith of Gray in the transaction and should have been received under the salutary provisions of section 2055, Code of Civil Procedure, we do not believe that it could have changed the result of the court's decision, for the reason that the court would take judicial notice of the fact that a tax was due the state on such a large amount under the inheritance tax statutes of the state as frequently construed by the courts, and for the further reason that the probative strength of the fact, if established, would not have been regarded as sufficient to overcome the positive statements of Gray as to when and the circumstances in which said assignment was made by authority of Mrs. Mason.

We are aware of the unhappy circumstances which enmesh the appellant, and by which it was lulled into a state of credulity which made it an easy prey to a rascally plot, but we see no way to relieve it at the expense of the person who intrusted it with valuable property with the understanding that it would guard it with vigilant care.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.

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213 Cal. 490

COCKRILL v. BOAS et al.

Sac. 4416.

Supreme Court of California.

Aug. 27, 1931.

Rehearing Denied Sept. 24, 1931.

1. **Specific performance** ⚷87.

Prospective purchaser must establish performance, tender thereof, or ability and willingness to perform before being entitled to specific performance, with deductions for alleged defects.

2. **Specific performance** ⚷97(1).

Prospective purchaser, having failed to pay purchase money within time specified, *held* not entitled to specific performance with deductions in purchase price for alleged defects.

3. **Vendor and purchaser** ⚷46.

Ambiguity, if any, in contract of sale drawn by purchaser's attorney, could not be construed in purchaser's favor (Civ. Code, § 1654).

4. **Vendor and purchaser** ⚷133.

Where contract of sale contained no reference to litigation or water rights, vendors *held* not required to bring to successful conclusion their suit involving water rights.

5. Appeal and error 🔑173(6).

Purchaser could not raise question regarding alleged defect in vendors' title for first time on appeal.

In Bank.

Appeal from Superior Court, Sutter County; E. P. McDaniel, Judge.

Action by J. L. Cockrill against Benjamin Boas and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

H. L. McAllister, of San Francisco (J. S. Josselyn, of San Francisco, of counsel), for appellant.

Norman A. Eisner, of San Francisco, for respondents.

LANGDON, J.

This is an appeal by plaintiff from a judgment of the superior court of Sutter county in favor of defendants in an action seeking various forms of equitable relief. The controversy arises out of a contract for the sale of about 1,600 acres of real property in said county, entered into by defendants as vendors and plaintiff as purchaser, on October 27, 1927. The sale price was specified to be $65,000, payable by an immediate deposit in escrow of the sum of $1,000, together with a note and mortgage of a third party, previously pledged with defendants by plaintiff, and the further payment of $55,000 in cash. The deed was to be deposited at once, and the balance of the purchase price was to be paid within 30 days. The same period was also allowed the purchaser to examine the title, and the vendor was given 60 days thereafter to cure any defects. An escrow was opened with a title insurance company. The sum of $1,000 was paid into escrow by plaintiff; and the note was deposited by defendants. Defendants also deposited a deed. A title search was made, and plaintiff called attention to two matters affecting the title: The absence of a patent, and litigation concerning water rights in adjoining property, between defendants and third parties. Later a question arose as to a subsisting lease on the property. The lease was terminable upon sale, and this defect was cured within the time allowed by the contract, as was also the case with the patent. Plaintiff, however, demanded that defendants bring to a successful conclusion their suit involving the easement in the adjoining property. This was not done and the present action was brought. Among other things, plaintiff asked for declaratory relief, for a constructive trust of the land in his favor, for specific performance, for an accounting, and for relief against a threatened forfeiture by defendants of the sum of $1,000 paid on account of the purchase price, and specified in the contract as liquidated damages for its breach. Defendants filed an answer and cross-complaint. The court found, in substance, that the contract of sale did not include any water rights; that no defects in the title existed; that a deed had been tendered in conformity with the terms of the contract; that plaintiff had failed to deposit the balance of the purchase price; and was at no time ready, able, or willing to perform his obligation to pay the balance of the price. Judgment was rendered in favor of defendants, quieting their title to the property, and forfeiting the instalment payment made by plaintiff on the purchase price.

[1, 2] We are satisfied that this judgment was correct. A study of the complaint and of plaintiff's brief indicates that the relief sought was probably specific performance with a deduction in the purchase price as compensation for the alleged defects, although some of his testimony is inconsistent with this theory. Conceding the power of the court in a proper case to grant specific performance in this manner, an essential basis for the equitable remedy must be a showing by the plaintiff of performance, or tender of performance, or ability and willingness to perform. Buckmaster v. Bertram, 186 Cal. 673, 200 P. 610; Peckham v. Stewart, 97 Cal. 147, 31 P. 928; Pomeroy, Specific Performance of Contracts (3d Ed.) p 713, § 323. Plaintiff pleaded none of these things, and the record shows that he neither deposited nor tendered the balance of the purchase price within the time required by the contract, nor did he ever pay it. Moreover, it affirmatively appears from his own testimony that he was unable to do so. His intention was to borrow the greater part of the purchase money, and he had not met the conditions laid down by the prospective lender. The chief condition, he testified, was the successful termination of the suit involving the water rights. Under these circumstances he cannot have specific performance, regardless of whether defendants are in default in their performance. The obligation to pay the purchase money into escrow within the 30-day period was, by the terms of the contract, an independent covenant, not conditioned upon deposit of the deed by the vendor; and the breach of that covenant leaves plaintiff without any right to the equitable relief sought. Southern Pacific R. R. Co. v. Allen, 112 Cal. 455, 44 P. 796; Donovan v. Judson, 81 Cal. 334, 22 P. 682, 6 L. R. A. 591.

[3, 4] The only other question is whether plaintiff is entitled to the return of his deposit. Since plaintiff is in default, defendants are entitled to retain it if they have fully performed. The only serious conten-

tion made by plaintiff is that the contract was one for the sale of real property and therefore carried with it all interests comprehended by the term, including water rights. The litigation over these rights had commenced prior to the execution of the contract, and it was stipulated that plaintiff was fully informed of the facts concerning it. The contract of sale was drawn by plaintiff's attorney, and an ambiguity should not be construed in his favor. Cal. Civ. Code, § 1654; Robert Marsh & Co., Inc., v. Tremper (Cal. Sup.) 292 P. 950. But there is no ambiguity. The contract contains no reference to the litigation, and makes no mention of water rights. To construe it as requiring defendants to carry unmentioned litigation to a successful conclusion within the 60-day period for curing defects in the title would be most absurd. The trial court's interpretation of the instrument is clearly supported by the evidence.

[5] No other defects in title were pleaded nor presented at the trial. On appeal, several alleged additional defects are set forth, reference being made to an informal report of the title search, introduced in evidence by defendants for a wholly unrelated purpose, namely, to establish its date. It is obviously improper to raise such issues on appeal, without pleading or proof in support thereof, and without an opportunity for rebuttal by the adverse party. Indeed, it does not even appear that these objections were made by plaintiff within the time specified in the contract.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.

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213 Cal. 496

EBBERT et al. v. MERCANTILE TRUST CO. OF CALIFORNIA et al.

Sac. 4449.

Supreme Court of California.

Aug. 27, 1931.

1. Equity 🔑66.

Cancellation of notes under contract that notes should be void unless agreement for improvement of land was carried out will not be decreed, except on condition that plaintiffs do equity (Civ. Code, §§ 3275, 3369).

Under Civ. Code, § 3369, court of equity cannot enforce forfeiture, but must grant relief from it, and under section 3275, whenever, by terms of obligation, party incurs forfeiture or loss in nature of forfeiture by reason of failure to comply with provisions, he may be relieved therefrom on making full compensation to the other party, except in case of grossly negligent, willful, or fraudulent breach of duty. It follows that notes and deeds of trust in present suit should not be canceled unless defendants were reimbursed for reasonable value of benefits already conferred by their part performance.

2. Damages 🔑80(1).

Any provision by which property is forfeited without regard to actual damage suffered would be unenforceable penalty.

3. Damages 🔑80(1).

Provision that notes should be void on failure to carry out agreement respecting improvement of land was "penalty" (Civ. Code, § 1671).

By its terms, the provision would apply regardless of amount of balance due on note and irrespective of kind or extent of default in performance, or amount of beneficial performance already received. There was nothing in the pleadings or in the nature of the contract to show that the actual damage suffered by default in performance would be "impracticable or extremely difficult to ascertain," and, unless such a showing is made, the provision is unenforceable.

[Ed. Note.—For other definitions of "Penalty," see Words and Phrases.]

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Suit to cancel notes and deeds of trust brought by Frank B. Ebbert and another against Mercantile Trust Company of California and another. From an adverse judgment, defendants appeal.

Reversed, with directions.

Clark, Nichols & Eltse, of Berkeley, and Brobeck, Phleger & Harrison, of San Francisco, for appellants.

Duard F. Geis, of Willows, and C. H. Sooy, and J. H. Sapiro, both of San Francisco, for respondents.

LANGDON, J.

This action was brought to cancel two notes and deeds of trust by which they were secured. Upon motion of plaintiffs, judgment was rendered in their favor on the pleadings. Defendants appeal on the judgment roll.

From the pleadings it appears that plaintiffs executed one note and deed of trust on their own property, and later succeeded to the property subject to the other deed of trust executed by one McMillan. The notes and deeds of trust arose out of the same type of transaction and are similar in their provisions. Plaintiffs on December 14, 1922, purchased from Berkeley Securities Company a tract of land of about 10 acres, at $655 per acre, paying $2,500 in cash, and executing their note for the balance, which totaled $4,832.77. The note was made to Security Bond & Finance Company, and the deed of trust to defendant Mercantile Trust Company, as trustee. The note provided that its payment was dependent upon performance by the vendor of the terms of a certain contract entered into by the parties at the time of purchase. By the terms of this contract, Berkeley Securities Company was given control over the property, and it agreed to grade the land, plant Kadota fig trees, install pumping plants, irrigate, cultivate, and care for the land and pay taxes for a period of six years. Until the payment of the note, one-half the proceeds of the crops was to go to the company, and the other half was to be credited on the last payments to be made on the note. The note contains this provision: "* * * Upon failure of the said Berkeley Securities Company to carry out any and all parts of its terms, conditions and covenants in the said agreement after ninety days' written notice" the note is to become "null and void as to the balance of the payments to be made herein." The deed of trust contains a similar provision. The complaint sets forth that written notice of failure to comply with the care contract was served on Berkeley Securities Company on July 17, 1926, and on defendant College Building & Loan Association on July 29, 1926. The latter notice concluded with the statement that "these instruments are now both null and void." The answer alleges that the care contract was fully performed for a period of three and one-half years; that Berkeley Securities Company and Security Bond & Finance Company became bankrupt, but that defendant College Building & Loan Association purchased the note for value and prior to the default in performance. It is further alleged that plaintiffs received the whole of the crops for 1926, 1927, and 1928, without accounting to defendant for its share thereof. The answer also sets forth various expenses incurred in carrying out the contract, and alleges that the reasonable cost of carrying out the required performance for the remaining two and one-half years of the six-year period was the sum of $50 per acre for each year, excluding the value of the crops.

[1-3] The prayer of the answer was that the court grant relief to the plaintiffs only upon condition that they do equity. This position is, we think, unquestionably sound.

The note expressly provides a penalty for failure to perform the care contract. That penalty is the forfeiture of the right to enforce the note and deed of trust. A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty. See Greenleaf v. Stockton Combined Harvester & Agricultural Works, 78 Cal. 606, 21 P. 369; Ballantine, Forfeiture for Breach of Contract, 5 Minn. L. Rev. 329. By its terms, the provision would apply here regardless of the amount of the balance due on the note, and irrespective of the kind or extent of default in performance, or the amount of beneficial performance already received. There is nothing in the pleadings or in the nature of the contract to show that the actual damage suffered by default in performance would be "impracticable or extremely difficult to ascertain" (Cal. Civ. Code, § 1671), and, unless such a showing is made the provision is unenforceable (Cal. Civ. Code, § 1670; Sun-Maid Raisin Growers v. Mosesian, 90 Cal. App. 1, 265 P. 828; Leslie v. Brown Bros., 208 Cal. 606, 283 P. 936; see Arndt, Liquidated Damages in California, 10 Cal. L. Rev. 8).

Moreover, the action is in equity, to cancel the note and deed of trust. The settled doctrine, not only prevents a court of equity from enforcing a forfeiture (Cal. Civ. Code, § 3369), but requires that the court grant relief from it. Section 3275 of the Civil Code provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." This section codifies the equitable rule, which Pomeroy states as follows: "Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the non-payment, or non-performance, or non-enjoyment, according to the stipulations of the agreement. The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured." Pomeroy, Equity Jurisprudence, § 433. The same writer also declares that "a court of equity will never, by its affirmative action, or by the affirmative provisions of its decree, enforce a penalty or forfeiture, or any stipulation of that nature. * * *" Id., § 381; see, also, section 459. The present holder of the note has not been guilty of any of the misconduct described in section 3275 of the Civil Code, nor can the bankruptcy of its predecessor in interest be regarded as a willful breach of duty. Defendant offers to do equity and to compensate plaintiffs for all losses actually sustained. It would be difficult to conceive of a clearer case for the application of the equitable doctrine.

Glock v. Howard, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, upon which plaintiffs place great reliance, is not controlling. The holding there was that in a contract of sale of real property, where time was of the essence, the vendor might, upon default by the vendee, stand upon his contract, retain title, and forfeit prior installments of the purchase price. In that case payment of the whole of the purchase price was a condition, precedent to the right to receive a deed. While this decision undoubtedly permits a forfeiture in violation of the spirit and perhaps the language of section 3275 (see 18 Cal. L. Rev. 681), its conclusion was reached without any consideration of the statute, and it deals only with express conditions precedent. It cannot be deemed to apply to a case involving facts which are wholly dissimilar. Defendants here are not defaulting purchasers claiming a deed, and plaintiffs are not standing upon their contract, but are seeking the aid of the court to escape from its obligations. Moreover, the instant case does not involve a condition precedent to performance by the purchasers. The payments on the note are required to be made periodically, and concurrently with performance by the vendor. The penal provision is in the nature of a condition subsequent, setting forth a contingency upon the happening of which the forfeiture takes place. See 6 R. C. L. 904, §§ 290, 291.

Another persuasive argument of defendants is that a strict construction of the forfeiture provisions, as required by statute (Cal. Civ. Code, § 1442), shows that there was not a sufficient compliance, with its requirement of notice on the part of plaintiffs. Because of the above conclusion, it is unnecessary to consider this point.

It follows that the notes and deeds of trust should not be cancelled unless defendants are reimbursed for the reasonable value of the benefits already conferred by their part performance. On the other hand, if the notes remain as binding obligations, plaintiffs are entitled to compensation for the partial failure of performance, which compensation may be applied on their liability under the notes, and reduced by any amount which may be due defendants out of the proceeds of crops not accounted for. Of course, in requiring plaintiffs to reimburse defendants for the reasonable value of their performance, the court must permit a deduction for any damages actually suffered by the default.

The judgment is therefore reversed, with directions to the trial court to permit amendment of pleadings or introduction of evidence in conformity with the conclusions reached in this opinion.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

213 Cal. 467

CASEY v. NISHIHARA (JOHNSON, Intervener).

Sac. 4401.

Supreme Court of California.
Aug. 25, 1931.

Rehearing Denied Sept. 24, 1931.

Mortgages 🔑335.

In determining whether grantor of trust deed was in default, authorizing foreclosure, grantor *held* entitled to offset against delinquent interest payments on trust deed note, interest grantor paid on sum, included in trust deed note, which grantee agreed to pay on delinquent taxes, but never paid, though grantor could not offset, in addition, interest accumulating on delinquent taxes.

> Grantor in trust deed could not offset interest accumulating on delinquent taxes which the grantee in the trust deed had failed to pay, since both the delinquent taxes and the trust deed note, covering the sum which the grantee had agreed to pay on delinquent taxes, bore interest at 7 per cent., and the detriment suffered by the grantor of the trust deed through the grantee's failure to pay the delinquent taxes, was completely offset by the credit received by reason of the overpayment of interest, and to give the grantor an additional 7 per cent. interest would be to give him a credit of 14 per cent. for the failure of the grantee of the trust deed to pay an indebtedness bearing only 7 per cent. interest.

In Bank.

Appeal from Superior Court, Yuba County; H. D. Gregory, Judge.

Action by Frank Casey against S. Nishihara, in which F. E. Johnson intervened and filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Reversed.

Russell W. Cantrell, of San Francisco, for appellant Casey.

W. E. Davies, of Marysville, for respondent Nishihara.

Russell P. Tyler, of San Francisco, for respondent Johnson.

CURTIS, J.

This action was brought by the plaintiff claiming to be the owner of certain real property in the possession of the defendant, for the purpose of obtaining possession of said real property. The defendant held said real property under a lease from one F. E. Johnson, and the court permitted said Johnson to intervene in said action, and under said permission he filed a complaint in intervention in said action in which he asserted his ownership to said real property and the defendant's right to said possession thereof under a lease from said intervener.

To secure the proper background of the relations existing between the parties to this action at and immediately prior to the commencement of this action it might be well to briefly trace the dealings carried on by them for a period of seven or eight years prior to the commencement of this action. At the inception of these dealings Johnson was the owner of the real property which forms the subject-matter of this action. At that time he borrowed from the plaintiff a sum of money, the exact amount of which does not appear, but it was probably the sum of $5,000. For this amount he gave his promissory note and secured the payment of said note by a mortgage on said real property. This note and mortgage remained outstanding and unpaid for some three or four years, or possibly five; the exact period does not appear from the record. That point is not material. Johnson was greatly in arrears in payment of his interest on said note, and the plaintiff, some time in 1926, brought suit for the foreclosure of said mortgage. Before this action reached final judgment and on January 6, 1927, the parties to said action adjusted their differences by Johnson giving a new note, covering his prior indebtedness to the plaintiff, certain delinquent taxes on the real property which the plaintiff had paid, and other delinquent taxes against said real property which had not been paid. This promissory note was secured by a trust deed given upon said real property. The amount of this note was $14,340.72, and it was made up of the following items: Balance due on first note, $7,406.83; delinquent taxes paid by plaintiff, $5,422.66; delinquent taxes not paid, $537.07; other delinquent taxes not paid, $1,974.16.

These items amount to $15,340.72. Of this amount the plaintiff released Johnson from the payment of $1,000, which amount deducted from the aggregate amount due plaintiff left the sum of $14,340.72, the amount of the later or second promissory note executed by Johnson in favor of plaintiff. It will be noted that in this note were included two items for delinquent taxes which had not been paid. Plaintiff agreed to pay all of these delinquent taxes. The item of $537.07 plaintiff paid following the execution and delivery of the note, but the plaintiff never did pay the other item of $1,974.16. This second note was dated January 6, 1927, and bore interest at 7 per cent. per annum payable monthly. It was payable eighteen months after date with a proviso that, if the interest was not paid within ten days after it became due, then the whole sum of principal and interest at the option of the holder should become due and payable. Johnson paid the interest on the whole of the principal sum of said promissory note, including the sum of $1,974.16 up to February 6, 1928; the last payment having been on February 29, 1928. The trust deed given to secure the payment of said note contained a covenant that "no default or breach under any of the terms of this trust deed shall be claimed until the maker of the obligation for which it is security shall have been served with a copy of written notice of such breach, and the privilege of curing same within ten days thereafter shall have been accorded them."

On May 24, 1928, plaintiff caused to be served upon Johnson, in pursuance of the foregoing stipulation in the trust deed, a notice of default in the payment of the interest due on said promissory note and in the payment of taxes due upon said real property. No interest or other payment was made by Johnson to the plaintiff on account of the amounts due on said promissory note and trust deed. Thereafter the trustees under said deed of trust, after due and legal notice as provided by law and in accordance with the terms of said trust deed, sold said real property to satisfy the amounts due plaintiff on said promissory note. At this sale the plaintiff, Frank Casey, became the purchaser of said real property, and by virtue of this purchase he claims to be the owner of said real property and entitled to the possession thereof. The trial court made findings against the plaintiff and rendered judgment in favor of the defendant Nishihara and adjudging the intervener to be the owner of said real property, subject only to the rights of plaintiff under and by virtue of said trust deed.

The basic finding upon which the trial court rested its judgment against plaintiff and in favor of defendant intervener was "that on the said 24th day of May, 1928, at the time that the said notice was so served by the said plaintiff, Frank Casey, upon the said F. E. Johnson, defendant in intervention, as aforesaid, that the said F. E. Johnson, defendant in intervention, was not in default of any of the provisions of said deed of trust requiring him to pay taxes upon the said real property described in said deed of trust and hereinbefore described, as aforesaid, and the court further finds that at the time of the service of said notice, as aforesaid, the said defendant in intervention, F. E. Johnson, was not in default in the payment of interest on the said principal sum owing by said defendant in intervention, F. E. Johnson, to the said plaintiff, Frank Casey, as evidenced by the said promissory note for which the said deed of trust was executed, as aforesaid, and in this respect the court finds that on the date of the service of the said notice as aforesaid that said plaintiff, Frank Casey, was indebted to the said defendant in intervention, F. E. Johnson, in the sum of one hundred twenty-three and 89/100 dollars ($123.89) as will be hereinafter more specifically set forth and referred to."

The court then proceeds to find that the amount of interest due and unpaid on the promissory note of $14,340.72 on May 24, 1928, the date Johnson was served with the notice of default, was the sum of $216.48. It further found that of said sum of $14,340.72, the sum of $1,974.16 was retained by Casey for the purpose of paying the delinquent taxes on said real property, and that Casey had never paid any of said delinquent taxes; that, in paying the interest on the entire principal sum of said promissory note from January 6, 1927, to February 6, 1928, Johnson had paid interest on said sum of $1,974.16, and the amount of interest paid on this sum of $1,974.16 by Johnson from January 6, 1927, to February 29, 1928, was $149.70. The court further finds "that on the date of said service of the said notice by the said plaintiff, Frank Casey, upon the said defendant in intervention, F. E. Johnson, that the said defendant in intervention, F. E. Johnson, was entitled to a further credit from the plaintiff, Frank Casey, in the further sum of one hundred ninety and 67/100 ($190.67), being seven per cent. of the said sum of nineteen hundred and seventy-four and 16/100 dollars ($1,974.16) retained by the said plaintiff Frank Casey from said tax sale, as aforesaid, which said seven per cent. was added to the said sum necessary to redeem said property at the time of the execution of said note to the date of the service of said notice, by reason of the statutes in such case made and provided. * * *" The court then proceeds to add these two amounts of $149.70 and $190.67 together, thereby securing the larger amount of $340.37, which latter amount the court found Johnson was entitled to as a credit against the interest due from him on May 24, 1928. This interest, as we have seen, amounted to $216.48, which deducted from the credit of $340.37 leaves the sum of $123.89, which amount the court found Casey was indebted to Johnson on May 24, 1928, at the date the notice of default was served. As conclusions of law from these facts the court found that, as Johnson was not in default, the notice was prematurely given, and all proceedings thereafter looking toward the sale of said real property under said trust deed were illegal, and the deed issued to Casey by the trustees was a nullity. It is apparent that, if the findings of the trial court are supported by the evidence, the conclusions drawn therefrom are correct, and the judgment must be affirmed.

There is no question but that Johnson was entitled to a credit on the interest due from him on May 24, 1928, in the sum of $149.70, being the interest paid by him from the date of said note to February 29, 1928, on the sum of $1,974.16, which Casey was to pay on the delinquent taxes, but which he never did pay. This sum of $1,974.16 Casey had agreed to pay out and advance for Johnson, and it was upon the understanding and agreement that he would do so that this amount was included in the promissory note secured by the trust deed. As Casey failed to advance this sum, Johnson never became indebted to him in this amount. Nevertheless, Johnson paid interest thereon, amounting to said sum of $149.70. This payment was rightly credited on the amount of interest Johnson owed, and reduced this latter amount to the extent of said sum of $149.70. As to the item of $190.67, we question the action of the court in giving credit in this amount to Johnson on the interest due from him. It appears to us that the court gave a double credit to Johnson in allowing both of these amounts as credits in favor of Johnson on his interest account. If Casey had paid these delinquent taxes, then Johnson was no doubt in default in the sum of at least $216.48. Having neglected to make the payment of $1,974.16, Casey was not entitled to interest thereon, and for that reason said sum of $149.70 was correctly credited to Johnson. Having received credit for this amount, he is not entitled to a further credit in the amount of the interest accumulating on the delinquent taxes which Casey failed to pay. The delinquent taxes, the court found, bore interest at 7 per cent. per annum the same as provided in the promissory note given by Johnson to Casey. Therefore the detriment suffered by Johnson through Casey's failure to pay said delinquent taxes was completely offset and met by the credit Johnson received by reason of his overpayment of interest. To hold otherwise would be to give Johnson credit of 14 per cent. for the failure of Casey to pay an indebtedness bearing only 7 per cent. interest. We can see no escape from this conclusion. It follows, therefore, that the findings of the court are not sustained by the evidence and particularly that which finds Johnson was not in default in the payment of interest on said promissory note on May 24, 1928, the date said notice of default was served on him. To the contrary, the undisputed facts show that he was in default in the sum of $216.48, less the sum of $149.70, or $66.78.

While this conclusion may result in Johnson losing his property, from the facts above stated it seems to us that he has no one to blame but himself. It further appears to us that Casey has been extremely lenient with Johnson and has been slow to take advantage of Johnson's numerous defaults and delinquencies. In the first place, the undisputed evidence is that Johnson borrowed some $5,000 from Casey a few years prior to January 6, 1927. The exact date does not appear in the record, but is not material. Johnson failed to pay the interest on this loan, and Casey was compelled to institute an action to foreclose the mortgage given to secure its payment. At that time it appears that not only a large amount of interest, over $2,000, was due, but $5,422.66 in delinquent taxes had accumulated against the mortgaged property which Casey was compelled to pay. While this foreclosure action was pending, Casey agreed to dismiss it and give Johnson another chance to save his property. A new note dated January 6, 1927, secured by a trust deed, was made out, which included the several amounts due from Johnson to Casey, with the stipulation that the interest thereon was to be paid monthly. The interest on this entire note amounted to only $83.65 per month. On January 1, 1928, Johnson leased the real property covered by the trust deed to the defendant Nishihara for the sum of $235 per month; the lease covering a period of ten years. This rental was payable monthly in advance. We, of course, do not know the condition of Johnson's financial affairs, but it would seem that his first duty to Casey as well as to himself would have been to devote sufficient of the rental received from the real property covered by the trust deed in payment of the interest on the indebtedness secured by the trust deed. Not only did he fail to meet his interest promptly, but he permitted it to become over three months in arrears, from February 6 to May 24, 1928, during which time he received as rental from this real property over $700, which amount far exceeded the amount of the delinquent interest. It would appear from the record before us that he made no reasonable attempt to meet his interest engagements with Casey, while he was appropriating to his own use the entire proceeds of said real property. On the other hand, the evidence shows that Casey was extremely lenient and indulgent in his dealings with Johnson. Not only did he permit a large amount of interest on the first loan to become delinquent before taking any action to enforce its payment, but he preserved Johnson's property from sale for delinquent taxes by paying them after they amounted to over $5,400. After the making of the new note and the trust deed, Johnson was frequently delinquent in the payment of his interest, but Casey took no action toward foreclosing the trust deed until Johnson apparently ceased entirely making payments on his interest and allowed over three months to go by without meeting a single installment of interest. We hardly see how Johnson could have expected treatment more generous than that accorded to him by Casey. It is true that Casey did not pay, as the court found he had agreed, the delinquent taxes amounting at the time of the new note to $1,974.16. In explanation of his neglect to pay this amount, Casey testified that he agreed to pay it as soon as he was able; that he had just paid out in satisfaction of other delinquent taxes against said real property $5,400, and he was unable to meet this additional payment of $1,974.16. As long as he agreed to pay these taxes, he should be held to his agreement. He should hold Johnson harmless for his failure to perform his agreement, and should be made to answer to Johnson for all damage sustained by reason of this failure on his part. This damage to Johnson has been adjusted by us in the manner set forth in previous portions of this opinion. This is the only instance in which Casey has failed in his engagements during the many years these parties have dealt with each other. On the other hand, there has been during all these years hardly any appreciable period of time in which Johnson has not been in default in meeting one or the other of his agreements with Casey. That he may lose his property, which is apparently of considerable value, through foreclosure proceedings, is to be deplored, but this result must necessarily follow the course of conduct pursued by him, and is due solely to his own failure to meet his lawful and legal engagements.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.

213 Cal. 613

HESS et ux. v. COUNTRY CLUB PARK et al. (MOLONY et al., Interveners).

L. A. 10786.

Supreme Court of California.

Aug. 31, 1931.

Rehearing Denied Sept. 24, 1931.

1. Action 🔑6.

Statute authorized action to annul building restrictions on plaintiff's property because of change in character of neighborhood, notwithstanding plaintiff had not violated restrictions (Code Civ. Proc. § 1060).

> Code Civ. Proc. § 1060 provides that any person interested under a deed, will, or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to property, may, in cases of actual controversy, bring an action for a declaration of his rights and duties, which declaration shall have the force of a final judgment and "may be had before there has been any breach of the obligation in respect to which the declaration is sought."

2. Action 🔑6.

In action to annul building restrictions in deeds, evidence sustained finding that change in character of neighborhood made it unjust, oppressive, and inequitable to give effect thereto (Code Civ. Proc. § 1060).

> Evidence disclosed that plaintiffs' lot was worth about $40,000, without restrictions against erection of any building except residences; that it was on a business street and could be used practically for business purposes only; that a business building thereon would increase the value of every lot in the tract and would not damage residences therein; that taxes on the lot were between $300 and $400 per year; and that street lighting assessments were $360 per year. Parties stipulated that the lot had been placed by city zoning ordinance in a district wherein only business buildings could be erected and exhibits showed that there were business places in both directions therefrom on the same street.

3. Injunction 🔑62(3).

Equity may decline to enforce building restrictions where change in neighborhood property uses makes enforcement unjust, oppressive, and inequitable.

4. Appeal and error 🔑1010(1).

Trial court's findings, supported by substantial evidence, are binding on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by Arthur C. Hess and wife against the Country Club Park and others, in which Leona Molony and others filed a complaint in intervention, and were made parties defendant. Judgment for plaintiffs, and interveners appeal.

Affirmed.

Superseding opinion of District Court of Appeal in 296 P. 300.

Fred N. Arnoldy, of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, for respondents.

WASTE, C. J.

This is an action to quiet title and to annul certain building restrictions contained in the deeds through which the plaintiffs deraign their title to lot 31 of tract No. 1600 in the city of Los Angeles. Plaintiffs seek to avoid the effect of the restrictions by reason of an asserted change of condition in the character of the neighborhood, it being alleged that their property is no longer useful for residential purposes. The action was brought against the defendant Country Club Park, a corporation, the original owner and subdivider of the tract. Thereafter a complaint in intervention was filed by the remaining defendants who are owners of other lots in the tract. In due course the pleadings were amended and the interveners made parties defendant. Following a trial before the court sitting without a jury, judgment for plaintiffs was entered as prayed for. From this judgment all of the defendants, save and except the corporation, have appealed.

Citing the case of Strong v. Shatto, 45 Cal. App. 29, 37, 187 P. 159, 162, the appellants contend that the respondents are not, under the allegations of their complaint, entitled to the relief granted. That case declares, in part, that: "The doctrine that equity will not enforce restrictions on the use of property, we think, only applies to cases where it is sought to enforce such restrictions by equitable proceedings, where the reason and justification for them has failed through changed conditions. In other words, under such circumstances a court of equity may deny the relief sought. But the rule does not go to the extent of permitting parties whose land is subject to the legal restraint of such limitations to bring action to quiet their title against such contractual obligations, because of changed conditions. Contractual obligations do not disappear as circumstances change. It is only the granting of equitable relief, and not the binding force of the restrictive covenant, that is affected by a change in the conditions. * * * As there has been no breach of the conditions here, and no attempt to enjoin such a breach or to enforce a forfeiture, we think it premature, at least, to determine the equities of the parties as they might exist at some future time in the event of such breach."

This court denied a petition for hearing in the Shatto Case. However, subsequent to that decision, and in the year 1921 (St. 1921, p. 689), section 1060 of the Code of Civil Procedure was enacted. In brief, this section provides that: "Any person interested under a *deed*, will or other written instrument, or under a contract, or who desires a declaration of his *rights* or *duties* with respect * * * to, in, over or upon *property* * * * may, in cases of actual controversy * * * bring an action * * * for a declaration of his rights and duties in the premises. * * * He may ask for a declaration of rights or duties, either alone or with other relief. * * * The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had *before* there has been any breach of the obligation in respect to which said declaration is sought." (Italics ours.)

In the case of Strong v. Hancock, 201 Cal. 530, 542, 543, 258 P. 60, 65, counsel presented the question whether or not the enactment of section 1060, supra, required an abandonment of the rule, announced in Strong v. Shatto, that prior to the breach thereof an action would not lie at the suit of the owner of the servient tenement to quiet his title as against covenants or restrictions running with the land. We found it unnecessary to pass upon the point in that case for the reason that there had been filed by the defendant therein a cross-complaint alleging facts, found to be true by the trial court, entitling the defendant and cross-complainant to affirmative relief by way of approval and enforcement of the restrictions there involved. By reason of our conclusion to affirm the trial court's findings and decree in that case we stated in the opinion that: "We do not find it necessary to consider what the said plaintiff's remedies might have been had we arrived at the conclusion that the cross-plaintiff was not entitled to the relief which the trial court accorded her." However, in a special concurring opinion, Mr. Justice Shenk expressed himself as satisfied that the declaratory relief statute set out above was sufficiently broad and comprehensive in its language to have application to this sort of action. He there stated: "This change in the law [the enactment of section 1060, supra] was * * * sufficient to enable the substituted plaintiff to proceed thereunder and to have his status declared under the conditions as were then shown to exist, and this, notwithstanding the old rule which required him to be hazardously active in the breach of such restrictions and passive in litigation." We are inclined to agree with the views of Mr. Justice Shenk so succinctly stated in his concurring opinion in the Hancock Case.

[1] The pleadings in this case present a practical situation which calls for declaratory relief. The owner of a lot in a tract of land claims that certain restrictive covenants and conditions are no longer enforceable because of a change in the character of the neighborhood. The original grantor and the owners of other lots in the tract claim, on the contrary, that the covenants and conditions are still enforceable, that they constitute easements upon the lot in question, and that their violation will be ground for injunctive relief and the forfeiture of the lot owner's title. If the lot owner can obtain a declaration in his favor, he may safely proceed to improve his property as he wishes. If such a declaration is refused, he is put in the hazardous position of being obliged to violate the terms of the restrictions before he can know whether or not he must suffer the penalties mentioned. It is inconceivable that he must run the risk of forfeiting any further investment, or even his title to the land, in order to obtain an adjudication of his rights. It seems clear that the declaratory relief statute was intended to relieve a party from exactly such a dilemma. Unless it can be availed of in a situation such as this, it will lose a large part of the value which, upon its enactment was supposed to attach to it. Under the terms of the statute the declaration may be either affirmative or negative in form and effect, and in a case such as this the trial court is therefore empowered either to make a declaration, at the plaintiff's request, that he is not under a duty to comply with the restrictive covenants, or, at the request of the defendants, to make a declaration that he is. That an "actual controversy" exists in such a case goes without saying.

This brings us to a consideration of the propriety of the findings and conclusion of the court below that the character of the neighborhood surrounding the plaintiff's lot has sufficiently changed to leave their property no longer useful or practical for residential purposes, thus rendering it inequitable and unjust to enforce the restrictions or to declare them to be valid subsisting easements. We have examined the entire record in this cause and find that upon this phase of the litigation the decision of the District Court of Appeal (First Appellate District, Division 2) accurately narrates the situation developed before the trial court. For this reason we adopt as and for the decision of this court the following portion of the opinion prepared by Mr. Justice (pro tem.) Burroughs (296 P. 300, 301):

"On January 23, 1912, the defendant Country Club Park, a corporation, was the owner of all the lands embraced in the tract No. 1600, hereinabove referred to. On said date, the corporation, having previously subdivided said tract of land, filed a subdivision map thereof, as provided by law. On May 31, 1916, said corporation conveyed to one Edwin B. Sword lot No. 31 of said tract, and through mesne conveyances respondents are now the owners of said lot. Each one of the appellants owns a lot in said tract No. 1600. In the several deeds, by which both the appellants and respondents obtained their respective titles, there is inserted certain restrictions as to the purposes for which said lots may be used. So far as necessary to a decision of the questions involved on this appeal, it is sufficient to say that the use is limited to residences only, to cost not less than $6,000, and to be located within certain lines. There are provisos attached to said conditions and restrictions by which, if there be any violation thereof by the grantee or his successors in interest, the premises revert to the grantor, its successors or assigns; 'and as to the owner of and the successors in interest of any owner of any other lot or lots in said tract, all and singular said conditions are and shall be covenants running with the land for the benefit of the grantor herein and for the benefit of each and all of the lots in said tract, and of the owners of such lots in said tract and their respective successors in interest, and the breach of any of said covenants and conditions or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by any or either of such owners, their heirs, assigns, or successors in interest.' It is also provided that the restrictions are of no effect after January 1, 1935; that the restrictions and conditions subsequent and the date of termination thereof 'apply to and bind only the property hereinabove described and hereby conveyed and the owners thereof, and the grantor expressly reserves the right to make and/or apply the same or varying or different restrictions and conditions subsequent or to omit the same entirely, respecting other lots in said tract, and/or property owned by the grantor.' The court found, among other matters, that since the execution and delivery of the said deeds and conveyances, the conditions in the neighborhood where said tract is situated have changed, and that the value of said lots have greatly increased; that said property, and particularly said lot 31, is in a section devoted exclusively to and essentially useful for business purposes; that the plaintiffs are ready, able, and willing to improve said lot for business purposes, and that the improvement thereof will not injure or damage the property of the defendants or any thereof, but on the contrary such improvements will make the property in that vicinity more valuable; that the conditions and restrictions are no longer beneficial for the purposes for which they were placed on said property, and that they have now become oppressive and inequitable, and to enforce them would be inequitable and unjust. The exhibits in the case show that said lot 31 is situated on the northeast corner of the intersection of Pico street and Wilton place; that the appealing defendants own lots on Wilshire place north of said lot 31, but not facing on Pico street. Charles B. Felts testified that he has been sales manager for the defendant Country Club Park for about thirteen years last past; that the last residence on said tract to be erected on Pico street was about eight years prior to October, 1927, the time of the trial; that lot 31 sold in 1912 for $4,000, and at the time of the trial, without the restrictions, had a value of about $40,000 and that other property there has a similar value; that Wilton place has many valuable homes. It was stipulated by the parties that Pico street is a business street from this tract on east. W. C. Skaggs testified that Pico street is a business street, and that the only practical purpose for which lot 31 could be used was for business purposes; a business house on this lot would increase the value of every lot in the tract; it would not harm the tract. F. S. Kadletz testified that his occupation was a real estate appraiser; that he had a large experience in that line of work for the city and county and also for individuals; that he was familiar with the Country Club Park tract of land and with said lot 31; that said lot was only suitable for business purposes; that no other property in the tract would be damaged if it were used for business purposes; that it would not damage the residences in this tract to erect a store building on said lot, because the character of the property as business property was already fixed. The plaintiff Arthur C. Hess testified that the taxes on said property were between $300 and $400 per year; that the assessments for the street lighting system was $360 per year; that the property was not desirable as residence property. It was stipulated that in 1912, when the tract was subdivided, the immediate neighborhood in which lot 31 and the adjoining property was situated was strictly residential district; that at that time Pico street had a width of 50 feet and since then has been widened to 80 feet; that since 1921 said lot and the lot immediately adjoining it to the north and for two lots deep on each side of Pico street from east of Western avenue westerly to the city limits has by an ordinance adopted by the city council of the city of Los Angeles been placed in a zoning district; that by virtue of said ordinance the only class of buildings that may be erected in said district, which includes said lot 31, are certain defined places of business. The exhibits attached to the transcript show that to the east of said lot on Pico street are many business places, to the west of said lot on said Pico street there are a number of business houses, such as a drug store, market, barber shop, oil stations, etc. It is true that none of these buildings is within said tract No. 1600, and that there have been no violations of the building restrictions in said tract. It further appears from the evidence that the said tract contains a total of 165 lots; that the defendant Country Club Park, a corporation, still owns 14 lots; that three lots have been sold by the last-named defendant without any restrictions contained in the deeds; that said tract contains 75 lots, the restrictions upon which expired January 1, 1925; leaving a total of 73 lots upon which, under the covenants contained in the deeds, the restrictions expire on January 1, 1935."

[2-4] A careful review of the record and an inspection of the several exhibits introduced convinces us there is ample evidence to support the findings of the court below that it would be unjust, oppressive, and inequitable to enforce or give effect to the restrictions or easements relied on by the appellants. That courts of equity may under such circumstances decline to lend their aid is now well settled. Downs v. Kroeger, 200 Cal. 743, 747, 254 P. 1101, 1102; Strong v. Hancock, supra, page 551 of 201 Cal., 258 P. 60. In the case first above cited it is held that: "Where there has been a change in the uses to which the property in the neighborhood is being put, so that such property is no longer residence property, it would be unjust, oppressive, and inequitable to give effect to the restrictions, if such change has resulted from causes other than their breach." The case is also authority for the proposition that the findings of the trial court are binding upon appeal when, as here, they are supported by substantial evidence.

For the foregoing reasons the judgment must be, and it is hereby, affirmed.

We concur: PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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213 Cal. 494

CALIFORNIA NAT. BANK OF SACRAMENTO v. EL DORADO LIME & MINERALS CO. et al.

Sac. 4470.

Supreme Court of California.

Aug. 27, 1931.

1. Receivers 🔑**69.**

Receiver takes control of property subject to existing interests.

2. Receivers 🔑**145.**

Original owners of business against whom court, following receivership and sale of properties, entered deficiency judgment, *held* not entitled to money in receiver's hands, being entitled at most only to credit therefor on their liability.

In Bank.

Appeal from Superior Court, Sacramento County; George F. Buck, Judge.

Action by the California National Bank of Sacramento, a national banking association, against the El Dorado Lime & Minerals Company, George Bonnefoy, and others. From an order confirming a commissioner's sale and an order settling the final account of a receiver, defendant last named and others appeal.

Affirmed.

Arthur C. Huston, of Woodland, and Thomas B. Leeper, of Sacramento, for appellants.

Devlin & Devlin, and Devlin & Devlin & Diepenbrock, all of Sacramento, for respondent.

PER CURIAM.

This is an appeal by several individual defendants from two orders of the lower court, one confirming a commissioner's sale of property and another settling the final account of a receiver. The issues which are determinative of the appeal were decided in prior litigation between the parties, culminating in the decision of this court in California National Bank v. El. Dorado Lime & Minerals Company, 207 Cal. 676, 279 P. 775. A detailed review of the facts may be found in that opinion. It is sufficient at this time to state that this judgment decreed that George A. Starkweather had title to all of the property of defendant corporation, as trustee for various creditors, including plaintiff; that the rights of the individual defendants (appellants herein), who were the owners of the business prior to its incorporation, were subordinate to the rights of Starkweather as trustee. The account of said trustee was approved, and the judgment further provided that the creditors were subrogated to the rights formerly exercised by him. Priorities among the creditors were determined. In the event of failure to pay the indebtedness, a sale of the properties was ordered. Pursuant to this order, a sale was had, resulting in a purchase of the whole for $140,539, and in a deficiency of $218,091.89. The court entered a deficiency judgment against the defendants with the exception of Leeper, who became interested in the litigation after the business was involved in difficulties, and was not one of the original owners. During the course of the proceedings, a receiver was in charge of the property. At their conclusion, he had on hand cash in the sum of $32,107.46. The court ordered this paid to the creditors.

[1, 2] The first contention of the present appeal is that the money in the hands of the receiver belonged to the defendants as owners of the property and should have been paid

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to them. The trial court found that the money did not represent profits of the business, but was simply the result of the sale of lime ore constituting capital assets of the corporation, title to which assets was, of course, in Starkweather for the benefit of the creditors. A receiver takes control of property subject to all existing interests. Bories v. Union Building & Loan Ass'n, 141 Cal. 74, 74 P. 552; Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237; 1 Clark on Receivers, 469, § 354; 23 R. C. L. 56, § 60. The court credited defendants with this sum on their liability. They are entitled to nothing more than this.

It is next contended that certain accounts receivable, warehouse supplies, and broken ore reserve should not have been sold; but, under the judgment, title to all such property was in Starkweather, and was properly sold for the benefit of the creditors.

Another claim is that defendant Leeper paid out the sum of $500.52 for services and compensation of a referee, in the original action, and that he was entitled to reimbursement. However, as a defendant in the action he was liable for the costs thereof, which amounted to $551.30, and the court directed that the money due him be applied on his liability for the costs.

No other points are worthy of mention. We are satisfied that the court acted correctly in the acts complained of, and the orders are hereby affirmed.

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213 Cal. 606

JORDAN v. GREAT WESTERN MOTORWAYS et al.

L. A. 11613.

Supreme Court of California.

Aug. 31, 1931.

1. **Automobiles 🔑245(64).**

Whether negligence of motorists colliding at intersection is independent or concurrent is generally jury question.

2. **Appeal and error 🔑1001(1).**

Jury's finding, supported by evidence, regarding whether negligence of motorists colliding at intersection is independent or concurrent, is conclusive on appeal.

3. **Automobiles 🔑244(36).**

Evidence sustained finding that negligence of motorists colliding at intersection was concurrent.

4. **Trial 🔑253(1).**

Instructions purporting to contain conditions necessary to verdict for one party must contain all those conditions and not overlook defenses on which substantial evidence has been introduced.

5. **Appeal and error 🔑1066.**

Failure of "formula" instructions in personal injury action to predicate verdict for plaintiff upon finding of plaintiff's freedom from contributory negligence *held* not prejudicial, since no substantial evidence of contributory negligence had been introduced.

6. **Negligence 🔑93(1).**

Negligence of driver of automobile colliding with bus could not be imputed to guest.

7. **Appeal and error 🔑1033(5).**

In personal injury action, instruction that burden was upon plaintiff to prove absence of contributory negligence could have been prejudicial to plaintiff alone, not defendant.

8. **Appeal and error 🔑1064(1).**

Possibly erroneous instructions regarding right of way at intersection *held* not prejudicial to motorist on right, since excessive speed deprived him of statutory right of way and left question of negligence open for jury (St. 1923, p. 560, § 131, as amended by St. 1925, p. 398, § 15).

> St. 1923, p. 560, § 131, as amended by St. 1925, p. 398, § 15, provides that, when two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle be traveling at a lawful speed, so that an excessive rate of speed on part of the vehicle on the right deprives it of the right of way otherwise given to it by the statute.

9. **Evidence 🔑474(8).**

Witness observing speed of vehicle is qualified to give opinion thereon, witness' experience affecting weight rather than competency of testimony.

10. **Evidence 🔑474(3).**

Lay witnesses having requisite opportunity for observation may testify regarding health of another.

11. **Damages 🔑158(3).**

Allegation of "severe bruises, gashes and injuries" *held* sufficiently broad to admit testimony regarding vaginal bleeding.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Irene Jordan against the Great Western Motorways and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Superseding opinion of District Court of Appeal in 294 P. 9.

Bryce P. Gibbs, of Los Angeles, for appellant Great Western Motorways.

Swing & Wilson, of San Bernardino, for appellant LeRoy E. Eslow.

A. S. Maloney and Martin J. Coughlin, both of San Bernardino, for respondent.

WASTE, C. J.

This is an action to recover damages for personal injuries sustained by the plaintiff in a collision between the defendant Eslow's automobile, in which plaintiff was riding as a guest, and a bus belonging to and operated by the Great Western Motorways, a corporation. In their respective answers the defendants denied the allegations of the complaint, the defendant bus company alleging the defense of contributory negligence. For the purposes of this decision we will assume that this special defense is also available to the defendant Eslow because of certain allegations in the complaint, denied by him, and because the case was apparently tried on this theory. At the conclusion of the trial the jury brought in a verdict in the sum of $10,000 against both defendants, each of whom has appealed from the judgment entered thereon.

The accident occurred on the morning of March 1, 1928, in the city of San Bernardino at the intersection of Sixth street, which runs east and west, and Arrowhead avenue, which runs north and south. It is a blind intersection at which the permissive speed is fifteen miles an hour. The defendant Eslow's car, in which plaintiff was riding, was proceeding east on Sixth street, while the bus was going north on Arrowhead avenue. The vehicles approached or entered the intersection at or about the same time, the bus being to the right of Eslow's car. As Eslow approached the intersection his view was partially obstructed by three other cars in the immediate vicinity, all going in different directions. Our examination of the record discloses that there is evidence from which the jury might reasonably have concluded that, in spite of the fact that it was a blind intersection and that each driver's view was further obstructed by the three cars mentioned, the defendant Eslow drove his car through or into the intersection at twenty miles an hour and collided with the bus without seeing it until the moment of impact, and that the bus at the same time was traversing the intersection at a speed estimated between thirty and forty miles an hour, and that the driver failed to keep the necessary lookout and was oblivious to the presence of Eslow's car. A few seconds prior to the collision the plaintiff, who was sitting to the right of Eslow, noticed the bus and immediately screamed or cried out to him to look out. The vehicles came together at a point within the southeast quarter of the intersection.

[1-3] Each defendant disclaims all negligence and responsibility for the accident and urges that the fault lay with the other. These contentions are without merit. Viewing the case in its aspect most favorable to plaintiff, there is ample evidence from which the jury might believe that, although Eslow's car could have been stopped in ten feet had it been going at twelve miles an hour, as he testified, yet it traveled approximately fifty-five feet after plaintiff had called his attention to the approaching bus; while as to the defendant bus company the jury might well have concluded that its bus was passing through the intersection at a speed in excess of thirty miles an hour, causing it to travel approximately one hundred and fifty feet north of the north curb line of Sixth street before it was brought to a stop. Whether the negligence of two defendants is independent or concurrent is generally a question for the jury whose finding, if there be evidence to support it, is conclusive on appeal. Gett v. P. G. & E. Co., 192 Cal. 621, 625, 626, 221 P. 376; Springer v. Pac. Fruit Exchange, 92 Cal. App. 732, 738, 739, 268 P. 951; Dougherty v. Ellingson, 97 Cal. App. 87, 93, 275 P. 456. In this case, if we judge by the verdict it rendered, the jury concluded, upon substantial evidence, that the negligence of the defendants was concurrent and so simultaneous as to allow no break between cause and effect.

[4-7] The case was apparently tried on the theory that contributory negligence was an issue, for all of the parties, including plaintiff, requested certain instructions on this doctrine. Both defendants predicate error on the giving of two so-called "formula" instructions in which no reference is made to the fact that before finding for plaintiff the jury must find her to be free from contributory negligence. It is well settled that instructions purporting to contain the conditions necessary to a verdict for one party must contain all of those conditions and not overlook defenses on which substantial evidence has been introduced. Beyerle v. Clift, 59 Cal. App. 7, 9, 209 P. 1015; Douglas v. S. P. Co., 203 Cal. 390, 393-394, 264 P. 237; Starr v. L. A. Ry., 187 Cal. 270, 278, 201 P. 599. However, the failure of a "formula" instruction to contain a reference to a defense upon which no substantial evidence has been introduced cannot be said to be prejudicially erroneous. As we read the evidence there was no issue of contributory negligence in the case at the time the instructions were given, and the trial court might well have omitted all reference thereto. We find nothing in the evidence admitted on behalf of the plaintiff, or that in-

troduced by the defendants, that would tend to show that plaintiff was guilty of contributory negligence. The defense is very meager, the defendant Eslow alone taking the stand in his own behalf, while the bus company failed to put in any defense other than the introduction of two photographs showing the damage done to its bus. Plaintiff was riding as a guest of Eslow and had no power of control over the car in which they were traveling. It does not appear either that she was guilty of independent negligence. There is no showing of any prior negligence on Eslow's part to indicate that he was not driving his car in a proper and careful manner. There was no reason, therefore, for the plaintiff to be apprehensive of her safety while riding with him, or to take any unusual precautions against their running into danger. That plaintiff was attentive to and not heedless of her well-being is shown by the fact that she discovered the presence of the bus a few seconds prior to the collision and by warning Eslow of its approach sought to avert the impending accident. There apparently was no appreciable time between the discovery of the danger and the occurrence of the collision. Whatever may have been the negligence of the defendant Eslow at the moment of collision cannot be imputed to plaintiff either by Eslow or his codefendant. Smellie v. S. P. Co. (Cal. Sup.) 299 P. 529. As there is nothing in plaintiff's conduct which would tend in the least to prove that she was guilty of contributory negligence in causing the injuries sustained by her as a result of the collision, it necessarily follows that any omission of the instructions to refer to this doctrine does not require a reversal of the judgment. The inadvertence in plaintiff's first instruction to the effect that the burden was upon her to prove the absence of contributory negligence could have been prejudicial to plaintiff alone.

[8] The defendant bus company complains of three instructions given at the request of defendant Eslow, having to do with the right of way as between two vehicles entering an intersection at or about the same time. It is contended that these instructions erroneously state that under certain circumstances the automobile on the left may have the right of way. The bus company urges that these instructions are correct statements of the law as it existed prior to the 1925 amendment of section 131 of the California Vehicle Act (St. 1923, p. 560), but that they do not accurately state the law as it existed at the time of the accident. Granting all that the defendant bus company advances in this regard, we fail to see wherein the instructions complained of could have been prejudicial to it. At the time of the accident section 131, supra, read as follows: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." St. 1925, p. 398, § 15. This section was set out for the guidance of the jury in the bus company's ninth instruction. It is immediately apparent that under the quoted section the vehicle on the right (the bus in this case) has the right of way only so long as it is proceeding at a "lawful speed." An excessive rate of speed on the part of the vehicle on the right deprives it of the right of way otherwise given to it by the statute, and while such excessive rate of speed may not, as urged by the bus company serve to transfer the right of way to the vehicle approaching from the left, a point we need not now decide, the question of negligence under such circumstances would at least be an open one for the jury to determine from the whole of the evidence. Here there is evidence that the bus traversed the intersection at an excessive rate of speed and the defendant bus company made no effort to controvert this showing. The bus did not therefore have the right of way under the law, and the jury may well have concluded that the collision was the result of the joint and concurring negligence of both defendants, regardless of which one had the right of way. The three instructions complained of, assuming them to have been erroneous and all too favorable to the defendant Eslow, could only have been prejudicial to the cause of the defendant bus company if they had resulted in a verdict favorable to Eslow, for then the entire responsibility would have been shifted to the bus company despite Eslow's negligence. On the contrary, however, a verdict was brought in against both defendants, the jury apparently concluding that the negligence of each had proximately contributed to the accident. Moreover, the effect of these instructions is greatly minimized when it is considered that Eslow himself came into the intersection at a speed in excess of the permissive speed. The jury had section 131 before it and undoubtedly concluded that the right of way was confined solely to vehicles proceeding at a "lawful speed." We find no other instructions requiring consideration. The charge on the whole fairly covers the issues and consists of instructions given at the request of all of the parties.

[9] Over objection of counsel, plaintiff was allowed to testify as to the speed of the bus and Eslow's automobile. We find no error in the trial court's ruling. A person having the opportunity to observe the speed of a moving vehicle is qualified to give his opinion as to such speed, and his previous experience or lack of experience goes to the weight rather than to the competency of the testimony. Bowman v. Motor Transit Co., 208 Cal. 652, 655, 284 P. 443; Kramm v. Stockton Elec. R. Co., 22 Cal. App. 737, 755–756, 136 P. 523; Hutchinson v. Miller & Lux Inc., 60 Cal. App. 1, 5, 212 P. 894.

[10] Nor do we find error in the ruling permitting a lay witness to testify regarding the condition of plaintiff's health. Lay witnesses having the requisite opportunity for observation may testify as to the health of another. Robinson v. Exempt Fire Ins. Co., 103 Cal. 1, 4–5, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; Chicago, etc., v. Van Vleck, 143 Ill. 480, 32 N. E. 262, 263.

[11] Urging that internal injuries were not within the issues as framed, the defendant bus company contends that plaintiff was improperly allowed to testify that she had suffered from vaginal bleeding (a term used by the physician) for a long time after the injury. Among other things, the complaint alleges "that the said plaintiff herein received severe bruises, gashes and injuries as a result of said collision." This allegation is sufficiently broad to admit the testimony complained of. Samuels v. Cal., etc., Ry. Co., 124 Cal. 294, 296, 56 P. 1115; Martin v. P. G. & E. Co., 203 Cal. 291, 302, 303, 264 P. 246; Dullanty v. Smith, 203 Cal. 621, 626, 265 P. 814.

The evidence supports the jury's implied findings of negligence on the part of both defendants and absence of contributory negligence on plaintiff's part. We have examined the entire record and the briefs and have found nothing warranting a reversal.

The judgment is affirmed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.

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213 Cal. 573

SLAUGHTER v. VAN WINKLE.

Sac. 4397.

Supreme Court of California.

Aug. 31, 1931.

1. Appeal and error 🔑1004(1).

Verdict will be set aside where so large as to suggest at first blush existence of passion, prejudice, or corruption.

2. Husband and wife 🔑334(3).

$6,000 to husband against wife's aunt for alienation of wife's affections *held* excessive, and was reduced to $2,500 compensatory and $500 punitive damages.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by George E. Slaughter against Emma Van Winkle. Judgment for the plaintiff, and the defendant appeals.

Affirmed on condition of remittitur; otherwise judgment reversed, and cause remanded for a new trial.

Brown & Chamberlain and L. J. Maddux, all of Modesto, for appellant.

Vernon F. Gant, of Modesto, for respondent.

PER CURIAM.

The plaintiff brought an action for damages for alienation of his wife's affections by the defendant, the wife's aunt. The jury returned a general verdict in plaintiff's favor for $6,000, and divided it, by answers to special interrogatories, into $3,000 compensation for actual and $3,000 for punitive or exemplary damages. A motion for a new trial was denied.

The appellant's principal contention is the alleged insufficiency of the evidence to justify the verdict; the special point stressed being that plaintiff failed "to prove malice by that high degree of testimony required by the law."

At the time of their marriage the respondent's wife was a widow, 37 years of age. She owned a twenty-acre walnut orchard and other interests, and occupied the lower apartment of a residence owned jointly by herself and the defendant aunt, who occupied the upper portion with her husband. After a courtship of eight months, the plaintiff and the widow were married, apparently to the great mental distress of the aunt, who seemingly assumed a foster mother attitude toward the plaintiff's wife. After the marriage, the couple took up their abode in the portion of the house theretofore occupied by the wife, and there followed a hectic period of hostility on the part of the aunt toward the plaintiff, with accompanying discord, intrusions, interferences, threats, arrest upon criminal and insanity charges, and physical encounters. Finally the respondent was asked to leave the premises by his wife, because of threatened litigation between her and her aunt over the property. Respondent thereupon took up his residence with his parents near by, but after a period resumed marital relations in the former home. Respondent and his wife finally separated, although communicating with each other and interchanging visits. Finally the wife sued respondent for a divorce.

The record presents a case of conflicting inferences and conclusions. The evidence is such that the verdict of the jury could have been either for the plaintiff or the defendant, and this court would have been compelled to sustain it.

[1, 2] Appellant also urges that the amount of the verdict is excessive. In answer thereto the respondent relies on the well-settled

rule that it is only where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that either a trial or an appellate court may exercise its power to set aside the verdict on the ground that it is excessive. 8 Cal. Jur. 834, § 88, and cases cited. We have no quarrel with this rule, but, upon an examination of the entire record, we are of the view that any amount in excess of $2,500 as actual and $500 as punitive damages can be ascribed to no other cause than passion or prejudice. Our power to thus interpose our judgment has often been recognized where upon the record the amount of the verdict is so large as to suggest at first blush the existence of the above conditions. Livesey v. Stock, 208 Cal. 315, 322, 281 P. 70; Simoneau v. Pac. Elec. R. Co., 166 Cal. 264, 277, 136 P. 544, 49 L. R. A. (N. S.) 737.

The judgment is accordingly reversed, and the cause remanded to the lower court for a new trial unless, within thirty days from the filing of the remittitur in the court below, plaintiff shall remit from the judgment all except the sum of $3,000 and the costs as at present adjudged therein, neither party to recover from the other costs on this appeal. If such remission be made, then, in that event, the judgment shall stand affirmed; otherwise it shall stand reversed.

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213 Cal. 554

COLLIER v. MERCED IRR. DIST.

Sac. 4379.

Supreme Court of California.
August 31, 1931.

Rehearing Denied Sept. 28, 1931.

1. Eminent domain ⇨79, 80.

Facts *held* to disclose that public use had intervened as to whole of irrigation project as against riparian owner's claim.

> Public use had intervened as to the whole project as against riparian owner's contention that, as the irrigation district had not in any one season stored 850,000 acre feet of water as authorized by water permit, but at most only 296,110, a public use had not intervened as to the full 850,000 acre feet, and that, as the irrigation district had not constructed canals sufficient to carry 2,125 second feet of water, its right to divert any amount in excess of 1,600 second feet previously diverted had not attached, since the riparian owner had with actual knowledge for five years or more of the intention of the irrigation district and with knowledge of effect that irrigation works might have on stream and his riparian right permitted an outlay at great cost for construction of dam, power house, and diversion works without protest, and the dam which closed the entire stream was erected and total yield of the stream to the capacity of the reservoir was diverted to public use.

2. Waters and water courses ⇨87.

Where riparian owner, with actual knowledge for more than five years of irrigation district's intention, permitted construction of dam, power house and diversion works without protest, owner *held* barred by laches from preventing alleged encroachment on riparian rights.

3. Eminent domain ⇨293(2).

In riparian owner's action for damages for invasion of riparian right, irrigation district, having right to invoke power of eminent domain, could tender such issue by answer and cross-complaint.

4. Payment ⇨9.

Damages for tort may not be satisfied by enforced acceptance of property or anything other than money.

5. Waters and water courses ⇨40.

Riparian right is usufructuary one in stream, part and parcel of land itself.

6. Stipulations ⇨19.

In cross-action to determine damages to riparian owner, permitting jury to consider irrigation district's stipulation guaranteeing riparian owner specified quantity of water *held* proper.

7. Eminent domain ⇨307(3).

In cross-action to determine damages to riparian owner as if in eminent domain proceedings, instruction respecting special benefits *held* proper.

> The court instructed jury that, in determining compensation, if any, to be awarded the riparian owner, jury should consider any special benefits accruing to riparian owner's land by reason of the regulation of the stream by the construction and operation by the defendant irrigation district of its dam, and, having determined those special benefits, to apply the same in reduction of the amount of compensation which jury might otherwise award to the riparian owner.

8. Eminent domain ⇨303.

Injury caused by invasion of riparian owner's right is measured by ascertaining depreciation in market value of physical property.

9. Eminent domain ⚷303.

In determining injury done by invasion of riparian owner's right by irrigation district, special benefits may be considered (Code Civ. Proc. § 1248, subds. 2, 4; Const. art. 1, § 14).

10. Eminent domain ⚷316.

Where action was converted into condemnation proceeding, riparian owner, having been paid in benefits, *held* entitled to costs (Const. art. 1, § 14).

In Bank.

Appeal from Superior Court, Merced County; J. A. Smith, Judge.

Action by William Collier against the Merced Irrigation District, in which defendant filed cross-complaint. From the judgment, plaintiff appeals.

Modified, and, as so modified, affirmed.

Treadwell, Van Fleet & Laughlin, of San Francisco, for appellant.

Stephen W. Downey, H. B. Seymour and Downey, Brand & Seymour, all of Sacramento, for respondent.

Samuel C. Wiel, of San Francisco, amicus curiæ.

PRESTON, J.

In this cause the pleadings tender both equitable and legal issues which have arisen out of the conflicting claims between plaintiff, a riparian proprietor, and the defendant, an irrigation district, which itself owns certain lands riparian to the stream in question.

The Merced river is a natural stream of this state of considerable capacity, rising in the Sierra Nevada Mountains and flowing westerly through the San Joaquin Valley and Merced county in its course toward the sea. Defendant is a public corporation irrigation district, organized in 1920, and owning in said county and valley about 189,000 acres of land susceptible to irrigation and cultivation, 10,000 acres of which lie to the north and the balance to the south of said stream. The lands are productive with irrigation and comparatively unproductive without it, as the natural rainfall in the valley is insufficient for profitable agricultural production. Like many other California streams, the run-off of said river varies widely during the different periods of the year and likewise varies widely from year to year. In some seasons it has been known to carry a flow of as much as 3,700 cubic feet per second; at other times it has been known to be as low as 25 cubic feet per second. The average run-off is 1,069,000 acre feet per annum. There are, however, periods of high flow in every year, occurring between the months of April to October, inclusive. They are due in part to rainfall, but more properly to the melting snows in the upper reaches of the stream in the said mountains. These periods of flood are usual and ordinary and constitute a part of the normal flow of the stream. There are in the stream no extraordinary flood, storm, or unusual freshet waters, but all of the water therein is properly classified as part of the usual and normal flow thereof.

The basic facts involved in this action are not in dispute. Plaintiff owns and for many years last past has owned some 527.86 acres of land in the San Joaquin Valley, patented to his predecessors in ownership in several separate lots or parcels. The main channel of said Merced river traverses these lands. There is also a branch or slough channel which takes out of said river at the easterly end of these lands and flows entirely through them, returning to the river. All plaintiff's lands are riparian either to the main channel of the river or to said branch channel, or to both. The branch channel itself, while a natural water course, receives water only at comparatively high stages of the river.

Plaintiff, for an indefinite period, has made use annually of the seepage of said main and branch channels of the stream, as well as of the overflow thereof at times, in growing upon his said lands and producing therefrom various crops of alfalfa and perhaps other grasses, and he has made beneficial use of the whole stream in its natural state, except such use thereof as has been subject to a preferential appropriative right owned by defendant district to divert and use on nonriparian lands, when present, the continuous flow of said stream to the extent of 1,600 cubic feet per second. This water is diverted from the stream above plaintiff's lands by means of two main canals; 1,500 cubic feet per second being carried in what is known as the south side canal and 100 cubic feet per second in what is known as the north side canal. The existence of this prior and preferential right is not in dispute, but it is subject to the limitation that, when 300 second feet or more of water are in the stream, 225 second feet thereof must be left undisturbed flowing down the channel thereof, but, when less than 300 second feet are present, three-fourths thereof must be allowed to remain in the channel of the stream. Until this controversy arose, however, plaintiff's riparian right, subject to said right above mentioned, was intact, and had all the elements and strength inherent in such a property right.

But this immediate controversy has arisen from the following additional facts: In 1919 the predecessor of defendant district lodged with the division of water rights certain ap-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

plications having for their object the securing of a permit to erect upon the upper reaches of this stream, in Mariposa county at a place called Exchequer, a dam across the stream 326 feet high, creating a reservoir with a capacity of 289,000 acre feet and to obtain the right to fill and refill this reservoir during the year to the aggregate extent of 850,000 acre feet and to drain the water from said reservoir at the rate of 2,125 cubic feet per second and pass it through a power house to be erected below said dam and, after using it for power purposes, convey it to headgates of canals then existing or thereafter to be constructed, and thereafter to divert the major part of it through said canals upon nonriparian lands for irrigation uses thereon. Said permits were issued about July 1, 1922, and thereafter recorded in the office of the county recorder of said Mariposa county, followed by the securing of a permit to the same effect from the federal Power Commission.

On or about said last-mentioned date actual work on said project was begun, and the same was prosecuted with diligence to completion. Prior to April 21, 1926, said dam and diversion works and said power plant were completed and during that year there was stored in said reservoir 159,152 acre feet of water, and in the year 1927 there was stored in said reservoir 296,110 acre feet, and in the year 1928, up to the time of the filing of the complaint herein, 27,038 acre feet. Said power plant has a capacity for generating electrical energy of approximately 42,000 horse power or 130,000,000 kilowatt hours of electrical energy per annum. Defendant also has contracted to sell and dispose of said electrical energy to the San Joaquin Light & Power Company for a period of some twenty years, greatly to the benefit of said district. For the purchase of the original water right and for the construction of the diversion works and improvements above mentioned, defendant in 1921 voted a bond issue of $12,000,000, on March 31, 1924, voted an additional bond issue of $3,250,000, and on April 1, 1926, an additional bond issue of $1,000,000, making a total of $16,250,000. A large portion of these sums was used in the construction of said dam and power plant and in the construction and extension of canals and in the betterment of the system generally.

In anticipation of this event the owners of large areas in the district leveled their lands and prepared them for the reception of irrigation water, and planted trees, vineyards and crops. It is even claimed that small towns sprang up in the district and that the population of other towns materially increased because of the anticipated operation of this project. Plaintiff not only had constructive notice, but he had actual notice of these proposed improvements and of the extent of the proposed invasion of his riparian rights. He had such knowledge for more than five years prior to the commencement of this action, and he never registered a protest.

Upon this state of facts, on March 7, 1928, plaintiff commenced this action. The complaint is in two counts—one containing a prayer for $100,000 for damages already suffered to plaintiff's riparian rights in the said above-mentioned lands; the other, a prayer for an injunction against threatened additional encroachment upon his said riparian rights. The theory of the complaint is that on April 21, 1926, defendant appropriated for said use plaintiff's riparian rights to the extent of taking the right to store and divert 300,000 acre feet of water per annum, but that defendant has not yet stored the full contemplated amount of 850,000 acre feet and therefore plaintiff has the right to enjoin the annual storage of the additional 550,000-odd acre feet of water of said stream; also that, inasmuch as the limit of capacity of the diversion canals is 1,600 cubic feet per second, the contemplated additional diversion of 525 cubic feet per second may properly be enjoined.

Defendant answered and set forth various and sundry defenses to plaintiff's claims; the principal one being that a public use had intervened as to the whole of its claim, to wit: The right to store, when produced by the stream, 850,000 acre feet per annum, by filling and refilling said reservoir and by diverting the original 1,600 acre feet therefrom evidenced by the prior water right and the additional amount of 525 cubic feet per second from the water so stored, subject, of course, to the limitation above specified when there is a small amount of water only in the stream. Defendant also alleged the right to generate electrical energy by means of said power house as above stated. It urged the above allegations as a complete defense to the injunction feature of plaintiff's complaint, and also pleaded that plaintiff had suffered no damage, but on the contrary had been benefited by the manipulation of the stream in the manner proposed by the reclaiming of his said lands. But in that respect it also pleaded, in the alternative, in each special defense to the action, as follows: "Defendant alleges, however, that if it has invaded any right of plaintiff that the damage, if any, suffered by the plaintiff can be readily estimated in terms of money, and defendant under such circumstances hereby offers to pay to plaintiff all lawful damages sustained, said damages to be fixed in this proceeding. Defendant further offers, stipulates and agrees under such circumstances, and as determined and fixed by the evidence and the court herein, to provide plaintiff, and to make available for his land, during the irrigation season of each year such amount of water as may be reasonably required by plaintiff by reasonable methods of diversion, said obligation of defendant to be made a part of the judgment in this case."

Defendant then ended with a prayer as follows: "Wherefore, defendant prays that plaintiff take nothing by this action but that defendant have judgment herein. In the event that any right of plaintiff is found to be invaded by defendant, defendant hereby offers to pay all lawful damages and prays that the compensation therefor be fixed in this suit. Defendant further prays for such further, other and additional relief as to the court may seem proper or appropriate."

The cause proceeded to trial. The court heard and determined the equitable issues first, and held that a public use had intervened as to all claims of defendant district, specifying them, as above outlined, and for that reason held that an injunction should be denied, but it confirmed the riparian right of plaintiff. At the request of plaintiff it then summoned a jury to try the legal issue of damages. On the trial of the case defendant was allowed to meet this issue by a stipulation which should be and become a condition precedent to the exercise of any additional rights in the stream and should become part of the judgment in the case, which said stipulation, so far as here material, is as follows: "That Merced Irrigation District shall never impound in the Exchequer Reservoir and/or divert from the Merced River by means of its canals or other diversion works, or otherwise, any of the waters of the Merced River until and unless, and only so long as, there is flowing in said main channel of the Merced River at and along the riparian lands of Plaintiff William Collier, described in the amended complaint, and at and along the whole thereof, and at and along every part thereof, water to the extent and quantity of eighteen (18) cubic feet per second, which water and all of said water shall be available for diversion by plaintiff and shall be suitable for irrigation of said lands of plaintiff described in the amended complaint, and all parts and portions thereof, without diminution by other riparian proprietors or by appropriators or by diversioners of any kind, or character or in any respect whatsoever."

The jury were instructed to give full credence to the weight and extent of this stipulation and to base their verdict upon its existence, enforceability, and inviolability. Expert and lay witnesses were heard by both sides and the jury returned a verdict in favor of the defendant. Judgment passed accordingly; plaintiff was denied his costs of suit. He promptly appealed. On this appeal he urges the questions which will now be discussed.

[1] The first contention is that the court erred in holding that a public use had intervened as to the whole of said project. Appellant's contention in this respect is that, as above outlined, respondent not having in any one season stored 850,000 acre feet of water of said stream, but at most only 296,110, a public use had not intervened as to the full 850,000 acre feet, and, moreover, inasmuch as defendant had not yet constructed canals sufficient to carry 2,125 second feet of water, its right to divert any amount in excess of 1,600 second feet had not yet attached.

We think this is entirely too narrow a view to take of the situation. As above pointed out, with full actual knowledge for a period of five years or more of the specific intention of respondent, as disclosed by the several state and national permits, and with knowledge of the effect the works might have upon the stream and consequently upon his riparian right, appellant permitted an outlay, at great cost, for the construction of this dam, power house and diversion works, without protest, and it is not unreasonable to hold that respondent thereby put itself in charge of a public use, as to all that portion of the stream covered by its expressed and known intention within the capacity of the reservoir. The closing of the stream by the dam under these circumstances should allow the use of the reservoir to its capacity during any one season up to the limit of respondent's permits. It utilized during the years 1926–1928 practically the whole yield of the stream, and it is but a fair construction of the effect of its action to say that it secured the right to take all the yield up to its claim of 850,000 acre feet, and that appellant, by his inaction, waived his right to equitable relief.

"It is perfectly true that not even a corporation possessing the power of eminent domain may under the Constitution (article 1, § 14) take or damage private property without first making adequate compensation. But this right may be waived by the owner, and, in order to prevent the obstruction of progress, he must be held to diligence in asserting his right as against a concern administering such a public use. If he allows his property right to be invaded and either taken or damaged for a public use, and the public right has so far intervened as to justify the belief that objection has been waived, then in law the property right so taken or damaged is to that extent dedicated to the public use." Conaway v. Yolo Water & Power Co., 204 Cal. 125, 131, 266 P. 944, 946, 58 A. L. R. 674.

If this right to store is conceded, the ability to divert in any certain quantity would seem to be largely a false factor, for, if the appellant is not allowed to object to the amount of storage, he may not be allowed to object to the manner of diversion thereafter unless a special injury results to him thereby. The injunction in the Herminghaus Case (Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607) was not against existing reservoirs nor against the filling and refilling of them during a season, but was against the future use of water in an unfinished and unused set of reservoirs existing in mere contemplation. Neither is the case of Turner v. East Side Canal Co., 169 Cal. 652, 657, 147 P. 579, controlling here. It was there held that, where a utility had taken extra water into its canal and had allowed it to go to waste, no public use had intervened. But here a dam which closed the entire stream was erected, and the total yield of the stream to the capacity of the reservoirs was devoted to public use, and this would seem to distinguish it from either of the above-cited cases.

[2] Besides, it fairly appears on the face of the complaint that appellant was guilty of laches. Conaway v. Yolo Water Co., supra. And laches abundantly appears from the evidence and facts found by the court. Inasmuch as appellant was put on notice of all the essential features of such a plea by the allegations of the intervention of a public use and the statute of limitations, it does not seem to be a harsh act to invoke the doctrine here for the first time to sustain the action of the court below. Garrity v. Miller, 204 Cal. 454, 268 P. 622. Stevinson v. San Joaquin, etc., Co., 162 Cal. 141, 121 P. 398; Akley v. Bassett, 189 Cal. 625, 648, 209 P. 576; Scott v. Symons, 191 Cal. 441, 457, 216 P. 604. We therefore fully approve of the ruling of the court in this respect.

[3] Appellant next claims that the pleadings of respondent are an attempt to invoke the special procedure outlined in section 534 of the Code of Civil Procedure, and urges that this may not be done, as the section is unconstitutional and void. The contention here is that, inasmuch as private property may not under the Constitution be taken or damaged without compensation being first fixed and paid, a property owner may not be denied an injunction to prevent a violation of this guaranty and that such is allowed by the section. This and other questions raised we regard as serious, but, in view of the fact that the property has already in effect been taken, the question of the validity of said section does not arise. For we think the proceeding here involved is allowable upon settled principles of equity. This cause is in effect the reverse of a condemnation proceeding—a proceeding to fix damages after the taking and not before the taking of the property as enjoined by the Constitution. As early as City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585, it was settled in this state that in a proceeding in eminent domain, the conflicting claims to the rights of the condemning party in the property could be determined as well as the conflicting rights of the parties defendant thereto. There was, therefore, no objection to respondent here, who has the right to invoke the power of eminent domain, tendering the issue by answer or cross-complaint of its own claims to the property and after these were settled to allow the action to be tried as if in an eminent domain proceeding. The answer of respondent contained every element of a cross-complaint in such an action. It was treated as sufficient to raise this issue and that is all that is required. Turner v. East Side Canal Co., supra. We regard the case as also being similar to the situation in Newport v. Temescal Water Co., 149 Cal. 531, 538, 539, 87 P. 372, 375, 6 L. R. A. (N. S.) 1098, and the following language from that authority seems appropriate: "And, finally, upon this proposition it may be said that, where the interests of the public are involved and the court can arrive in terms of money at the loss which plaintiff has sustained, an absolute injunction should not be granted, but an injunction conditional merely upon the failure of the defendant to make good the damage which results from its work. Such an action, if successful, should be regarded in its nature as the reverse of an action in condemnation. The defendant in effect would be held to be damaging private property without just compensation first made to the owner, and, failing to make such compensation, should be enjoined from further damage."

This holding is but an application of the well-known equity rule which Mr. Pomeroy states as follows (1 Pomeroy, Equity [4th Ed.] § 242): "It was a fundamental conception of the equity jurisprudence, from the earliest periods as soon as its jurisdiction had become established * * * to determine the entire controversy, to award full and final relief * * * and thus to bring all possible litigation over the subject matter within the compass of one judicial determination."

Appellant at this juncture urges that respondent took his property for a public use on April 21, 1926, and his damages are the difference between its market value with and without this property right. From this premise he urges serious and far-reaching error arising from the so-called stipulation above quoted respecting a so-called guaranty of the presence continuously at his land of 18 cubic feet per second of water available for his sole use and benefit. The argument is that to allow the jury, in measuring his damages, to predicate its action upon the existence and inviolability of said guaranty was to pay his damages in property or "chips and whetstones" and not in money as the law demands.

[4] It is, of course, not open to question that damages for a tort may not be satisfied by the enforced acceptance of property or any other thing than money. In other words, the law does not countenance the payment of damages by a substitution of their equivalent in property or in valuable privileges. But does this properly characterize the issue here?

[5] The riparian right is a usufructuary one in the stream, a part and parcel of the land itself. Any injury short of a complete dives-

titure of the right leaves a quantum in kind in the proprietor thereof. If the intruder relinquished a part of the right to the channel of the stream, to that extent he restored the right to its rightful owner. We have here then a partial taking, with a relinquishment to the stream of a portion of the right seized. We have seen above that under the ruling of the court the action became in effect a cross-action to determine damages as if in eminent domain proceedings. Appellant concedes that in eminent domain proceedings a stipulation of this character would be proper, and in this connection it may be profitable to cite from a few of the mass of cases from outside jurisdictions on this question.

In the case of Tyler v. Hudson, 147 Mass. 609, 18 N. E. 582, 583, a leading case, the following language is found: "The right to take the land, by purchase or otherwise, does not involve the obligation to take the whole interest in land purchased or otherwise taken. That a right of way could be reserved in land taken by purchase, will not be questioned; the objection to reserving a right in the owner in land taken in invitum is technical, rather than substantial. It is true that, in a sense, it may be said to create a new estate in him without his assent. A technical answer might be that, the estate being for his benefit, his consent and acceptance, simultaneous with the taking, will be presumed. The real answer is that the refinements and nomenclature of conveyancing will not be applied to a taking by right of eminent domain. No more land and no greater interest in it need be taken than the public use requires. If the right to make a particular use of the land is of benefit to the owner, and puts no new burden upon him, and does not interfere with the public use for which the land is taken, there is no reason that he should be deprived of that use, and be paid its value as damages. All the right to use the land, except that, may be taken, and that be left in him to enjoy or not, as he pleases."

The above holding was followed with express approval in the case of St. Louis, etc., Co. v. Clark, 121 Mo. 169, 195, 25 S. W. 192, 906, 907, 26 L. R. A. 751, 752, wherein commissioners appointed for the purpose made a report allowing the property owner $87,510 as damages. The railway company paid the award, entered into possession, and then a jury trial followed and they assessed the damages at $72,000. No crossings were contemplated at the time of the award by the commissioners, but, on the trial later and after possession had been taken, crossings in lieu of money compensation were tendered, and it was there objected, as here, that, as the property had already been taken, it was too late to make a relinquishment of any estate therein. The court quoted from and approved the case of Tyler v. Hudson, supra, and said: "No good reason can be seen why the condemning company should not have the right to announce, upon the trial, and have made a matter of record, if not done in its petition, the manner in which the right of way should be used; otherwise, the jury would have the right to make the award on the basis of the most injurious use to which the easement could be lawfully applied in the construction and operation of the road."

And again, in disposing of the same argument made here, the court said: "We do not think that defendants observe the distinction between the appropriation of the land itself and the plans and methods that may be adopted for the construction, maintenance, and operation of the road thereon. We think it true, as claimed, that the appropriation of the land is complete when the amount of damage awarded by the commissioners is paid and possession is taken. * * * Upon an assessment by a jury, in case the road has already been constructed, it seems too plain to require more than a statement of the proposition that the damage should be ascertained in view of the condition in which the unappropriated land is left by the use actually made of the easement. This in no sense constitutes a payment of damages in privileges, but is simply a reduction or increase, as the case may be, of the damages on account of the manner of constructing the road."

The case of Spokane Valley Land, etc., Co. v. Jones, 53 Wash. 37, 101 P. 515, 517, seems much in point. There a riparian owner claimed that its right had been invaded by the construction of a dam and diversion of the waters of a lake. It brought suit after the dam was built and secured an injunction which was stayed for thirty days to allow the filing of a condemnation proceeding, which was done. On the trial, the company offered a similar stipulation conceding the owner certain privileges and rights in the lake similar to those tendered appellant here. The owner objected on several grounds, among which was the claim that "the offer is an effort to reduce the damages by tendering to respondents something in lieu of money, in contravention of article 1, § 16, of the Constitution." The court then said: "We next come to the principal question, whether the effect of this offer is to give the respondents some right or easement as compensation rather than money, in contravention of article 1, § 16, of the Constitution. Is it not rather an effort on the part of the appellant to appropriate a part of the water of Liberty Lake, reserving to the respondents so much thereof as shall be found necessary for the irrigation of their land, such quantity to be made definite by the court after hearing the evidence?" This case reviews the authorities to a great extent.

A later and similar case was Olympia L., etc., Co. v. Harris, 58 Wash. 410, 108 P. 940, wherein a like holding was made.

The cases cited by appellant are in the main distinguishable from the above principles. Although appellant insists that the situation is that of a taking of property and a recompense in other property, to this we cannot subscribe for the reasons above set forth.

[6] Still not satisfied, appellant further urges that respondent in this situation is paying him with water under such guarantees that it is not riparian water, but privately owned water that may be from some other stream. We think a fair construction of the stipulation is that the waters shall be a part of the natural flow of the stream. It is true that the stipulation contains guarantees that savor of a priority right as distinguished from a riparian right, but the ability of respondent to respond to its guarantees seems not to be doubted. A right of priority is a constant quantity, and is superior in efficacy to a riparian right in the same quantity of water. But it is still water of the stream and it still washes the appellant's lands, and, while more stable, it is at the same time a kindred right and a part and parcel of the same land. We think it is carrying the refinements of logic too far to sustain this contention of appellant.

The same observation is applicable to appellant's further claim that being in possession of a greater right, he may not release or cede away any of this right without setting up a substitution of one piece of property in payment of damages done to another.

The further contention that the damages should be allowed as of April 21, 1926, is disposed of by the above discussion.

[7] The next major attack of appellant is upon the instructions of the court to the jury respecting special benefits. It is complained that the court fell into error in giving an instruction upon this subject as follows: "In determining the compensation, if any, to be awarded plaintiff, William Collier, in this action you are entitled to take into consideration any special benefits accruing or to accrue to plaintiff's lands by reason of the regulation of the stream flow of the Merced River by the construction and operation by the Merced Irrigation District of its Exchequer Dam and having determined those special benefits to consider and apply the same in reduction of the amount of compensation which you might otherwise award plaintiff in this proceeding. Special benefits are such as are peculiar to the land of plaintiff and result from the mere construction of the dam. They are to be distinguished from general benefits, the latter being enjoyed by the public at large as the result of the construction of the improvement. General benefits, accordingly, are not to be considered by you in your deliberations. But special benefits may be so considered and accordingly you may take into consideration benefit if any to the Collier land which is direct and special as to that land and not enjoyed in common with the public at large."

The language of article 1, § 14, of the Constitution, in this behalf is: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county or the state until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation. * * *"

Section 1248, subd. 4, of the Code of Civil Procedure, provides in this connection as follows: "4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property."

This provision of the statute was followed by the court. Under the constitutional provision it would seem at most that special benefits were to be excluded in right of way cases except those involving a municipal corporation or county. In other words, except in favor of municipal corporations and counties in right of way proceedings, benefits are to be excluded, but there is no inhibition respecting special benefits in any other kinds of taking under the eminent domain law. This interpretation was practically conceded in Yolo Co. v. Hudson, 182 Cal. 48, 186 P. 772. The following from Hicks v. Drew, 117 Cal. 305, 314, 315, 49 P. 189, 192, seems to be in point: "The jury was instructed as follows: 'If the jury find from the evidence that the plaintiff has sustained any damage by the act of defendant, as she has complained against him, and that by the same act she has received benefit, then, in estimating such damage, such benefit should be deducted.' This instruction was correct." See, also, Eachus v. L. A., etc., Co., 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149; Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040, 70 P. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188.

[8, 9] Moreover, the question of benefits seems to be an immaterial factor in the class

of cases to which this one belongs. Respondent was permitted to prove that the storage above appellant's lands would practically prevent overflows on said lands and would have a tendency to reclaim them and make them useful for ordinary cultivation; also that in the operation of the power plant about one-half the water would be restored to the stream; also to show the measurement of the stream at appellant's lands during the operation of the dam; also that seepage from the canals into the stream was unavoidable. The court, however, expressly instructed the jury to disregard seepage waters as an element of benefit. It will be noticed that each item of evidence throws light upon the extent of the taking by respondent. Besides, while the riparian right is a part and parcel of the land in a legal sense, yet it is a usufructuary and intangible right inhering therein and neither a partial nor a complete taking produces a disfigurement of the physical property. The only way to measure the injury done by an invasion of this right is to ascertain the depreciation in market value of the physical property. But the only way to show that depreciation is to show the consequences to the land from the construction and operation of the public works. Therefore, in a case of this type, it is impossible to separate or disregard the item of benefits in making up a verdict or judgment. Were it a case where the property taken had a physical independent existence and an independent value and was a part of a larger area, it would then be possible to disregard the item of benefits when appraising the specific property appropriated. Section 1248, subd. 2, Code Civ. Proc. There was no error in the instructions or rulings with respect to the item of benefits. There was a distinct conflict in the evidence as to whether the lands of appellant had a greater or a less market value after the taking by respondent, but there is no question of law arising on the evidence.

This cause, ably handled by counsel on both sides, represents a contest between opposing schools of thought. We cannot refrain also from commending the trial judge for his very efficient handling of the difficult issues presented to him.

[10] There is, in our opinion, no need of further discussion except as to the item of costs in the court below and in this court. The cause having been converted practically into a condemnation proceeding and appellant having been paid in "benefits," the constitutional provision above quoted seems to be sufficient to vouchsafe the award to him free from the costs of respondent and with his own costs as well. San Joaquin, etc., Co. v. Stevinson, 165 Cal. 540, 132 P. 1021.

Accordingly, the judgment is modified so as to allow appellant his costs in the court below and on appeal. As so modified, said judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

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213 Cal. 601

GENERAL PETROLEUM CORPORATION OF CALIFORNIA v. BEILBY et al.

Sac. 4455.

Supreme Court of California.

Aug. 31, 1931.

1. Appeal and error ⚷781(6).

Where agreement on which injunction was based was superseded during appeal, appeal *held* moot, requiring dismissal.

2. Appeal and error ⚷781(6).

Where differences are adjusted during appeal, appeal will be dismissed.

3. Appeal and error ⚷781(1).

Injunction enjoining lessee's agents for distribution of lessee's products, from trespasses on leasehold, *held* not to prevent other defendants from conducting lawful business with agents so as to entitle other defendants to appeal after question had become moot between lessee and agents.

In Bank.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Suit by the General Petroleum Corporation of California against R. M. Beilby and others. From an adverse judgment, defendants appeal.

Appeal dismissed.

Hinsdale, Otis & Johnson, of Sacramento, and T. P. Wittschen, of Oakland, for appellants.

Devlin & Devlin & Deipenbrock and Irving D. Gibson, all of Sacramento, and A. L. Weil, of San Francisco (Harris F. Shaw, of San Francisco, of counsel), for respondent.

WASTE, C. J.

Appeal from a judgment permanently enjoining defendants, and each of them, their agents, employees, and servants, during the pendency of a lease, from interfering with the leasehold rights of plaintiff in property at the southwest corner of Thirty-First and M streets in Sacramento used as a gas and oil station and of which the plaintiff is the lessee under a recorded "Advertising and Facilities Lease" entered into with the defendants Beilby & Foster, holding a lease from the owners of the property. The sublease was entered into with the implied consent of the owners and for a period beginning May 28, 1928, and ending June 30, 1935, and thereafter until canceled by ninety days' written notice from either party of intention to terminate. Advertising rights, surface and subsurface rights, and rights to the use of tankage, pumps, containers, pipes, and other facilities on said leased premises or thereafter to be installed for the storage, delivery, and sale of petroleum products, were exclusively leased to respondent corporation for an agreed rental of $5 a month and 1 cent a gallon for each gallon of gasoline sold on the premises during each preceding month. Their immediate lessors, Beilby & Foster, were constituted the agents of the respondent for the sale of its products and were licensed during the period of said lease without charge to the exclusive use of the storage and distributing facilities of said station for the storage, sale, and delivery of gasoline or other motor fuel consigned to them by respondent corporation. Said agents, however, were not given a license to all the rights enumerated in the lease to respondent. The agents agreed to diligently advance the sale of respondent's petroleum products, to hold the moneys received therefor, less 4 cents a gallon allowed commission on the sale of gasoline, as trustee for respondent, to be paid over from time to time. The agency agreement was superseded by a duly executed similar agreement executed in March, 1929, but effective as of the date of the former agreement. This agreement provided that, in addition to the 4 cents a gallon commission, the agents should receive an additional 1 cent a gallon on all gasoline and motor fuel sold in excess of 500 gallons each month.

In April, 1929, Beilby & Foster became dissatisfied with the service of respondent and entered into an arrangement solicited by defendants Growney and Blachly, distributors of "Western" gasoline, by which said Growney and Blachly were to supply them with gasoline, and thereupon Beilby & Foster began to use the leased premises and their advertising, storage and distributing facilities for the sale of the "Western" product, in violation of respondent's leasehold rights in said premises.

The plaintiff thereupon brought suit against Beilby & Foster and said Growney and Blachly, as joint tort-feasors in aiding and abetting the repeated trespasses on their leasehold rights constituting an irreparable and continuing injury for which a remedy at law was inadequate, and praying that such trespasses be enjoined. A meritorious prima facie case for injunctive relief was pleaded. The defendants Beilby & Foster and Growney and Blachly separately filed amended answers alleging that said lease and agency agreement was in reality but a contract for the sale of respondent's petroleum products and as such was not of equitable cognizance, and upon this contention base an exhaustive argument, and assail the judgment of injunction here appealed from, upon various grounds, one of them being that a new and existing agreement between defendants Beilby & Foster and respondent under which said parties are now operating is, in effect, the same agreement upon which the injunction judgment was based and is not a new agreement.

The facts are that after the judgment of injunction was rendered respondent and appellants Beilby & Foster on December 26, 1929, entered into a new agency agreement similar in form to the original agreement but differing materially therefrom in several particulars, and which by its express terms modified and superseded all former agreements, constituted a novation and an extinguishment of the contracts upon which the judgment of injunction was based, and has now become the agreement of the parties under which they are actually operating.

Upon the appeal being taken the respondent filed a motion to dismiss the appeal on the ground that the questions involved therein had by the entering into of the new agreement between the parties to the action become moot. The motion was supported by the affidavit of J. F. Walsh, Northern California division manager of the respondent corporation, and incorporated copies of the original advertising and facilities lease of May 28, 1928, the agency agreement of May 28, 1928, the agency agreement of March, 1929, substituted therefor, and which documents constitute the basis for the injunction judgment rendered on December 19, 1929. The affidavit also sets forth the new agency agreement of December 26, 1929, which differs materially from the original agreement of May 28, 1928, in that it provides that said agents shall be allowed 2 cents a gallon on all gasoline or motor fuel sold in excess of 250 gallons each month, and an additional commission of 3 cents a gallon on all gasoline or motor fuel sold; a new arrangement as to price to cover tank truck delivery in Sacramento instead of price at the nearest bulk delivery plant of respondent, a new method of accounting eliminating the old agreement that proceeds of sales should be held by the agent as trustee and paid over from time to time. The agreement also provides for an amendment of the description of the recorded lease to conform to the correct description of the leased property from the owners to respondent's lessors, Beilby & Foster. Appellants Beilby & Foster filed no counteraffidavits. Appellants Growney and Blachly, who were neither parties to the lease nor to the agency agreements, did, and claimed that the old agreements have not been superseded as far as they are concerned, and that they have a right to be heard upon the merits of the appeal.

[1, 2] The motion to dismiss was denied without opinion, this court not being in a position to determine without a more mature consideration whether or not the appeal had really become moot. The court has now examined the record in considering the appeal on its merits and is satisfied that there is no longer any real controversy existing between the respondent and the appellants Beilby & Foster as to any matter upon which the injunction judgment was based, and that the appeal therefore has become moot. Authority is ample to the effect that, where all differences respecting the subject-matter of a controversy are adjusted during the pendency of the appeal, the appeal will be dismissed. Nelson v. Nelson, 153 Cal. 204, 94 P. 880; Bernard v. Weaber, 23 Cal. App. 532, 138 P. 941; California Prune Ass'n v. Orchard Co., 195 Cal. 264, 232 P. 463; Armstrong v. Sacramento Valley Ry. Co., 179 Cal. 648, 650, 178 P. 516.

[3] Counsel for appellants contend, however, that the rights of Growney and Blachly are entirely distinct from those of Beilby & Foster, and, since they have in no way changed their position, that the appeal should not be dismissed as to them, and assert that the effect of the injunction is to prevent them from selling their wares to Beilby & Foster. From the very nature of the suit, that of irreparable injury resulting from continuing trespasses upon the leasehold rights of respondent, and the injunctive relief awarded, this contention is more fanciful than real and is directly contrary to the findings of the trial court. As we read the judgment of the lower court, it merely protects the respondent in such leasehold and property rights as it has lawfully acquired under its lease, and enjoins the defendants Beilby & Foster, their agents, employees, and servants, within which category may very properly be included Growney and Blachly, tort-feasors, from further trespassing upon the leasehold and property rights of the respondent. The injunction in no way prevents them from freely conducting a lawful business, but does enjoin unlawful trespass upon the leasehold rights of respondent of which rights they had both actual and constructive notice.

In the counteraffidavits filed on behalf of Growney and Blachly upon the motion to dismiss, there are no denials of the averments of the affidavit of Mr. Walsh that the new agreements between appellants Beilby & Foster and respondent are now in full force and effect, or that the parties thereto are now duly performing all of the terms, conditions and obligations of these new agreements. Under such circumstances, a reversal or affirmance of the judgment would have no legal effect, since the facts upon which the injunction judgment was based have no longer any existence in fact.

We conclude, therefore, that the material questions involved upon this appeal have become moot, and that the appeal should be dismissed, and it is so ordered.

We concur: SHENK, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

213 Cal. 487

ITO v. WATANABE.

Sac. 4381.

Supreme Court of California.
Aug. 27, 1931.

Rehearing Denied Sept. 24, 1931.

1. Jury 🔑13(18).
Trial 🔑374(2).

If only equitable issues are raised, jury trial is unnecessary, and verdict is only advisory.

2. Contracts 🔑264.

Rescission, as for fraud, may be effected by notice and restoration or tender of consideration; action being unnecessary (Civ. Code, § 1691).

3. Trial 🔑374(2).

Where vendor sued for balance of price, issue of fraud raised by purchaser was legal, not equitable, issue; hence verdict was not merely advisory.

4. Vendor and purchaser 🔑314(3).

In action by vendor for balance of price, purchaser could defend on ground of fraud without pleading either affirmance or rescission of contract (Civ. Code, § 1691).

5. Fraud 🔑20.

Misrepresentations with intent to deceive do not alone constitute "fraud" unless they materially induced contract and were relied on.

[Ed. Note.—For other definitions of "Fraud," see Words and Phrases.]

6. Stipulations 🔑18(8).

Defendant not objecting to form of special interrogatories, which omitted essential elements of particular issue, *held* bound by stipulation that court could find on all other issues.

7. Appeal and error ⚷1062(1).

Where parties submitted special interrogatories and stipulated that court could find on other issues, error in court's disregarding verdict *held* harmless, where verdict was insufficient to support judgment.

In Bank.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by K. Ito against Kiyoshi Watanabe. Judgment for plaintiff, and defendant appeals.

Affirmed.

Busick & Leeper, of Sacramento, for appellant.

Lee Gebhart, of Sacramento, for respondent.

LANGDON, J.

Plaintiff and defendant entered into a contract by the terms of which plaintiff agreed to sell to defendant an hotel business, furniture, and other equipment, and to procure a new lease for him. This action is for the balance of the purchase price. The answer of defendant alleged misrepresentations inducing the making of the contract and partial failure of consideration. It further alleged a notice of rescission and offer to restore the consideration received. In addition the answer set forth a delivery by defendant of an unindorsed certificate of the Yokohama Specie Bank, San Francisco branch, as security for the payments to be made, and prayed that plaintiff be required to return this certificate and the sum of $1,600 already paid on the contract. Defendant demanded a jury trial, which was granted over the objection of plaintiff. Eleven special interrogatories were submitted to the jury, and the parties stipulated that the court could make findings on all other issues. On four of the questions given to the jury, involving the issue of fraudulent representations, their answers were in favor of defendant. Plaintiff thereupon moved that the court disregard this verdict and enter judgment in favor of plaintiff, which it did. This appeal is taken by defendant on the judgment roll alone.

[1-4] The first question presented by these facts is whether the court acted within its powers in disregarding the jury's verdict. Its action appears to have been based chiefly upon the theory that the answer raised only equitable issues, and that therefore, under the well-settled rule (see Brichetto v. Raney, 76 Cal. App. 232, 245 P. 235), the jury trial was unnecessary and its verdict was only advisory. This rule would doubtless apply to an action brought by the buyer to cancel or to rescind the agreement. But a rescission may be effected by notice and restoration or tender of the consideration, without the necessity of an action. Cal. Civ. Code, § 1691; Zeller v. Milligan, 71 Cal. App. 617, 236 P. 349; see 19 Cal. Law Rev. 424. The present action is brought by the seller for the balance of the purchase price, and the buyer is defending on the ground of fraud, and alleging a prior rescission by notice and offer to restore the consideration. Fraud is the issue, and, as raised in this case, it is a legal issue. No equitable doctrine is involved and no equitable remedy is sought. See American Sign Co. v. Electro-Lens Sign Co. (D. C.) 211 F. 196. A buyer may defend on this ground without pleading either affirmance or rescission of the contract (Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380), and the fact that he alleges a rescission already completed does not change the nature of his defense.

[5-7] It follows that the court was in error in its view that the jury's verdict was advisory only if such was its view. It is urged, however, that the court was justified in ignoring the answers to the special interrogatories on the ground that they were uncertain and incomplete. Their uncertainty is plain, for, as submitted, they did not include the essential elements of materiality and reliance, so that the jury found merely that plaintiff made certain false representations with the intent to deceive defendant, and did not find that the subject of the representations constituted a material inducement to enter into the contract, or, indeed, that they were relied upon at all. It was for this reason that the District Court of Appeal, Third District, denied a petition for a writ of mandate to compel the court to enter judgment on the verdicts. Watanabe v. Superior Court, 280 P. 135. A hearing by this court was denied in that proceeding. The situation, therefore, appears to be this: Defendant agreed to the submission by the court of certain issues to the jury, and stipulated that the court might find on all the other issues. The jury found that there were intentional misrepresentations, but the court expressly found that it was not true that defendant was induced to enter into the agreement on the basis of any such misrepresentations. We are unable to perceive any proper ground upon which to reverse this judgment. The error of the court in disregarding the jury's verdict was not prejudicial, for that verdict has already, in a prior proceeding between these parties, been judicially determined insufficient to support a judgment; and, even if it were not so determined, it would be necessary for us to make the same determination. There is nothing in the record before us to indicate that the defendant objected to the form or

content of the special issues, and it clearly appears in that record that counsel for defendant contemplated and agreed to the court's finding on the other issues. It would be unreasonable and unjust under these circumstances to require plaintiff to submit to a new trial.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

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213 Cal. 596

SHELL OIL CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

S. F. 14212.

Supreme Court of California.

Aug. 31, 1931.

Rehearing Denied Sept. 28, 1931.

1. United States 🔑22.

Under implied powers, Congress may adopt any means adapted to give effect to its express powers which are consistent with letter and spirit of Constitution (Const. U. S. art. 1, § 8, cl. 18).

2. Intoxicating liquors 🔑22.

Volstead Act provision giving dependents of one addicted to intoxicants through unlawful acts of others right of action *held* valid (Volstead Act tit. 2, § 20 [27 USCA § 32]; Const. U. S. Amend. 18).

3. States 🔑4.

State courts must enforce within their jurisdiction action conferred by valid act of Congress (Const. U. S. art. 6).

4. Intoxicating liquors 🔑282.

Master and servant 🔑394.

Dependents' action under Volstead Act provision for damages from loss of support caused by addiction of husband and father to intoxicants allegedly brought about by defendant's unlawful acts *held* triable in California superior court, and not subject to California Workmen's Compensation Act (Volstead Act tit. 2, § 20 [27 USCA § 32]; Const. U. S. Amend. 18).

> The cause of action is referable only to Volstead Act tit. 2, § 20 (27 USCA § 32), and is not in any way fettered by any provision of the Workmen's Compensation Act of California. The act of Congress contemplates a trial in a court where common-law procedure prevails, such as the superior court of California, not the Industrial Accident Commission.

In Bank.

Application for writ of prohibition by the Shell Oil Company to the Superior Court of the State of California, in and for the County of Los Angeles, to restrain respondent from proceeding with a certain cause.

Writ denied, and alternative writ discharged.

McCutchen, Olney, Mannon & Greene, J. M. Mannon, Jr., and F. F. Thomas, Jr., all of San Francisco, for petitioner.

Bertrand J. Wellman, of Los Angeles, for respondent.

PRESTON, J.

The petition for writ of prohibition is denied, and the alternative writ is discharged.

One reasoning briefly is: First, that we are concerned here necessarily with questions of jurisdiction only and not with defects in pleadings, nor with difficulties, even if well-nigh insuperable, which may be encountered in proving the facts necessary to a recovery.

The action in the court below is by the wife and minor children of one Joseph C. Wheeler to recover from the petitioner herein actual and exemplary damages growing out of the loss of support by reason of the addiction on the part of said husband and father to the use of intoxicating liquors, brought about, it is claimed, by the unlawful acts of the petitioner herein in providing him with liquor while in its employ. Apparently, the said Wheeler was for many years a trustworthy employee of petitioner and while in such employ acquired the liquor habit to such a degree that he was discharged by petitioner.

The action is grounded upon section 20 of title 2 of the so-called Volstead Act (section 32, title 27, U. S. Code [27 USCA § 32]), which purports to give certain classes of persons a right of action when they have been injured by addiction to the liquor habit of one from whom they have the right of support through unlawful acts of others. Numerous questions are discussed, but the principal one is the validity of said provision. Several instances are cited where causes of action have been sustained under this section: Smithers v. Brunkhorst, 178 Wis. 530, 190 N. W. 349; Stein v. Rainey, 315 Mo. 535, 286 S. W. 53; Karterman v. Sogura, 140 Wash. 195, 248 P. 417; The Westmoor (D. C. Or.) 27 F.(2d) 886; Hoyt v. Tilton, 81 N. H. 477, 128 A. 688. In none of these cases has the validity of this section been called into question, but on the contrary it has been assumed. The section, of course, is an attempt to exercise the powers conferred by the Eighteenth Amendment, which prohibits "the manufacture, sale, or transportation of intoxicating liquors * * * for beverage purposes. * * *"

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Who can say that the conferring of a cause of action upon a dependent who has been injured in his means of support by another, when due to a violation of this amendment, will not aid in the accomplishment of its object, to wit, the suppression of the traffic in intoxicating liquors? The rule in this respect is not in doubt. It has been well stated in Everard's Breweries v. Day, 265 U. S. 545, 558, 559, 44 S. Ct. 628, 631, 68 L. Ed. 1174, as follows: "The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Article 1, § 8, cl. 18. In the exercise of such non-enumerated or 'implied' powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution."

This quotation is supported by a long and consistent line of federal court cases, beginning with McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579. It has also been confirmed in the more recent case of Lambert v. Yellowley, 272 U. S. 581, where at page 593, 47 S. Ct. 210, 213, 71 L. Ed. 422, 49 A. L. R. 575, the court approves further language of the Everard Case as follows: "We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious."

[2] The first of these recent cases had to do with preventing physicians from prescribing intoxicating malt liquors for medicinal purposes and the other with the provision: "Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once." These provisions were held to be within the powers conferred by the Eighteenth Amendment. It is easily seen that the provision here in question would lend even more aid to the suppression of the unlawful use of intoxicating liquors. We therefore entertain no doubt whatever as to the validity of this provision.

[3] If its validity be assumed, under article 6 of the Constitution of the United States, the Eighteenth Amendment and all laws passed in pursuance thereof is the supreme law of the land. The state courts have a plain duty to perform in that respect as has been well stated in Robb v. Connolly, 111 U. S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542, where the court says: "So that a state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity, arising under the constitution or laws of the United States, or involving rights dependent upon such constitution or laws. Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'"

[4] From the above premise it is easily seen that the question as to whether or not the Wright Act of California adopted section 20 of title 2 of the Volstead Act is a false quantity. Neither are we impressed with the contention that the plaintiffs in the court below must resort to machinery provided by the Workmen's Compensation Act for relief. The cause of action here in question is referable only to the act of congress and is not in any way fettered by any provision of the Workmen's Compensation Act of California. If it be assumed that the Legislature of California is competent to provide that actions of this kind be heard by a special court or commission, a ready answer is that such action has not been taken. The section in question contemplates a trial in a court where common-law procedure prevails; the Industrial Accident Commission is not such a court; the superior court of California is such a court. It has assumed jurisdiction of the action, and, unless restrained, will proceed with a trial of the cause. This to us seems entirely proper. The fact that the provision in question declares the damages resulting from such action to be the separate property of the plaintiffs or that the rule of damages is otherwise varied by the provision is not here material. As above stated, the California courts are charged with the duty of enforcing within their jurisdiction the cause of action conferred by a valid act of Congress; hence the conclusion first announced.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

213 Cal. 514

HENDERSON v. OROVILLE-WYANDOTTE IRR. DIST.

RUTHERFORD et al. v. SAME.

Sac. 4513, 4514.

Supreme Court of California.

Aug. 29, 1931.

Rehearing Denied Sept. 28, 1931.

1. Waters and water courses 🔑249.

Evidence *held* to show that failure of irrigation district to contract for water with users was due to district's refusal to contract, precluding district from gaining any rights growing out of refusal.

2. Waters and water courses 🔑253.

Irrigation district, accepting transfers of water systems under agreement to contract with water users could not by refusal to comply with agreement after acquiring property escape obligations thereunder.

3. Waters and water courses 🔑253.

Irrigation district agreeing to contract with outside water users as condition for transfers of water system *held* bound as though formally contracting with outside water users.

4. Waters and water courses 🔑253.

Irrigation district acquiring water property on conditions governing charges and quantity of water to be delivered to users could not refuse to carry out contract on ground that contract was beyond power of transferor or district.

> Utility companies operating water system made application to Railroad Commission to transfer to irrigation district public utility water systems. Users of water outside boundaries of district filed protest to transfer until district should guarantee users as to future rates and service to be rendered. District adopted resolution stating terms and conditions on which it would furnish water to outside water users in event authority was granted by Railroad Commission to make transfer, and on basis of such resolution commission granted authority to transfer property to irrigation district. Resolution set forth in detail quantity of water and minimum charge for water that would be made to users, but after transfer district fixed charge of $7.50 per acre foot to outside water users, and $5 per acre foot to water users within district.

5. Waters and water courses 🔑253.

Where Railroad Commission fixes conditions for sale of water rights, irrigation district, after purchasing property under such conditions, cannot disregard conditions (St. 1915, p. 149, § 51 (a).

6. Public service commissions 🔑6.

Sale of property burdened with public use is not legal, unless authority therefor is first given by Railroad Commission (St. 1915, p. 149, § 51 (a).

7. Public service commissions 🔑6.

Railroad Commission, in authorizing sale of property burdened with public use, may impose conditions protecting pre-existing rights (St. 1915, p. 149, § 51 (a).

8. Waters and water courses 🔑257(1).

Conditions imposed by Railroad Commission for transfers of water systems to irrigation district that outside water users be guaranteed same rights as existed prior to transfer at rate agreed to by district *held* not invalid as attempting to extend public use (St. 1915, p. 149, § 51 (a).

9. Waters and water courses 🔑257(2).

Irrigation district consenting to rates as condition of transfers of water systems to it could not complain that rates were unreasonable or not controlling as to outside water users (St. 1915, p. 149, § 51 (a).

10. Constitutional law 🔑242, 298(3).

Judgment declaring rates charged outside water users by irrigation district invalid as regards excess over amount authorized by contract *held* not confiscation of property without due process or denial of equal protection of laws.

11. Constitutional law 🔑298(3).
Waters and water courses 🔑257(2).

Judgment invalidating rates charged by irrigation district to outside water users in excess of rates charged members *held* not confiscation of property because members were required to pay higher charges by reason of assessments for benefit of district.

In Bank.

Appeals from Superior Court, Butte County; J. O. Moncur, Judge.

Separate actions by J. C. Henderson against the Oroville-Wyandotte Irrigation District and by J. E. Rutherford and another against defendant named. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Rehearing denied; SHENK, J., dissenting.

R. A. Leonard, of Oroville, and Chickering & Gregory, of San Francisco, for appellant.

George F. Jones, of Oroville, and Sanborn, Roehl, Smith & Brookman, of San Francisco, for respondents.

CURTIS, J.

These two actions, which have been consolidated on appeal, were instituted under the provisions of sections 1060 to 1062a of the Code of Civil Procedure by the plaintiffs on behalf of themselves and other landowners and water users situated outside of the exterior boundaries of the defendant, the Oroville-Wyandotte irrigation district, for a determination of their rights and duties and those of the said irrigation district in the service of water to them by said district and the rates to be charged therefor. These actions have been before this court on a prior appeal wherein this court reversed the action of the trial court in sustaining demurrers to the complaints of the plaintiffs. Henderson v. Oroville-Wyandotte Irrigation District, 207 Cal. 215, 277 P. 487; Rutherford v. Oroville-Wyandotte Irrigation District, 207 Cal. 786, 277 P. 489. Thereafter a trial was had in the superior court of the county of Butte, and the plaintiff in each action was awarded judgment. From these judgments the defendant district has appealed. After the commencement of the present actions, Charles Dankert instituted in this court a proceeding against said irrigation district requiring it to furnish to said plaintiff and other landowners and water users situated like himself water from the irrigation system of the defendant district at certain rates set forth in the petition filed therein. After giving due consideration to said petition, we declined to decide the merits of the questions involved therein on the ground that they were the same as those presented on the joint appeal now before us. Dankert v. Oroville-Wyandotte Irrigation District (Cal. Sup.) 293 P. 785.

The defendant Oroville-Wyandotte irrigation district was organized on July 8, 1919, as a public corporation and irrigation district under the laws of the state of California, and has continued to exist and operate as such since the date of its organization. For some time prior to the organization of said district the Palermo Land & Water Company, which we will hereafter refer to as the Palermo Company, and the South Feather Land & Water Company, hereinafter referred to as the South Feather Company, owned and operated two separate and distinct systems of canals in the vicinity of Oroville, Butte county, and supplied water, owned by them respectively, as public utilities, subject to the jurisdiction of the Railroad Commission to fix the rates charged to consumers under their respective systems, for irrigation, domestic, and mining purposes. After the organization of the defendant district, negotiations were begun looking to the acquisition by said district of the water rights and irrigation systems of the Palermo and South Feather Companies. Two applications were filed before the Railroad Commission on June 30, 1922, one by the Palermo Company entitled application No. 8000, and the other by the South Feather Company entitled No. 8018, asking for the authorization of the Railroad Commission to the transfer to the district of the two public utility water systems owned and operated by said companies. These applications were filed in pursuance of section 51 (a) of the Public Utilities Act (St. 1915, p. 149, § 51 (a), which requires the consent of the Railroad Commission to the sale and transfer of any public utility property. It appears that a portion only of the lands served with water from these two public utilities were included within the boundaries of said irrigation district. The outside users naturally became apprehensive regarding this proposed change in ownership of the water systems from which they were being served with water for their said lands, and appeared before the Railroad Commission and filed their protest against this transfer of said public utility systems to the irrigation district until the district should give "guaranties as to future rates to be charged for water and the service to be rendered and also that some provision be made for water users (without the district) to join the irrigation district." Hearings in these proceedings were held before Examiner Satterwhite at Oroville and San Francisco at which all interested parties were notified and given an opportunity to appear and be heard. Pending these hearings and prior to the final order of the Railroad Commission granting authority to make said transfers, the defendant irrigation district, at a duly called meeting of its board of directors held on the 20th day of October, 1922, adopted two resolutions, one applicable to the Palermo Company and the other to the South Feather Company, in which it set forth the terms and conditions upon which it would furnish water to the outside water users in the event authority was granted by the Railroad Commission to make the transfer to it of said two irrigation systems. These resolutions will be hereafter referred to more in detail. Certified copies of these resolutions were filed with the Railroad Commission, whereupon it granted authority to the two public utilities to transfer their property to the defendant district upon the conditions specified in the two resolutions of the district. The opinion and order of the Railroad Commission are quite lengthy, and we will set forth herein only the parts thereof that are material to the questions involved upon these appeals. After reciting that the applications were made by the utilities to transfer their properties and that the same were opposed by water users residing outside of the district, that hearings were held, and that "the matter was submitted without any definite proposal from the district," the opinion continues:

"After a number of conferences between representatives of the Commission, the companies, the district, and the protestants, the district and the protestants agreed on a form of proposal to be submitted, whereupon the Commission ordered the matters reopened and set a day for hearing, that the proposal could be submitted and made a part of the record in these proceedings.

"This proposal, applying to the water users of the Palermo system, is in the form of a resolution of the Board of Directors of the district, and is set out in full below:

" 'On motion duly made, seconded and unanimously carried, the following resolution was adopted:

" 'Whereas, on the 30th day of June, 1922, there was filed Application Number 8000 with the Railroad Commission of the State of California, which application is entitled: In the matter of the application of Palermo Land & Water Company, a corporation, to sell its water system, and F. F. Ford and Oroville-Wyandotte Irrigation District to purchase the same,

" 'And whereas, said application was filed for the purpose of said Palermo Land & Water Company receiving permission from the Railroad Commission of the State of California to sell its water system to the Oroville-Wyandotte Irrigation District, and

" 'Whereas, a public hearing on said application was held at Oroville, California, on the 22nd day of August, 1922, and

" 'Whereas, at the said hearing the present water users of the Palermo Land & Water Company did file a protest against the granting of the said application, and

" 'Whereas, in consideration of the said present water users withdrawing their said protest the said Oroville-Wyandotte Irrigation District does agree to enter into contracts with each of said water users accepting this offer as herein set forth within six months from date hereof,

" 'Whereas, the term "present water users" is hereby declared to mean the owners, their heirs, successors, grantees and assigns of land supplied with water from the water system of the Palermo Land & Water Company and which lands are not now in the Oroville-Wyandotte Irrigation District,

" 'Now, therefore, be, and it is hereby resolved that the president and secretary of the Oroville-Wyandotte Irrigation District, be, and they are hereby directed and empowered to enter into the above mentioned contract or contracts, for and on behalf of the said Oroville-Wyandotte Irrigation District and in its name, and in accordance with the terms and conditions herein contained.

" 'First.

" 'That the said water users, and each of them shall be entitled to and shall receive one (1) inch of water, continuous flow, for every four (4) acres of land. The amount of water now supplied to said water users shall continue to be so supplied by the said Irrigation District and shall be part of the said one (1) inch of water for every four (4) acres of land, and the additional water necessary to make one inch of water continuous flow for every four (4) acres of land shall be available to said water users from the first water developed by the said District.

" 'Second.

" 'That the present rate of twenty-two cents (22 cts.) per miner's inch continuous flow per day of twenty-four hours of water for irrigation purposes, with a minimum charge of five dollars ($5.00) per acre per year, shall be the rate charged by the District and paid by the water users for the said water until January first, 1928. The District shall not charge any rate for said water in excess of the rates above specified.

" 'Third.

" 'If at any time, five (5) years after the first construction work has been started by said Irrigation District, any of the present water users shall make a legal application to have their lands included in the said Oroville-Wyandotte Irrigation District, and said application shall be rejected by said Oroville-Wyandotte Irrigation District, then and in that event the said water user shall pay the same charge for water on his land as is paid for water within the Oroville Wyandotte Irrigation District. The said Irrigation District shall act upon said application within ninety (90) days from the date of the filing thereof.

" 'Fourth.

" 'That the above mentioned rates specified in paragraph two hereof shall not be raised after January first, 1928, provided however that should the charge paid for water within the said District exceed the sum of twenty-two cents (22cts.) per inch, then and in that event the present water users shall pay the same charge as is paid within said district.

" 'Fifth.

" 'All the existing rights of the present water users shall continue and this agreement is an addition to all the rights and benefits they now possess.

" 'Sixth.

" 'Should any of the present water users at any time have their lands included within the Oroville-Wyandotte Irrigation District, then and in that event this agreement shall be null and void, as to such water users.

" 'Be it further resolved, that the secretary of the Oroville-Wyandotte Irrigation District be, and he is hereby directed to file a certified copy of this resolution with the Railroad Commission of the State of California, as part of the records of Application Number 8000, as a stipulation by the District in said proceedings to the end that the said commission may proceed to make its order in said matter.

" '[Signed] J. A. Wisner (attest),
" 'Secretary.

" 'Approved:
" '[Signed] R. C. Tyler,
" 'Chairman.'

"The proposal applying to the water users of the South Feather system is identical in terms with the above, with the exception of the rate, which has been made $50 per miner's inch per season. This is a reduction of $10 per miner's inch per year from the present rate established by this Commission. The reduction in rate on the South Feather system makes the charges for the quantity of water the same on both systems, as the Palermo Land and Water Company delivers and sells water on the basis of 50 miner's inches per second-foot, while the South Feather Land and Water Company uses 40 miner's inches per second-foot.

"Upon the presentation of this proposal at the further hearing of the matter, the protestants formally withdrew their objections to the transfer. * * *

"Inasmuch as the applications filed with the Commission did not specifically set out the status of the water users outside the district or indicate the rates to be charged and service to be rendered, but only generally referred to same as set out in the deed of conveyance hereinbefore referred to, the Commission believed that a transfer under such conditions would not have properly safeguarded the rights of the water users, and purposely delayed authorization of the transfer until something more definite was offered the water users. Now that a method has been proposed whereby the water users outside the district are given reasonable protection as to service and rates, and because of which the protestants withdrew their protest to the transfer, the Commission now believes that public convenience will best be served by granting the authority sought, subject to the conditions contained in the applications and in the proposals submitted in connection therewith.

"Order.

"Palermo Land and Water Company and South Feather Land and Water Company, public utility water corporations, having filed applications with this Commission for authority to transfer their public utility properties to F. F. Ford and Oroville-Wyandotte Irrigation District, and F. F. Ford having indicated in writing his desire that the Commission authorize the transfer of these properties to the District direct, the Oroville-Wyandotte Irrigation District having joined in these applications, hearings having been held and the matters having been submitted.

"It is hereby ordered that the applications designated above be and the same are hereby granted, subject to the following conditions:

"That the present water users of the two water companies parties hereto, and those persons or firms desiring to become water users within ten (10) years from the date hereof, shall receive service from the Oroville-Wyandotte Irrigation District at the rates and under the conditions recited in Application 8000 and Application 8018 and in the resolutions of the directors of the Oroville-Wyandotte Irrigation District dated October 20, 1922, submitted and marked as Exhibit 4 in Application No. 8000 and Exhibit 5 in Application No. 8018. * * *

"Within thirty (30) days after its execution the Oroville-Wyandotte Irrigation District shall file with the Commission a verified copy of the deed under which it has secured and holds title to the properties authorized to be transferred."

Thereafter the two public utilities conveyed to the district their respective water rights and irrigation systems. After the acquisition of these rights and the irrigation systems, the district continued to operate them, and delivered water to the plaintiffs and other outside water users according to the terms and at the rates specified in its said resolutions and in the order of the Railroad Commission up to the year 1928. In January of that year, the district fixed a charge of $7.50 per acre foot to the outside water users, while the charge fixed for water users within the district was $5 per acre foot. Plaintiffs and the other outside water users contended that the district could not lawfully charge them a rate for water greater than that charged water users within the district, and that a charge of $7.50 per acre foot, in so far as the same exceeded the charge to users within the district of $5 per acre foot, was unlawful.

These actions were thereupon brought, one by plaintiff Henderson, who since 1892 has been a water user and a landowner under the Palermo system, and the other by plaintiff Rutherford, who possessed a water right agreement and has been a water user under the South Feather system since 1913. The fact that there were two public utility water systems serving two different groups of water users made it necessary to bring two actions, one by Henderson acting in a representative capacity in behalf of himself and other outside water users formerly supplied with water from the Palermo system, and the other by Rutherford, acting in a representative capacity on behalf of himself and other outside water users formerly supplied with water from the South Feather system.

The purpose of the two actions, as set forth in said complaints, was to have the court adjudge, declare, and determine the rights and duties of plaintiffs and those similarly situated and the duties of the defendant district under the contracts and written instruments by virtue of which the defendant district acquired the two irrigation systems from the former owners. The real issue presented by the pleadings of the parties to this action is whether the district may lawfully impose upon the outside water users a charge for water in excess of that charged by the district for water supplied to users within the district. The actions were tried by the court, and at the conclusion of the trial the court made findings and entered judgments in favor of the plaintiffs. The court held that the term "charge" as used in the opinion and order of the Railroad Commission authorizing the transfer of the property of said utilities to the district, and as used in the resolutions of the defendant district, referred to and set out in the said opinion and order of the Railroad Commission, meant, "rate to be paid for the use of water." The court accordingly held that the district could not legally charge plaintiffs or other landowners similarly situated a rate for water greater than the rate paid for use of water by members of the district. It further held that the charge of $7.50 per acre foot to outside users was unlawful to the extent that it exceeded $5 per acre foot, the rate charged for use of water by members of the district, and such excess was in violation of the resolutions of the defendant district and said opinion and order of the Railroad Commission. From these judgments, the defendant has appealed.

No serious contention is made by the district as to the meaning of paragraph fourth of the resolution of the district, setting forth the terms and conditions upon which it would purchase said public utilities. This paragraph reads as follows: "That the above mentioned rates specified in paragraph two hereof shall not be raised after January first, 1928, provided however that should the charge paid for water within the said District exceed the sum of twenty-two cents (22 cts.) per inch, then and in that event the present water users shall pay the same charge as is paid within said district." No point is made by either party hereto that the district could not after January 1, 1928, charge the outside users an amount in excess of $5 per acre foot, provided the same charge was made to users of water within the district. It is, however, the contention of the district that under all the facts and circumstances brought out by the evidence its power to fix charges for water owned by it and under its control is not restricted or limited in any manner whatever by the resolutions of its board of directors above referred to or by the order of the Railroad Commission authorizing the transfer of the two utility systems, or by any other act, resolution, or order of said district, or of said Railroad Commission. It claims to possess and hold the water rights and other property transferred to it by the Palermo and South Feather Companies subject only to the dedication of such portions of said irrigation systems to public use as had been made by either of said companies prior to said transfer, and that any contractual obligations assumed by it, or any conditions fixed by the Railroad Commission in its order granting authority to make said transfers, beyond the pre-existing dedications, are of no binding effect upon the district and cannot in any manner affect its control and management of the affairs of the district.

In support of this position it first contends that neither the plaintiffs nor any outside water user ever entered into contracts with the district pursuant to the resolutions of its board of directors, and consequently they have no rights against the district beyond those attaching by operation of law under the pre-existing dedications. The provision of said resolution relied upon by the defendant district is as follows: "Whereas in consideration of the present water users withdrawing their said protest, the said Oroville-Wyandotte Irrigation District does agree to enter into contracts with each of said water users accepting this offer as herein set forth within six months from date hereof." It is conceded that no formal or written contracts were ever entered into under this provision of the resolutions. Upon this issue of the case the trial court found in each case as follows: "That plaintiff and other owners of land similarly situated, were within the six months period provided in the resolution of the defendant district, ever since have been, and now are ready, able and willing to execute a contract with defendant upon the terms set forth in said resolution and offered within said period of six months to execute such an agreement, but that defendant then refused and still refuses so to do."

[1-4] This finding is unquestionably supported by the evidence before us. Some time after the transfer was made the defendant district, through its attorney, prepared a printed form of contract, purporting to conform to the provision of the resolutions above quoted. It contained, however, a radical and material departure from the terms of said resolutions, in that it provided that "party of the second part (the outside water user) shall pay yearly the same total costs for water as is paid within the Oroville-Wyandotte Irrigation District, said total cost to consist of the same rate per inch of water as is paid by landowners within the district, plus the same assessment paid by the landowners of similar land within the district for the year said water is being used." The plaintiffs and the other outside water users refused to sign the contract as prepared by the defendant, and prepared a form of their own following the precise provision of the resolutions providing for such contracts. This they presented to the attorney for the district and asked that it be ac-

cepted and executed by the district. The attorney refused to accept the draft of the contract proposed by the plaintiffs or to have the district sign or execute it or any one similar thereto. The rather technical objection is now made by the district that this draft of the proposed contract of the plaintiffs while presented to the attorney was never formally presented to the board of directors, the body empowered by law to act for the district. The evidence, however, shows that the board of directors had committed the preparation of these contracts to the attorney for the district, and that the board of directors was acting under the advice and direction of their attorney in this matter, and was fully informed of the negotiations between their attorney and plaintiffs. It is apparent, therefore, that the finding of the trial court that the failure of the parties to enter into said contracts was due to the refusal of the district to execute the same finds ample support in the evidence. The defendant should not, therefore, after its refusal to sign the contracts called for by its own resolutions, be permitted to gain any rights growing out of its said refusal. That the defendant district considered that it was bound by the terms of its resolutions, although no formal contracts had been executed in accordance with their provisions is shown by its subsequent action in furnishing water to the outside users in accordance with the terms of its resolution for five years and until January 1, 1928. The defendant district having accepted transfers of the two utility systems under the express agreement that it would enter into contracts in conformity with the terms of said resolutions, cannot by its refusal to comply with its agreement after it has acquired said property, escape the obligations assumed by it in the resolutions under which it agreed to purchase said property. It is bound by this contract as effectively as if it had in accordance with its agreement entered into formal contracts with the outside water users. This is particularly so in the present action, where the obligations thus assumed by the district were those imposed by the Railroad Commission as conditions upon which the Railroad Commission granted authority to the utilities to transfer their properties to the district. The position of the defendant regarding its contract obligations with the outside water users is similar in principle to that of a party to an informal agreement with the understanding that the parties thereto will later execute a more formal contract, and the failure of said party to enter into the formal contract does not release him from his obligation incurred under the informal agreement. "The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material." Levin v. Saroff, 54 Cal. App. 285, 201 P. 961, 963.

The defendant district accepted conveyances from the two public utility companies upon the conditions imposed by the Railroad Commission, and expressly agreed that it would enter into written contracts with the outside water users whereby it would obligate itself to perform said conditions. Its subsequent refusal to enter into such contracts with the outside water users did not entitle it to hold the property conveyed to it free from the conditions imposed by the Railroad Commission, and which it had consented to by its said resolutions. In such a case, the outside users may rely upon the agreement of the district as set forth in said resolutions followed by the district's acceptance of conveyance of said property and its later retention and use of said property as its own. If we are correct in this conclusion, then it is apparent that the district holds said property conveyed to it by the two utility companies subject to the preexisting dedications to public use and safeguarded and protected by the conditions imposed by the Railroad Commission and accepted by it at the time of the transfer of said utilities. These conditions not only governed the charge which the district might make for water delivered to the outside users, but also the quantity of water which these users were entitled to receive under previous contracts made with their respective companies. These contracts had been in force many years prior to the conveyance of the utilities to the district. The terms set forth therein were made conditions upon which the Railroad Commission granted its authority to make such conveyances, and, as the district accepted such conveyances subject to such conditions, it cannot now refuse to carry out its contract upon the ground that the contracts were beyond the power of the utility companies to make, or that the district itself exceeded its powers in agreeing to carry out these contracts after its acquisition of the properties from the utilities. In our former opinion in the Henderson Case we referred to this matter, and there said: "The further contention of respondent seems to be that, inasmuch as the Railroad Commission admittedly is without supervisory power over defendant irrigation district (citing authorities), and further asserting the passage of such resolution of the district was an act ultra vires its powers, the said district thereby acquired the water rights in question without restriction or condition, and plaintiff and others in like situation are thereby foreclosed from questioning the unregulated supremacy in the premises of said district. In other words, the contention is that the exemption, weakness, and infirmities of the district are now to be claimed elements of strength as against the claims of plaintiff and others. We, of course, are not required to finally dispose of this question, and do not do so, but we do not hesitate to say that a water right was in 1892 dedicated to the lands of plaintiff and others in like situation, and they have enjoyed such right continuously up to this time, and it is difficult to see how, by any transfer of franchises or property from the utility to the district, these rights can be said to have been destroyed or consumed—rights of which each of the contracting parties admittedly had full notice. Byington v. Sacramento Valley, etc., Co., 170 Cal. 124, 130, 148 P. 792." Henderson v. Oroville-Wyandotte Irrigation District, 207 Cal. 215, 219, 277 P. 487, 488. Having acquired ownership of the utilities subject to these contracts and having expressly agreed to carry out the same, the district is now bound by its contract. City of San Diego v. La Mesa, L. G. and S. V. Irr. Dist. (Cal. App.) 292 P. 1082.

[5] The district further asserts that the Railroad Commission has no jurisdiction over the purchaser of a public utility, and that in a transfer of property of that character its jurisdiction operates solely upon the seller and not upon the buyer. From the foregoing it makes the deduction, if we correctly understand its position, that the purchaser or buyer is not bound by the action of the Railroad Commission fixing the conditions upon which a transfer of public utility property may be consummated. In Hanlon v. Eshleman, 169 Cal. 200, 146 P. 656, 657, this court held, "with the rights of an intending purchaser the commission has nothing to do." That, however, was an action brought by a prospective purchaser against the members of the Railroad Commission in which he sought to compel the Railroad Commission by mandamus to authorize a sale in accordance with his agreement with the owner of a public utility. Very properly the court held that the prospective purchaser had no standing in such an action. The point decided in that action is very different from that made by the district in this case. While it is true that the purchaser is not in any manner under the jurisdiction of the Railroad Commission, and has no standing in any proceeding instituted before said commission brought for the purpose of authorizing a sale to him, if, after the commission has acted and has fixed the conditions under which it would authorize a sale to him, he then purchases the property under the conditions fixed by the Railroad Commission, we know of no law, and none has been called to our attention by the district, which would permit the purchaser after acquiring the property to disregard the conditions under which he made his purchase.

[6-9] Another assertion made by the district is that the sole interest of the Railroad Commission lies in protecting the existing public use, and the contention is then made that any attempt on the part of the Railroad Commission before granting authority to sell a public utility, to enlarge or extend this public use, is void as beyond the jurisdiction of the Railroad Commission. Section 51 (a) of the Public Utilities Act requires the consent of the Railroad Commission to the sale and transfer of any public utility. No sale of property burdened with a public use is legal, or of any validity whatever, except the authority to make such sale is first given by the Railroad Commission. In approving or authorizing such a sale, the Railroad Commission has jurisdiction to impose such conditions as will in the judgment of the Railroad Commission protect and safeguard the pre-existing rights of those entitled to service under said public utility. Glenn-Colusa Irrigation District v. Paulson, 75 Cal. App. 57, 242 P. 494, 500. In that case the court expressly held that, "in making its decision relative to the discontinuance of its public utility functions by the West Side Canal Company and the permitting of a transfer of its properties to the Glenn-Colusa irrigation district, the Railroad Commission was confronted with the fact that the irrigation district was not a public utility subject to the regulations and control of the Railroad Commission (see City of Pasadena v. Railroad Commission, 183 Cal. 526, 10 A. L. R. 1425, 192 P. 25), and therefore was under the necessity of making its orders conditional, as in that way only could the use of the water for irrigation purposes, as formerly furnished by the Sacramento Valley West Side Canal Company, be insured." The language of this decision is strikingly applicable to the situation before the Railroad Commission when the two utilities, the Palermo and South Feather Companies, petitioned for authority to transfer their properties to the defendant district. After these properties were once conveyed to the district, the Railroad Commission lost all authority and jurisdiction over them, including the power to fix rates for the use of water by outside consumers as well as those within the district. The Railroad Commission was therefore confronted with the duty of protecting the rights of these outside users after the systems under which they were being served with water had passed out of its jurisdiction. It accordingly imposed the conditions set forth in its order authorizing the sale before it would grant such authority. It may not be said that these conditions enlarge or extend the rights of the outside water users, or add anything to such rights beyond those enjoyed by the outside water users prior to the transfer. The quantity of the water received by them under the conditions imposed by the Railroad Commission was the same as that which they had for years previously been receiving under their public utility right. As the Railroad Commission would be without authority after the transfer to fix the rates to be charged the outside users, it im

serted in its order authorizing the transfer conditions which, if they were not suggested by the district, they were by the district agreed to, would protect in the future the rights of the outside users then existing. We are not called upon to decide whether these conditions imposed by the Railroad Commission resulted in fixing reasonable rates for the use of water by the outside users. The order of the Railroad Commission has become final in that respect, and determines that question beyond the power of this court to modify or set aside, at least in a proceeding like that now before us. In view of the fact that the district consented to these rates, in fact, as far as the record before us shows, took the initiative in having them incorporated in the order of the Railroad Commission, it is now in no position to complain that they are unreasonable or that it should not be governed by them in its dealings with the outside water users. We therefore conclude upon this branch of the case that the Railroad Commission in safeguarding the rights of the outside users in the manner and to the extent it did by its order authorizing the sale, merely sought to preserve to the outside users their pre-existing rights under the two public utilities. There is nothing to be found either in the case of Hanlon v. Eshleman, 169 Cal. 200, 146 P. 656, or Baldwin v. Railroad Commission, 206 Cal. 581, 275 P. 425, 429, which militates against this conclusion. The former case we have already referred to and stated its purpose and the ruling of the court therein. In the Baldwin Case the properties of a privately owned public utility company was by the authority of the Railroad Commission conveyed to a water storage district, organized under the laws of this state. Stats. 1921, p. 1727, and acts amendatory thereof. Some of the consumers under the public utility were not included within the storage district, and the Railroad Commission in granting permission to transfer the property of the utility imposed certain conditions in its order safeguarding the rights of these outside consumers. In this connection the court said: "When the commission has safeguarded, as it has in its order authorizing the transfer, the rights of consumers of the canal company outside the district, and has provided that the consumers within the district shall be served as provided in the Storage District Act, it is clear that the commission has properly performed its functions." That case, instead of holding that the Railroad Commission is without power to exact conditions upon which it would authorize a sale of a public utility, expressly holds that such an exercise of power is a proper function of the commission in order to safeguard the rights of outside consumers.

[10, 11] Finally the district contends that the judgments of the trial court confiscate the properties and systems of the district without due process of law and deny to it the equal protection of the law. The judgments of the trial court simply construe the several instruments and documents under which the district acquired the properties of the two utilities, and declare the rights and duties of the parties thereto under these documents and instruments. They in fact merely construe the contracts under which the district acquired and now holds these properties. The effect of these judgments is that the district is held to its contracts. If there is any confiscation of the property of the district, it is due to the contracts which the district made at the time it acquired this property and not to any judgment of the court construing these contracts. In support of this final contention that the judgments of the trial court confiscate the property of the district, the latter refers to certain evidence given at the trial of these actions which shows, or at least tends to show, that the members of the district are paying more for their water than are the outside users. In fact it is contended that the members of the district for less than half of the water available and delivered since the acquisition of the two utilities by this district pay more than two-thirds of the actual cost of furnishing such water to the users. This cost of water to the members of the district, however, includes the revenues from taxes and assessments paid by the members of the district in addition to the acre foot rate charged all water users. The weak link in the district's argument is that the revenues raised by taxes and assessments are not wholly and perhaps not at all used for the purpose of furnishing and delivering water to the users thereof. On the other hand, it clearly appears from this evidence that these revenues are largely used for the purpose of paying the interest on its bonded indebtedness and other expenses incurred by the district in extending its water system. The district comprised 24,200 acres, only 2,068 of which were receiving water at the time the district acquired the properties of the two utilities. A portion, the record fails to show just how much, of these 2,068 acres within the district receiving water was under the irrigation system of the two utilities prior to the transfer. There were 2,757 acres outside the district receiving water from these two irrigation systems at the time of the transfer and after the transfer they continued to receive water from the district. As there were over 20,000 acres in the district without water at the time the district acquired the two utilities, it is apparent that in order to carry out its plans it would be necessary to expend very large sums of money in securing additional water rights, constructing canals, ditches, and laterals, and purchasing rights of way for the same. As to the advisability of making these extensions in the irrigation system of the district the outside users had no voice, and with these plans they were not seriously concerned. They would receive only slight

and probably no benefit from the large expenditures of money necessary to perfect an irrigation system adequate to the needs of the whole district. It was this burden—this large expense which would be necessary if the district carried out its plans to supply all of the lands of the district with water—that the outside users sought to protect themselves against when it was proposed that the district acquire the properties of the Palermo and South Feather Companies. In the light of these facts we think it may well be doubted whether the members of the district are actually paying more for their water service than those outside the district. At the time of the organization of the district it is apparent that there was considerable diversity of opinion among the landowners residing in the locality where the district was subsequently organized as to whether it was advisable to organize the district, and as to the advisability of having their lands included in the district. The result was, as we have already seen, that the plaintiffs and those whom they represent remained out of the district. Those who consented to become members and have their lands included in the district, it may well be assumed, knew of the plans of the organizers of the district to include therein a large body of land without water with the object and purpose of acquiring additional water rights which might be brought upon and used upon these heretofore nonirrigated lands. With this knowledge they became members of the district and thereafter the district began to carry out the plans of developing a water system sufficient in capacity to irrigate as far as possible all of the lands in the district. These members of the district are of course liable for the expense thus incurred. They stand in an entirely different position from the plaintiffs who decided to remain out of the district and to receive water from the district under the plan outlined above. That those in the district are compelled to meet higher charges for water they receive than the outside users is not surprising. In fact, it must have been contemplated by them that such would be the result if they became members of the district, and the district should put into execution the plan of extending its water system to all the irrigable lands in the district. The fact that the members of the district under these circumstances are required to pay higher charges for the water used than the outside users does not to any extent amount to a confiscation of the property of the district. The two classes of water users stand in entirely different positions regarding their respective rights to have water supplied to them by the district. There is in our opinion no merit in the contention of the district that the judgments herein confiscate the plants or property of the district.

From a review of the record in the two cases we are satisfied with the construction placed by the trial court upon written instruments and other documents by which the transfer was consummated of the two public utilities from the Palermo and South Feather Companies to the defendant district, and, furthermore, that the trial court in its judgments in these actions correctly determined and declared the rights and duties of the parties hereto under said written instruments and documents.

The judgments are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

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213 Cal. 508

CARRIER & BRADDOCK, Inc., v. S. W. STRAUS & CO., Inc.

S. F. 13466.

Supreme Court of California.
Aug. 28, 1931.

Rehearing Denied Sept. 24, 1931.

1. Frauds, statute of ⚷44(3).

Oral contract, if any, to place with insurance broker insurance on various buildings over period of years *held* within statute of frauds (Civ. Code, § 1624, subd. 1).

> Alleged oral contract between insurance broker and corporation, engaged extensively in business of underwriting and marketing mortgage bond securities floated for building and construction of apartment houses, hotels, and office buildings, required broker to invest or procure investment of money in corporation's securities and corporation to place insurance with broker under stated conditions and arrangements. Agreement, according to broker, was to continue over period of years, and was not to be performed within a year from the making thereof, and could not from nature of subject-matter have been performed within one year.

2. Frauds, statute of ⚷157.

Objection that contract sued upon is within statute of frauds may be raised by motion to strike after reception of evidence (Civ. Code, § 1624, subd. 1).

3. Frauds, statute of ⚷144.

Raising question of statute of frauds for first time on motion for nonsuit *held* not too late (Civ. Code, § 1624, subd. 1).

4. Insurance 🔑106.

Insurance broker, on losing license thereby rendering performance of contract impossible, *held* estopped to claim breach of contract to place insurance with it, precluding recovery of subsequent commissions.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Carrier & Braddock, Inc., against S. W. Straus & Co., Inc. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Leslie C. Rogers, J. M. Mannon, Jr., and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondent.

PRESTON, J.

The judgment of nonsuit herein is affirmed. Two of the many reasons which seem to justify the action of the court below will be found in the brief narrative following:

The action is by plaintiff corporation, an insurance broker, for damages by way of loss of prospective profits in the form of commissions which were to accrue over a period of fifteen years, lost to it because of the failure of defendant corporation to place through it the insurance on apartment house and hotel structures under its control during said period of time.

Plaintiff, at all times herein prior to July 1, 1924, was a licensed insurance broker, but after said date it did not secure such license. It was a one-man corporation, being the alter ego of one Craig Carrier. Defendant corporation was engaged extensively in the business of underwriting and marketing mortgage bond securities, floated principally for the building and construction of apartment houses, hotels, and office buildings, and it was extensively engaged in such business on the Pacific Coast. But to protect the security behind the bond issues it was sponsoring, defendant controlled the amount and classes of insurance in force upon the structure both during the construction period and thereafter during the period representing the life of the bond issue, which was usually about fifteen years. Defendant apparently also had an insurance department of its own, but frequently in insurance matters dealt through other brokers, requiring such brokers, however, to surrender to it one-half of the commissions customarily received on such insurance business.

On October 25, 1921, plaintiff wrote defendant soliciting "fidelity and surety insurance" on a "reciprocity basis" and concluded by soliciting authority to act as defendant's "insurance brokers," stating it "would place buying and selling orders for securities" with it. This letter brought a visit from a representative of defendant, and evidently the parties reached some understanding respecting the insurance on a contemplated apartment house building to be erected at the southeast corner of Powell and Sacramento streets, San Francisco, and to be known as the Francesca building. This is evidenced by a letter of November 10 in which plaintiff wrote defendant confirming the arrangement as covering the fire, compensation, liability, and surety bond insurance. In this letter appeared the following: "In consideration of our handling this insurance as the owner's or your brokers the writer hereby places an order with you for $5,000.00 of your 7% bonds; long maturities are preferable and at an early date the particular bond and maturity will be arranged."

On November 14, 1921. defendant replied to this letter, making no dissent from its terms except to say that it had its own insurance department: "We, however, will divide the regular commissions due us for the placing of this business, with your firm, which is the basis we use in the placing of all of our insurance on the Pacific Coast." During the period between this time and the fall of 1924, plaintiff and defendant did some brokerage business together, and plaintiff's commissions were $5,953.88, half of which it gave to a person designated by defendant. During this period also plaintiff subscribed to bond issues being marketed by defendant to the extent of some $65,000 and instigated purchases of such issues by others to the extent of $24,000. It is clear that during this period of time defendant was not allowing plaintiff to place the insurance on all the buildings it was financing or, indeed, all the kinds of insurance on any one building at all. However, on August 12, 1924, it became evident that a disagreement was about to arise concerning the arrangement between the parties. On August 21, 1924, plaintiff undertook to put its oral understanding with defendant into the form of a letter, the important clause of which was as follows: "It is that we were, and are, to have the complete insurance both during the construction, and for the life of the bonds after completion, on some building financed by you over which you have the control of the insurance (on building equivalent to Francesca Apartment Building and in proportion to less or more expensive building) for every $5,000.00 of bonds purchased by us or through our influence (with the exception of the Senator Hotel, on which a special arrangement was made) we, in turn, to pay to you one-half of the regular commission."

Defendant repudiated this claim at once. This suit followed in which the existence of such an understanding was put in direct issue. The essence of plaintiff's claim is that said bond purchases authorized it to place the insurance on sixteen existing or future buildings yielding commissions during fifteen years, equivalent in amount to those that might be yielded to the brokers who handled the placing of insurance on the Francesca building. Plaintiff for some reason did not even handle that business for defendant nor purchase the specified bonds. The damages arrived at in this highly uncertain, hearsay, and speculative manner were to be the sum of $155,000, one-half of which sum was made the prayer of the complaint. The answer denied plaintiff's claims in toto as to the contract, and pleaded the absence in plaintiff of a license to act as a broker, setting up also the statute of limitations and finally offering to repurchase at cost all bonds purchased by plaintiff or at his instigation.

The case went to trial. Plaintiff's evidence consisted largely of his own testimony. He testified to the existence of an understanding in all respects similar to that claimed in the letter above quoted. At the conclusion of his evidence, defendant moved for a nonsuit upon a variety of grounds. This motion was granted, and a formal judgment was entered. Plaintiff has appealed therefrom.

It will be noted at the outset that the so-called reciprocity agreement contended for by plaintiff rests entirely in parol. The writings passing between the parties related only to certain specific structures and dealt not at all with any general understanding between them. If it be assumed that the contract was in existence between the parties, a breach thereof did not occur until August, 1924. It has been noted above, however, that on July 1, 1924, plaintiff ceased to be a licensed insurance broker under the laws of this state and was not such broker at the times herein involved subsequent to said date.

It is the contention of defendant that the contract is too vague and uncertain to be enforceable. As we understand it, plaintiff's testimony, giving it the most favorable construction allowable, is that, for each $5,000 purchase of bonds through defendant, defendant was to give to it the placing of insurance of all classes on some structure, which insurance would yield substantially the equivalent in commissions to the insurance carried by said Francesca apartments, on which structure a bond issue of some $500,000 was placed, the period of harvest to be fifteen years. It must be evident that such a contract is vague and speculative, and also that the existence of such a contract taxes greatly human credulity—that the mere subscription to a one one-hundredth part of a bond issue, presumably worth and marketable at par, could bring about such far-reaching and comprehensive privileges with such continuing emoluments.

[1] We do not feel called upon, however, to dwell upon this contention, for defendant urges that, inasmuch as the contract by its very nature was not to be performed within one year, and inasmuch as plaintiff's duties thereunder were not to be performed within one year, the statute of frauds comes into operation and renders such an agreement, if admitted to exist, unenforceable. The reply made to this contention is that all plaintiff had to do was to subscribe for bonds to the extent of $5,000 for any one issue and its duty in that respect was thereby performed; hence the statute of frauds would not operate.

It is clear, however, that the insurance required by defendant during construction and thereafter during the life of the bond issue was of various types, such as fire, earthquake, boiler, plate glass, elevator, workmen's compensation, public liability, property damage, surety bonds, fidelity bonds, etc. The period of the bond issue being for approximately fifteen years, it is clear that, with respect to renewals, changes in rate, and other matters relating to such insurance, the active constant attention during the whole period on the part of plaintiff, in order to earn its compensation, was required. In other words, it is too clear for controversy that plaintiff did not, by its mere subscription to the bond securities, end its duties to the defendant, and the statute of frauds does apply. Section 1624, subd. 1, Civ. Code. This section provides that "an agreement that by its terms is not to be performed within a year from the making thereof" is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent. It is apparent also that the contract, by its terms, was to be a continuing one and could not from the nature of the subject-matter have been performed within one year. For this reason also it is within the statute of frauds.

[2, 3] The objection that raising the question of the statute of frauds for the first time on the motion for nonsuit came too late cannot be allowed. The point could have been raised by a motion to strike after the reception of the evidence. Hanley v. Murphy, 70 Cal. App. 157, 232 P. 767. The cause was in no different condition when the motion for nonsuit was made. If plaintiff was embarrassed in any way by the delay in the making of the point, it could have sought a reopening of its case. But nothing is urged to show such prejudice or that it was denied the privilege of reopening the cause.

[4] We think it is equally clear that, when plaintiff prior to any breach of the contract

and on July 1, 1924, ceased to become a licensed broker, it thereby placed itself where it could not insist upon performance of the contract by defendant. This follows from the observations made above, for, if its services were required during the full period of the mortgage upon the property, it should have maintained itself in a position to carry out its duties, and its failure or neglect to maintain such status estops it to claim a breach of the contract on the part of defendant, and, moreover, would prevent the collection of commissions on insurance placed subsequent to said date.

We are satisfied to rest our views upon the matters above set forth without entering into further discussion.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

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213 Cal. 459

PEOPLE v. FARRINGTON.

Cr. 3396.

Supreme Court of California.
Aug. 25, 1931.

Rehearing Denied Sept. 24, 1931.

1. **Homicide 🔑268.**

In prosecution for murder, sufficiency of identification of defendant *held* for jury.

2. **Homicide 🔑332(6).**

Conviction of murder approved by trial court will not be disturbed on appeal unless reviewing court can say as a matter of law evidence does not support verdict.

3. **Criminal law 🔑1170½(1).**

In prosecution for murder committed during robbery, refusal to allow defendant to test certainty of witness concerning identity of robbers *held* not prejudicial error, where matter was sufficiently gone into.

> Defendant attempted to test certainty of witness as to identity of robbers. The specific questions to which objections of the prosecution were sustained, were addressed to what witness would do if he sat as juror in the case, and whether or not, if he had been asked, he would have sworn to complaint in case charging defendant with murder.

4. **Criminal law 🔑1170½(5).**

Though defendant in murder prosecution, having shown conversation between witnesses, was entitled to wider cross-examination, denial thereof *held* not prejudicial.

5. **Criminal law 🔑829(1).**

Refusal to give defendant's requested instruction *held* not error, where subject was covered by court's instructions.

6. **Homicide 🔑309(5).**

Instruction that, if jury had reasonable doubt whether defendant committed murder or manslaughter, they might convict of manslaughter, *held* properly refused, where defendant was guilty of murder in first degree or not guilty (Pen. Code, § 189).

7. **Criminal law 🔑814(3).**

Instructions must be given with reference to facts proved before jury.

8. **Criminal law 🔑488.**

Defendant's request to submit bullet, not offered in evidence until close of trial, to ballistic expert, *held* addressed to discretion of court.

> Just before close of trial, defendant, without giving any reason, offered a bullet in evidence which had been taken from body of murdered man, and merely marked "for identification." It was admitted. As evidence in case was being closed, defendant requested permission to submit bullet to "some person who was either an expert on ballistics or an expert with the microscope" for the purpose of ascertaining whether the bullet could possibly have been ejected from a pistol having the riflings of the pistol in evidence.

9. **Criminal law 🔑1153(4).**

Request to submit articles introduced in evidence to examination of experts being addressed to court's discretion, denial of request in absence of prejudice does not authorize reversal.

10. **Homicide 🔑169(6).**

Testimony of defendant's father that he knew where defendant was going eighteen days before murder *held* irrelevant.

11. **Homicide 🔑224.**

In murder prosecution, evidence whether witness had been subpœnaed at coroner's inquest *held* irrelevant.

12. **Homicide 🔑354.**

Where jury finds murder in first degree without recommendation, death penalty must be imposed (Pen. Code, § 190).

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Peter Farrington was convicted of murder, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, and Edmond H. Tomasney, for appellant.

U. S. Webb, Atty. Gen., Lionel Browne, Deputy Atty. Gen., and Mathew Brady, Dist. Atty., and Harmon D. Skillin and J. J. McMahon, Asst. Dist. Attys., all of San Francisco, for the People.

WASTE, C. J.

Peter Farrington, accused of the crime of murder in having, on or about April 29, 1930, killed John Malcolm, a police officer of the city and county of San Francisco, was convicted of murder in the first degree, and the death penalty was imposed. It was also charged in the information that, prior to the present offense, Farrington, under another name, had been convicted of assault with intent to commit robbery in San Francisco, and, under still another name, had been convicted of the crime of "violently stealing" in British Columbia. Farrington at first denied that he had suffered the two prior convictions of felony, but subsequently withdrew his denial and admitted the two priors. Motion for a new trial was made and denied.

On April 29, 1930, Max Kahn, office manager of the California Stevedore & Ballast Company, and Maurice Murphy, paymaster of the same company, alighting from a taxicab near the office of the company on Pier 26 on the waterfront in San Francisco, were held up and robbed of $3,200, the amount of the pay roll just drawn from a bank. Two men perpetrated the actual robbery, while one remained in an automobile close by. During the course of the robbery John Malcolm, a San Francisco police officer, sought to aid Kahn and Murphy, and was shot and killed. The murderer and his accomplices escaped from the scene in the waiting automobile. Some time later, the appellant was arrested in the state of Washington and afterwards returned to San Francisco for trial. From the judgment of conviction and order denying his motion for a new trial, the defendant appeals.

The most important question presented for consideration on appeal concerns the sufficiency of the identification of the appellant. Certain other objections to the legality of the conviction are advanced, but the real question is whether or not there is, in the record, evidence upon which the jury was warranted, as a matter of law, in finding that the appellant was the actual perpetrator of the crime.

The appellant was identified by the witness Gibson, driver of the taxicab which took Kahn and Murphy to the office of the stevedoring company, and who stated that the defendant answered the description of one of the two men who perpetrated the actual holdup; and was the one who asked him if he had a "rod" (pistol), and searched him for a gun. The appellant was definitely identified by the witness as the "one that did the shooting," and also by another witness, Brehmer, in the employ of the freight department of the American-Hawaiian Steamship Company, who watched the struggle between the police officer and the appellant, at which time the appellant had a gun in his hand. William Hales, another witness, who saw the officer shot, identified the defendant in the courtroom. Christian Clausen, superintendent of the stevedoring company, identified the appellant as the man he saw pull a gun "out of his pocket and put it in Kahn's stomach." He was very positive that the defendant was the man. Henry Hade, a clerk in the employ of the American-Hawaiian Steamship Company, was another witness to the robbery who testified "he heard a scuffle and ran to the door from which he saw the officer and a fellow with a gun * * * an armed man holding the officer's arm and * * * telling the officer to turn around." He identified the appellant as the man who fired the gun.

[1, 2] The appellant testified that he was not present on the occasion of the shooting, but was in the city of Stockton visiting an unnamed woman. He could only show, however, that he registered at a hotel in Stockton about noon of the day following the killing of Malcolm. He challenges the sufficiency of the identification, and analyzes various parts of the testimony in support of his contention that the identification witnesses testified in a manner "and to things incompatible with their assertion to that effect." Uncertainties in the testimony of other witnesses are pointed out, and discrepancies in the testimony of others are referred to. The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction. People v. Erno, 195 Cal. 272, 283, 232 P. 710. On the record before us, we cannot say that this is such a case.

[3] Complaint is made by the appellant that the court unduly denied him the right to test the degree of certainty of the witness Gibson as to the identity of the robbers whom he saw on Pier 26 just preceding the shooting of the policeman. The specified questions, to which objections of the prosecution were sustained, were addressed to what the witness would do if he sat as a juror in the case, and whether or not, if he had been asked, he would have

sworn to a complaint in the case charging appellant with the commission of murder. While these questions, if answered, might in an indirect way have tested the faith of the witness in his own testimony, we deem the questions irrelevant. The matter was sufficiently gone into, and no prejudicial error resulted to the defendant.

[4] The defendant, on cross-examination, having brought out the fact that Murphy, the paymaster, talked to the manager, Kahn, who was with him at the time of the occurrence, about what had transpired in connection with the holdup and shooting, was, we think, entitled to a wider range of cross-examination on that subject. The trial court sustained the objection of the prosecution without giving any reason, and the prosecution now offers no sufficient reason why the cross-examination was curtailed. However, as Murphy and Kahn were the victims of the holdup, and it having been brought out that they did talk about the happening, as might readily be presumed they would, common knowledge of the jurors no doubt enabled them to appreciate the fact that the two men had probably gone fully into all that transpired, and compared notes as to what occurred.

[5] The court refused to give an instruction submitted by the defendant in which were closely related the question of the sufficiency of the identity of the assailant of the deceased and the question of reasonable doubt in the minds of the jurors. The court, however, did give an instruction of its own covering the duty of the jurors in considering the evidence as to the identity of the defendant, and in other parts of the charge sufficiently covered the questions of presumption of innocence, reasonable doubt, and the duty of the jurors in considering all the evidence in the case.

[6, 7] The court properly refused to give an instruction requested by the defendant to the effect that, if the jurors entertained a reasonable doubt whether defendant was guilty of manslaughter or murder, they might find the defendant guilty of manslaughter. It is neither necessary nor proper for the court, on a trial on an indictment for murder, to give the definition of manslaughter or to tell the jury that it may find the defendant guilty of manslaughter, unless there is evidence in the case tending to prove that the crime was or may have been manslaughter. Instructions are always to be given with reference to the facts proved before the jury. People v. Byrnes, 30 Cal. 206, 207. The deceased police officer was killed by an assailant engaged in the perpetration of a robbery, and, under the facts in evidence, the defendant was guilty of murder in the first degree (Pen. Code, § 189), or not guilty.

[8, 9] When the appellant was arrested in Washington, a number of personal articles were found in a suitcase in his room, among them a .38 caliber pistol, a holster, and belt. The pistol was admitted in evidence on the offer of the prosecution, apparently in connection with the testimony of Brehmer, an eyewitness to the shooting, that, "having served in the army, he was able to recognize the gun on the day as a .38 caliber gun," and that the weapon introduced in evidence "resembled it." A bullet removed from the body of the dead police officer by the autopsy surgeon was merely marked "for identification." Just before the close of the trial the defense reopened its case and offered the bullet in evidence, also without any explanation or giving any reason for the offer. It was admitted, whereupon, and just as the evidence in the case was being closed, counsel for the defendant requested permission to submit the bullet to "some person who is either an expert on ballistics or an expert with the microscope," for the purpose of ascertaining whether or not the bullet "could possibly have been ejected from a pistol having the riflings" of the pistol in evidence. The court denied the request on the ground that the case had been set for trial for more than a month and a half, and the defense had had ample time in which to make such an experiment if it had desired to do so, and that such action would delay the trial. Such requests are addressed to the discretion of the trial judge, and, in the absence of a prejudicial refusal, such a denial will not work a reversal on appeal. We have read all the evidence about the pistol and the bullet, and cannot see that the denial of appellant's request resulted in any prejudicial or material harm to his case.

[10, 11] The shooting of the police officer occurred in San Francisco on April 29, 1930. It was therefore not error for the trial court to sustain the objection of the prosecution to the testimony of appellant's father that he knew where the appellant was going from the city of Los Angeles about eighteen days before the killing took place. Such evidence was irrelevant and immaterial. Questions propounded to the witness Brehmer by the defense, on cross-examination, as to whether or not he was subpœnaed to appear at the coroner's inquest in the matter of Malcolm's death, were addressed to another irrelevant and immaterial matter, and the trial court properly sustained the objection of the prosecution thereto.

[12] By the verdict the jury found the defendant "guilty of murder of the first degree," but did not decree in their verdict that he should suffer the extreme penalty. Because of this form of the verdict, appellant challenges the jurisdiction of the trial court to impose the death sentence. The contention is without merit. When the crime of murder of the first degree is found by the jury, without recommendation as to the punishment the defendant shall suffer, the law imposes the death penalty. Pen. Code, § 190; People v.

La Verne (Cal. Sup.) 297 P. 561. The jurors were fully instructed as to the form of the verdict they should render if they decided that the defendant should suffer death as punishment for the crime he committed.

By the use of excerpts from the transcript, appellant seeks to challenge the fairness and impartiality of the trial judge. Read alone and in the way appellant would have us read them, such extracts from the record appear to sustain appellant's charge. But read with the context and in the light of the entire record of the trial, these excerpts fail of the purpose for which they are quoted. We find that the trial judge was fair and just to both the prosecution and the defense. He conducted the trial with commendable expedition, but withal he was patient and even kindly disposed toward all the parties and counsel for both sides.

Appellant has been fairly and justly convicted of the wanton killing of a peace officer in the discharge of his duty. The judgment of conviction and the order denying the motion for a new trial are, and each is, affirmed.

We concur: SHENK, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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213 Cal. 484

BOWLER et al. v. ROOS et al.

S. F. 13458.

Supreme Court of California.

Aug. 27, 1931.

1. Death 🔑42.

Negligence 🔑89(1).

Contributory negligence of heir does not bar recovery by others in action for wrongful death, though all must be joined under Code (Code Civ. Proc. § 377).

2. New trial 🔑140(3).

In action for wrongful death, denial of new trial where supporting affidavit indicated perjury at trial *held* error.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Michael Bowler and others against Robert A. Roos and another. From judgment for plaintiff and an order denying new trial, defendants appeal.

Reversed with directions.

Bronson, Bronson & Slaven and Goldman & Nye & Reed M. Clarke, all of San Francisco, for appellants.

Charles J. Janigan, of San Francisco, for defendant Tatosian.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM.

This is an action for wrongful death. The deceased, Mrs. Bridget Bowler, a woman sixty-two years of age, was riding in an automobile driven by her son, Edward Bowler, when a collision occurred between the said automobile and one driven by defendant Larson for his employer, defendant Roos. The heirs of Mrs. Bowler, nine in number, joined in this action, and the jury returned a verdict in their favor in the sum of $7,000. The evidence satisfactorily establishes negligence on the part of defendant Larson and contributory negligence on the part of Edward Bowler.

[1] Counsel for defendant urge that the action for wrongful death should be barred by the contributory negligence of any heir, on the theory that the action is single and indivisible (Code Civ. Proc. § 377), and if recovery by one heir is barred, the bar must necessarily apply to all. The argument is without substance and it is not, as counsel suggest, newly raised in this state. It was presented, fully considered, and rejected in Bowen v. Kizirian, 105 Cal. App. 286, 287 P. 570. The court there said (page 290 of 105 Cal. App., 287 P. 570, 571): "It is established that the failure of one of the plaintiffs to prove loss will not defeat recovery by another of the plaintiffs whose pecuniary loss has been proved. And this, notwithstanding the fact that under the statute, as interpreted by our courts, only one action may be brought and only one judgment recovered. So far as the interpretation of this statute is concerned, no reason appears why the rule should be any different where the evidence discloses that one of the parties is not entitled to recover, not on account of a failure to prove pecuniary loss, but because of the intervention of another rule, such as contributory negligence. In Estate of Riccomi [185 Cal. 458, 197 P. 97, 14 A. L. R. 509], supra, it is said it would be absurd to hold that because two heirs must join in one action, the one proving damage must share the proceeds with the one suffering no injury. It would seem equally absurd to hold that an innocent party cannot recover because another party, with whom he is required by law to be joined as plaintiff, is not innocent."

[2] Defendants contend, however, that the trial court should have granted their motion for a new trial, and this contention must, we think, be sustained. Of the nine heirs who brought this action, all were adults, and only three lived with the deceased. Two of these, James and Bernice Bowler, worked and supported her. Practically all of the children

were self-supporting. The only heirs who can possibly be deemed to have suffered substantial loss appear to be Mary Cruise and Nora Bowler. The former is a nurse, divorced from her husband, having the custody of three minor children, all of them of school age and attending school. She testified that the deceased took care of the children when she was away on a case, giving them food, and at other times making clothes and washing clothes for them. Nora Bowler was, according to the testimony, a woman of twenty-eight, but mentally incompetent, subject to epileptic fits, and requiring constant care and attention. Evidence offered by plaintiffs tended to show that the deceased took care of her.

Defendants moved for a new trial, and in support of their motion offered the affidavit of Mrs. Rose C. Ray stating that Nora Bowler had been employed by her as a household servant for several years, including the period covered by the testimony of plaintiffs already referred to; that she had received wages of $50 per month; that her health was good; and that she did her work in a satisfactory manner. Defendants made a showing of diligence, and in this connection called attention to the testimony of plaintiff Edward Bowler in his deposition taken before the trial, wherein he stated that Nora Bowler was employed in domestic service. This statement, of course, was contradicted by other evidence offered by plaintiffs at the trial. The affidavit tended to establish perjury on a material issue in the case, and no counter affidavit was filed. The only defense to the motion was the testimony of a physician to the effect that Nora Bowler was feeble-minded. This might be true and still in no way overcome the charge made in the affidavit.

Although the trial court is vested with a broad discretion in the matter of granting new trials, we think this is a case where the denial of such relief cannot be justified.

The judgment and order appealed from are reversed, with directions to the lower court to grant a new trial to defendants.

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116 Cal.App. 432

PEOPLE v. JONES.

Cr. 52.

District Court of Appeal, Fourth District, California.

Aug. 31, 1931.

1. **Criminal law 🔑823(17).**

Instruction regarding murder in first degree *held* not objectionable as omitting essential elements of deliberation and premeditation when considered with remainder of instructions.

> The portion of the instruction objected to omitted the elements of premeditation and deliberation, but, when read in conjunction with the whole instruction and other instructions in which court several times informed jury that deliberation and premeditation were necessary elements of murder in first degree, the portion of instruction complained of could leave no question in the mind of the jury as to all of the elements and the definition of first degree murder.

2. **Homicide 🔑308(2).**

Instruction giving statutory definition of murder in second degree *held* sufficient (Pen. Code, § 189).

3. **Criminal law 🔑808½.**

In homicide case, instruction giving statutory definition of reasonable doubt verbatim *held* sufficient (Pen. Code, § 1096a).

4. **Criminal law 🔑829(5).**

Refusing defendant's requested instruction on self-defense, fully covered by other instructions, *held* proper.

5. **Criminal law 🔑730(2).**

Error, if any, in district attorney's opening statement, intimating that defendant quarreled with wife in forenoon of day on which he shot deceased, *held* cured by court's admonition.

6. **Criminal law 🔑720(7).**

Counsel has right to present to jury his views of proper deductions or inferences to be drawn from evidence.

7. **Homicide 🔑253(1).**

Conviction of murder in first degree *held* supported.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

A. J. Jones was convicted of murder in the first degree, and he appeals.

Affirmed.

Ralph E. Swing, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Stanley Mussell, Dist. Atty., and James L. King, Chief Deputy Dist. Atty., both of San Bernardino, for the People.

GRIFFIN, Justice pro tem.

Appellant was found guilty of murder in the first degree and sentenced to life imprisonment. A large number of witnesses testified at the trial. The testimony on the part of the witnesses for the state tended to show that appellant was guilty of murder in the first degree. Testimony of witnesses for appellant substantiated his plea of self-defense.

The evidence discloses that appellant, with his family and a number of relatives, including Monroe Hicks, the deceased, was residing in an auto camp on the outskirts of the city of Redlands in the county of San Bernardino. Appellant and his family lived in one tent and the relatives in other tents near by. They were there for the fruit-picking season. No trouble of any consequence had occurred between appellant and Monroe Hicks and there was no evidence of any ill feeling between them prior to the day of the homicide.

On Sunday, March 22, 1931, at about 10 o'clock in the morning, an altercation occurred in appellant's tent, his daughter screamed "Monroe," and presently Monroe Hicks came out of his tent near by and over in front of appellant's tent. Appellant, who had been shaving, came out of his tent with an open razor in his hand, saying, "What did you come up here for, interfering with my family affairs?" To which Hicks replied, "Don't you come saying anything to me or you will get the worst of it."

The evidence as to what took place following this verbal altercation is conflicting. Witnesses for the state contend that appellant came out of his tent with an open razor in his hand and by striking and slashing at deceased forced him back to his own tent. Appellant denies this and claims that deceased put his hand to his right hip pocket, but that when he discovered that deceased had only a pair of orange clippers in his pocket they both went back to their tents.

Nothing of any consequence occurred during the day until about 4 o'clock in the afternoon when several of the relatives and appellant were out in front of the tents repairing an automobile tire. Appellant was sitting on the running board of one car and several of the relatives were just opposite him and within eight or ten feet.

Deceased came out of his tent and walked up to where the others were grouped at the rear of the car. According to the evidence, appellant opened the conversation by saying, "You needn't look so hard," and deceased replied, "Who wouldn't." Appellant arose from the running board and started towards his tent, saying, "If you're not satisfied, I'll make you satisfied." As appellant walked toward his tent, deceased reached over into the automobile and picked up a portion of an automobile spring, or tire iron, and stood holding it with both hands behind his back. A heated conversation ensued. Appellant walked back about forty feet and took a pistol either from his tent or out of the trailer where his wife testified he had always kept it. Appellant came back towards Hicks carrying his pistol in front of him and demanded that deceased put the tire iron down. He snapped the pistol, but it failed to discharge. When the pistol snapped deceased "ducked forward." As he raised his head appellant shot him, the bullet piercing the heart and passing through his body. Deceased fell forward on his right side and face and appellant fired another shot into his left shoulder, and then as he rolled over on his face appellant stooped over him and fired a third shot into the center of his back. After the shooting appellant walked back to his tent and reloaded his gun. He talked to several persons, stating in substance that he had to kill the deceased to protect himself. He contends that deceased drew the tire iron back in a threatening manner and came toward him. There is evidence to show that deceased made no movement toward appellant and no words were spoken by him after appellant came towards him with the pistol.

[1] Appellant presents six grounds for a reversal of the judgment. He contends, first, that the court erred in instructing the jury. He urges that people's instruction No. 7, which is a general instruction on a long printed form consisting of several pages, was erroneous and misleading.

In this instruction the court correctly instructed the jury on murder and malice as defined in sections 187, 188, Penal Code, respectively, and on the degrees of murder as defined in section 189 of the Penal Code, and also manslaughter as set forth in section 192 of the Penal Code. Then it explained fully the distinguishing features and degrees of the several offenses.

Appellant's most serious contention appears to be based on the following portion of this instruction: "If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder in the first degree."

While it may be true that this last sentence, when isolated from the remainder of the instruction and read alone, and omitting the elements of premeditation and deliberation, would not be a complete and correct definition of murder of the first degree, yet when read in conjunction with the whole instruction, and the other instructions, it could leave no question in the mind of any juror as to all of the elements of, and the definition of murder of the first degree. The jury was told several times in other portions of the instruction in no uncertain terms that deliberation and premeditation were necessary elements of first degree murder. Substantially this same contention was presented in the case of People v. Watts, 198 Cal. 776–800–801, 247 P. 884, 893. In that case the court said: "There is no basis for the claim that the trial court charged that defendant could be found guilty of murder in the first degree without including in the charge the essential elements of deliberation and premeditation. * * * Before the court gave the instruction * * * it had carefully charged the jurors that to constitute murder in the first degree the killing must be preceded by and be the result of a concurrence of will, deliberation, and premeditation on the part of the slayer. They were also told that, to justify a conviction, every element of the crime must be established by the prosecution beyond a reasonable doubt."

This is just the situation in the case before us, and we may adopt the language of the court set forth in the Watts Case as follows: "All the instructions, read and considered together as one charge, without straining the language, show a fair, harmonious, and correct statement of the law applicable to the facts of the case, and contain all the conditions and limitations which are omitted from the isolated excerpts selected by appellant for criticism."

[2] Appellant contends that no sufficient definition of murder in the second degree was given and that the refusal of his instruction thereon was error. The jury was given the statutory definition as heretofore stated which would of itself be sufficient. In addition to this the general instruction above referred to elaborates upon this definition sufficient to leave no doubt as to the meaning of murder in the second degree.

[3] Appellant further contends that the court misdirected the jury on the question of reasonable doubt. The statutory definition of reasonable doubt was given verbatim and was in itself sufficient. Section 1096a, Pen. Code. It was supplemented by another instruction repeating the statutory definition and elaborating thereon which in substance was a correct statement of the doctrine. People v. Lewandowski, 143 Cal. 574–580, 77 P. 467.

[4] Appellant further contends that the court erred in refusing his instructions numbers 11 and 19; and that no sufficient instruction on the principle of selfdefense was given and that by reason of such refusal the court erred. The jury was correctly, fully and completely charged upon the definition of murder and manslaughter in all of its phases in the general instruction. As to self-defense, the jury was fully and correctly charged thereon in three of the state's instructions and in four of appellant's given instructions. The court is not required to state the law to the jury more than once, but may refuse requested instructions which are fully covered by other instructions. 8 Cal. Jur. 314.

We have examined all of the instructions given by the trial court and we find that taken as a whole they were full and fair, and that, read as a whole, they are not to be held subject to the criticism which appellant aims at portions of particular ones. The particular instructions against which appellant directs such criticism are not fairly subject thereto, nor could the jury in considering the same have been misled thereby.

[5] Appellant's second ground of appeal is that the court erred in refusing to direct a mistrial by reason of misconduct of the district attorney. The first assignment of error under this point arose out of a remark made by the district attorney in his opening statement to the jury, which related to the actions of appellant's wife and intimating that appellant was disagreeable and quarreled with her in the forenoon of this particular day. Appellant's attorney immediately objected and asked that the court admonish the jurors to disregard the statement. The court very promptly and emphatically admonished them to disregard it and the district attorney to refrain from alluding to it further. This cured the error, if any there was. Other objections were made throughout the trial to remarks by the district attorney and the court. The court on many occasions instructed the jurors to disregard any remarks made by *counsel* or the *court* and *not to consider them as evidence or proof of any fact.*

[6] In his third ground of appeal appellant makes objection to remarks in the district attorney's closing argument upon the ground that they were improper conclusions and there was no evidence to support them. In this argument the following took place:

"Mr. King: These boys will be better men when they grow up if they are not in the environment of this father, and this mother's life will be better and a few years longer if this defendant is not living with her day after day; so he is not entitled to very much sympathy, ladies and gentlemen. He is a great man, as Mr. Bates calls him, and the head of the whole outfit.

"Mr. Eckhardt: I submit to your Honor that it is not in the evidence, and I object to it and assign it as prejudicial misconduct, and not based on the evidence.

"Mr. King: That is a conclusion deducted from the evidence.

"The Court: It is a conclusion deducted from the evidence. Proceed.

"Mr. King: So I say, gentlemen of the jury, this man was the head of the outfit. He had boys of his own. This man's leadership capacity was shocked, and he shot that man as he would have shot a dog that was barking at his heels."

Appellant contends that the court not only failed to rule properly but added judicial commendation to the argument of the district attorney. This argument, and the reason given by the court for its ruling, might better have been unsaid, yet counsel has a right to present to the jury his views of the proper deductions or inferences to be drawn from the evidence. People v. Willard, 150 Cal. 543–552, 89 P. 124.

Appellant also objected to certain questions as leading. The record shows that many of the objections to the questions cited in the brief were sustained by the court, and that when overruled, the ruling thereon was proper. Other points raised are without merit.

Appellant has presented to this court on appeal a lengthy but comprehensive brief reflecting much energy and diligence. Considering all the facts in the case, and all of the instructions read and considered together as one charge, they show a fair, harmonious, and correct statement of the law applicable to the facts of the case. This has repeatedly been held to obviate such objections as are now made. People v. Doyell, 48 Cal. 85; People v. Dennis, 39 Cal. 625; People v. Nelson, 56 Cal. 77; People v. Watts, supra.

[7] The record discloses that the trial consumed approximately five days. It likewise reveals that appellant was given every opportunity to present his case. We believe, after a careful examination of the entire record, that he was accorded a fair and impartial trial and that his conviction of murder in the first degree is amply supported by the evidence. We find no errors that would justify a reversal.

The judgment and the order denying a new trial are affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

116 Cal.App. 416

GIDDENS v. KROGH et ux.

Civ. 7888.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1931.

1. Landlord and tenant ⟹184(2).

Agreement terminating lease *held* properly construed as intended to terminate provision obligating lessors to return deposit made by lessees.

Lease provided that deposit in question was consideration and compensation to lessors for entering into lease, but if lessees performed covenants, then money should be returned at termination of lease, whether by expiration of five-year term or by mutual agreement; and it appeared that lessees' assignee, notwithstanding reduction in rent, found it necessary to demand further reduction which lessors refused to make, whereupon parties entered into agreement providing that lease, of which over two years remained, was terminated, and that lessors would buy certain personalty located on premises, and although this agreement was executed in March and final installment on purchase price of property was not paid until August, no mention of the deposit was made during that time.

2. Contracts ⟹169.

Where agreement was ambiguous, court in ascertaining parties' intention properly looked beyond terms of instrument and considered circumstances and dealings showing parties' interpretation (Civ. Code, § 1647; Code Civ. Proc. § 1860).

3. Landlord and tenant ⟹184(2).

Lease contemplating deposit as compensation for lessors' executing lease, even if deposit were security, *held* valid, except perhaps to extent that it involved forfeiture.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by James A. Giddens against H. J. Krogh and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

C. Huntington Jacobs, of San Francisco, for appellant.

John E. Springer and Avery J. Howe, both of Palo Alto, Arthur P. Shapro and A. L. Crawford, both of San Francisco, and Milton E. Wright, of San Jose, for respondents.

SPENCE, J.

Plaintiff sought to recover the sum of $1,000 deposited by his assignors with defendants as lessors under the terms of a lease. The cause was tried without a jury, and from a judgment in favor of defendants, plaintiff appeals.

[1] The lease, executed on May 1, 1926, by defendants and Michael McGuinn and Robert W. Lawton, plaintiff's assignors, was for a term of five years commencing July 1, 1926. It covered a garage and service station and provided for a monthly rental of $250. It fur-

ther contained the following provision: "Mr. Michael McGuinn has deposited with the lessors the sum of One thousand ($1,000) dollars, the receipt of which is hereby acknowledged. Said money is not deemed any part of the rental herein reserved, but is a flat consideration and compensation to the lessors for entering into this lease, but said lessors agree that if the lessees shall well and truly perform all of the covenants and conditions herein contained, and continuously occupy the said premises for the period herein reserved, then said money shall be returned to said Michael McGuinn at the termination of this lease, whether said termination be by the expiration of the lease term or by mutual agreement of the parties hereto, whether by assignment or otherwise, as long as the lessee shall not be in default in the performance of the covenants herein created. The lessors will pay the said Michael McGuinn six per cent. per annum payable monthly, on the first day of each and every month, on said deposit."

On July 1, 1927, the lease was assigned to plaintiff with the consent of defendants. Shortly thereafter plaintiff refused to pay the $250 per month as rental and stated that "he would walk out" if the rent was not reduced. The parties then orally agreed upon a reduction of the rent from $250 to $200. The latter amount was paid by plaintiff up to March 11, 1929. Shortly prior to that date plaintiff told defendants that if the rent was not reduced to $150 per month "he would have to walk out, he could not make it." Defendants refused to make a further reduction, but it was finally agreed that the lease should be terminated and that defendants would purchase certain equipment from plaintiff. The parties entered into a written agreement on March 11, 1929, the pertinent portion of the agreement reading as follows: "The above lease on Southgate Garage & Service Station, is hereby mutually and agreeably terminated this date, and the Lessor, H. J. Krogh, further agrees to pay the Lessee, J. A. Giddens, the sum of Five hundred dollars ($500.00) for the personal property of the Lessee, J. A. Giddens, which is listed below, and now located on said premises. * * *" After unsuccessfully endeavoring to raise the $500, defendants on April 10, 1929, gave plaintiff an installment note for that amount, payment of which was finally completed on August 10, 1929. Neither during the negotiations of the parties nor at the time they signed the agreement providing for the termination of the lease and the purchase of the equipment was any mention made of the $1,000 deposit. Nor was it mentioned thereafter at the time of signing the $500 note or any other time until September, 1929, about one month after the last installment on the note had been paid. The original lease provided for interest on the $1,000 payable monthly. This interest was paid by defendants up to February 1, 1929, but not thereafter and no demand was subsequently made for interest or for principal until written demand upon defendants was made by plaintiff's attorney on September 10, 1929.

It appears to have been conceded in the trial court that any rights which appellant's assignors had with respect to the deposit passed to appellant on the assignment of the lease. It was further conceded that appellant and his assignors had performed all of the conditions of the lease up to the time of the agreement of March 11, despite the fact that for some time prior thereto, appellant had paid a smaller rental than that provided in the written lease under an oral agreement between the parties. In the trial court and on this appeal appellant had contended that the agreement of March 11, 1929, constituted a termination within the meaning of the original lease entitling him to the return of the $1,000 deposited with respondents. The record discloses that the trial court construed the agreement with reference to the surrounding circumstances and the course of dealing between the parties and concluded and found that the agreement was understood and intended to be a termination of all further rights and liabilities of the parties under the lease including the provision above quoted. In our opinion the trial court properly construed the agreement.

[2] Appellant argues that the language of that agreement is clear and free from doubt and "there therefore was no room nor any need for determining the intent of the parties by any other criterion than the language of the agreement itself." Standing alone the language of the agreement terminating the lease does appear perfectly clear but ordinarily such an agreement would terminate every right and liability of the parties under the lease. But the doubt which arises in the meaning of that language is caused by the very provision of the lease under which appellant claims to be entitled to the return of the money. Reading the lease and the agreement terminating the lease together, it is doubtful whether the latter was intended to terminate all of the rights and liabilities of the parties under the lease or whether it was intended to terminate all of those rights and liabilities save and except those claimed under the provision relating to the $1,000 deposit. Under such circumstances it was proper for the trial court to look beyond the terms of the instrument in arriving at the intention of the parties (6 Cal. Juris. p. 252, § 163); and to consider the surrounding circumstances (Civ. Code, § 1647; Code Civ. Proc. § 1860; 6 Cal. Juris. p. 294, § 180), and the course of dealing between the parties showing the meaning which the parties themselves placed upon the agreement. Cabrera v. Thannhauser & Co., 183 Cal. 604, 616, 192 P. 45; Mitau v. Roddan, 149 Cal. 1, 15, 84 P. 145, 6 L. R. A. (N. S.) 275.

The evidence shows that on the second occasion when appellant threatened to abandon the lease and "walk out," he was refused a second reduction in the rental. At that time the lease had twenty-six months to run and appellant's business was not a paying enterprise even with the rental at the reduced figure theretofore orally agreed to by respondents. He sought to terminate the lease and to sell his equipment to respondents, and after several days had elapsed respondents consented and signed the agreement of March 11. Appellant testified that before respondents had signed the agreement Mr. Krogh stated that "he would go down and get the money and bring it back and pay me and relieve me," but as Mr. Krogh was unable to get the money an installment note for $500 was finally accepted. Appellant vacated the premises and ceased paying rent. Respondents ceased paying interest on the $1,000. In speaking of the transactions to one of the witnesses appellant said "that he did not sell out; that he turned it back to Mr. Krogh." It is highly significant that no mention of the $1,000 deposit was made during any of the dealings of the parties over a period of several months. Under the evidence the trial court correctly concluded that the entire course of dealings between the parties both before and subsequent to the signing of the agreement showed that they intended that the execution of the agreement and the payment of $500 therein provided should terminate all of their obligations under the lease. Referring to the importance in cases of doubtful construction of the practical interpretation of agreements by parties as shown by their course of dealings, the court said in Mitau v. Roddan, supra, at page 15 of 149 Cal., 84 P. 145, 150: "Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions."

[3] Appellant further contends that the provision of the lease relating to the $1,000 deposit is invalid and that he is entitled to recover regardless of any failure to comply with the conditions of the lease and without reliance upon the termination agreement. He cites and relies upon Green v. Frahm, 176 Cal. 259, 168 P. 114; Knight v. Marks, 183 Cal. 354, 191 P. 531; Redmon v. Graham (Cal. Sup.) 295 P. 1031. Each of these cases involved a clause providing for a deposit as security and further providing for a forfeiture of the deposit in case of breach. These cases are authority for the proposition that the portion of the clause providing for a forfeiture is invalid; but as pointed out in Green v. Frahm, supra, at page 262 of 176 Cal., 168 P. 114, 115, that portion of the clause providing for a deposit as security is valid. Even if the clause in the present lease is construed as one providing for a deposit as security for the lease and not as a "flat consideration and compensation to the lessors for entering into this lease," the clause is nevertheless valid to that extent under the authorities cited by appellant. We therefore find no merit in this contention.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

116 Cal.App. 468

MILTON G. COOPER & SON, Inc., v. WILLIAM R. DAVIS & BRO., Inc., et al.

Civ. 7540.

District Court of Appeal, First District, Division 1, California.

Sept. 2, 1931.

Rehearing Denied Oct. 2, 1931. Hearing Denied by Supreme Court Oct. 29, 1931.

1. Exchanges 🔑12.

Evidence sustained finding that unincorporated merchants' association committee made settlement with common debtor of members without full investigation contemplated by constitution, entitling member who refused to share under settlement to sue debtor separately and retain entire recovery.

2. Exchanges 🔑4.

Constitution and by-laws of merchants' association constituted contract between members and in their relation to association.

3. Exchanges 🔑12.

Under by-laws, member of merchants' association could maintain action against common debtor of members pending payment of other creditors' claims under settlement made by association.

By-laws contained no provision that a creditor member, not bound to compromise with a debtor, as was the case here, should refrain from action pending satisfaction of the claims of his fellow members who entered into a compromise.

4. Exchanges 🔑4.

By-laws of unincorporated merchants' association should be given reasonable construction.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Milton G. Cooper & Son, Inc. (formerly Milton G. Cooper Dry-Goods Company) against William R. Davis & Bro., Inc., in which a complaint in intervention was filed by J. H. Newbauer & Co., for whom J. H. Newbauer and another were afterwards substituted. From an adverse judgment, interveners appeal.

Affirmed.

Francis J. Heney, of Los Angeles (William J. Hayes and Grant H. Wren, both of San Francisco, and Charles H. Patterson, of Oakland, of counsel), for appellants.

Dunne, Dunne & Cook, of San Francisco, Barker, Smiley & Keithly, of Los Angeles, and Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for respondent.

PER CURIAM.

Plaintiff corporation, which has its principal place of business in Los Angeles, was at all times material to this case and until about January 25, 1926, a member of an unincorporated association of merchants known as the San Francisco Board of Trade (which will be hereinafter referred to as the board). For some time prior to the month of August, 1925, William R. Davis & Bro., Inc., a corporation (hereinafter called the defendant), had been engaged in the conduct of a department store on Mission street in San Francisco. On August 5, 1925, a meeting of the creditors of the defendant was held at the office of the board at San Francisco for the purpose of considering defendant's affairs. The creditors represented at the meeting consisted of both members and nonmembers of the board, and their claims comprised approximately 80 per cent. of defendant's indebtedness. At this meeting a committee, consisting of the representatives of both the members and nonmembers, was appointed. The committee proceeded to take an inventory of defendant's property, and negotiations commenced which resulted in an offer of settlement being made to the committee by the defendant of a sum sufficient to pay 40 per cent. of the claims of all its creditors. A majority of the committee recommended that the offer be accepted; and following meetings of the creditors held on various dates between November 10, 1925, and January 14, 1926, inclusive, but at which plaintiff was not represented, it was resolved to accept the offer. These amounts were in January, 1926, paid to each of the creditors except the plaintiff, and a sum equal to 40 per cent. of the latter's claim was deposited with the board. The plaintiff, whose claim amounted to $6,643.57, had on September 25, 1925, brought suit against defendant and attached. The attachment was later released upon security being given. On January 15, 1926, defendant answered plaintiff's complaint, alleging payment, the facts constituting this defense being that the committee had full power to bind the creditors and to enter into an agreement for a composition; that defendant offered to pay to the committee 40 per cent. of its entire indebtedness in cash, this being in full payment of its entire indebtedness and in full satisfaction of any and all liability of any stockholder, officer, or director of defendant; that the committee accepted the offer in full payment of all claims, including that of the plaintiff, and that the agreed sums were paid to and accepted by the plaintiff and the other creditors in full satisfaction of their claims.

On February 19, 1926, a complaint in intervention was filed by J. H. Newbauer & Co., for whom J. H. Newbauer was afterwards substituted, and Levi Strauss & Co. This complaint was on behalf of other members of the board than the plaintiff who were creditors of the defendant. It alleged that by the attachment suit plaintiff sought to obtain a preference over other members of the board, and that under the board's constitution and bylaws members who were creditors were entitled to share ratably with plaintiff in any recovery effected in its action. Plaintiff answered to the intervener's complaint, denied the construction placed upon the constitution and by-laws of the board, or that plaintiff sought to obtain a preference. As a special defense thereto plaintiff alleged, in substance, the facts of the transaction above set forth, and that before the present action was brought plaintiff caused an investigation to be made, and found that defendant's assets would yield a higher return to the creditors than the amount offered; that the committee was proceeding without proper investigation; that the proposed settlement was inequitable and fraudulent within the meaning of the constitution of the board and permitted a portion of defendant's assets to be reserved for distribution to its stockholders; that plaintiff conveyed this information to the board and protested the proposed settlement, but the latter and the creditors' committee notwithstanding consummated the settlement; that the administration of the matter by the board was inefficient and uneconomical and was concluded without the fullest or proper investigation.

The cause was first tried on the issues between the plaintiff and the defendant by a jury, and resulted in a judgment for the plaintiff. The action as between plaintiff and the interveners was then tried by the court without a jury, and was submitted and decided upon all the evidence adduced at the first trial with certain additional evidence. Thereafter the court, pursuant to its findings, rendered a judgment that interveners take nothing. No appeal was taken by the defendant, but the interveners have appealed from the judgment entered against them.

The court found in accordance with the allegations of plaintiff's answer to the complaint in intervention, and also against interveners' allegations that plaintiff sought to obtain a preference or advantage in the collection of its claim over other creditor members of the board, or that under the constitution or by-laws of the board the creditor members were entitled to share with plaintiff any sums recovered by it; also that assets of the defendant of the value of $112,000 were not applied on its indebtedness, but were distributed to its stockholders.

As grounds for the appeal it is contended that the trial court's construction of the constitution and by-laws was erroneous, and that the findings are unsupported by the evidence.

The facts disclosed by the evidence are as follows: The defendant commenced business in 1924; 300,000 shares of its preferred and 350,000 shares of its common stock were issued, and all the common stock except the qualifying shares was held by William R. and Harry C. Davis. The company fell into financial difficulties in May, 1925, when it called upon the Mercantile Trust Company for assistance, and this concern ultimately became a creditor to the extent of over $100,000. During May, 1925, a representative of the trust company became a member of defendant's board of directors and its treasurer, and continued his connection with defendant until July, 1925, when its affairs became so involved that he advised an application to the board for assistance. Certain of defendant's creditors were members of the board, and as above stated the first meeting of creditors was held on August 5, 1925. Creditors holding about 80 per cent. of the claims against defendant were represented at the meeting, and it was then resolved that the representatives of a committee consisting of certain creditors be sent to defendant's store "for the purpose of taking an inventory," and a letter from the board to the creditors on August 8, 1925, after reciting the appointment of the committee, stated that "representatives of this committee are taking inventory and preparing an accurate statement of the assets and liabilities"; also that "pending completion of this work and a definite arrangement with the creditors the net cash receipts are being impounded. This report when completed will be submitted to you together with its recommendations."

According to plaintiff's representative he was offered a position on the committee, and accepted, and was told that he would be notified of any further meetings of the committee. He was not made a member, and it was testified that with the exception of the above letter plaintiff received no notification from the board of any action by the committee until September 23, 1925. In the meantime, however, plaintiff, under date of September 10, 1925, had written the board requesting advice with regard to the condition of defendant's affairs, but received no reply.

The inventory was completed on August 31, 1925, the value placed upon defendant's assets, including cash on hand in the sum of $53,326, being a total of $327,326. The committee estimated the "realizable value" of the assets to be the sum of $210,000, stating in their report that "the estimated realizable values are arbitrary figures, and are made for the purpose of arriving at an approximation of the maximum recovery which may be expected." Defendant's liabilities, according to the minutes of a meeting of the committee held on September 1, 1925, at which time the report of the appraisers was considered, were estimated to be $366,000; and at this meeting it was stated by the chairman that after exact figuring the value of the merchandise had been placed at $177,000. At meetings of the committee held on September 14 and 16, 1925, various offers of settlement by defendant were considered, and finally the offer of 40 per cent. was made by defendant. This offer all the representatives of the members of the committee except the representative of the Mercantile Trust Company expressed themselves satisfied to accept, and on September 19, 1925, one Albert Baer deposited with the committee the sum of $10,000 with his accepted order for $92,548.65, the minutes of the committee reciting that these sums, with $57,750 or thereabouts then on hand, would be approximately the amount necessary to pay the 40 per cent. offered. It appears that the sum mentioned as being on hand was money collected on sales since the appointment of the creditors' committee, and was the "cash on hand" shown in the inventory.

No action in connection with the offer appears to have been taken by the board or the creditors until November, 1925; and in the meantime the defendant caused to be filed a notice which led to the commencement of the present suit. On September 23, 1925, there appeared in the McCord Daily Notification Sheet, a trade publication, the fact that defendant had filed a notice of its intention to sell to Albert Baer on September 25, 1925, its stock in trade in bulk, with its fixtures, furnishings, equipment, and outstanding accounts receivable. Plaintiff learned of this on the same day, and telegraphed the board asking information as to the proposed sale, and whether all claims would be paid in full, to which no reply was made. Plaintiff then communicated with a mercantile concern in San Francisco, which procured from the board a summary of the report made by the committee showing defendant's assets and liabilities, and the information that defendant proposed a 40 per cent. settlement with its creditors without assignment. On September 24, 1925, plaintiff's representative, accompanied by one Sugarman, who was engaged in the business of purchasing bankrupts' stocks, arrived in San Francisco from Los Angeles. They visited the office of the board, where Sugarman offered $177,000 for defendant's stock in trade, not including cash on hand or accounts receivable. The evidence supports the conclusion that Sugarman was ready, willing, and able to purchase and pay the amount offered. Moreover, it shows that before bringing suit plaintiff protested to the attorney for the board that the proposed settlement was not for the best interests of the creditors, but was told that, should any action be brought to prevent consummation of the transfer to Baer, "the case would be immediately thrown into bankruptcy and the forty per cent settlement forced through regardless," it being further stated by the board's representative that there had been no assignment by defendant to the board, and that the latter consequently had nothing to sell.

Sugarman's offer being refused, and the plaintiff, being dissatisfied with the amount of the offer of settlement, in order to protect itself against the proposed sale to Baer, brought suit on its claim and attached.

During the negotiations for a settlement, defendant's officers had been endeavoring to find a purchaser for the store. Several concerns were approached, including the firm of Whitthorne & Swan, who ultimately became the buyers. On September 18, 1925, said William R. Davis and Harry C. Davis entered into a contract with Baer, which recited that defendant had authorized the sale of its merchandise, outstanding accounts receivable, furniture, fixtures, and equipment to Baer for the sum of $108,000, and had directed a notice of sale thereof, as required by section 3440 of the Civil Code; and had further directed that such part of the above sum as might be necessary for a settlement with all its creditors at 40 per cent. net cash, with expenses in the sum of $5,000, be paid to the board of trade. These amounts Baer agreed to pay, it being further provided that Baer should go into possession of the store and conduct a sale of the merchandise, he agreeing to resell the stock, etc., to the Davises or any one designated by them on or before January 15, 1926, for $15,000, with the sum of $108,000, with interest at 6 per cent. It was also agreed that Baer should be reimbursed for all expenses in conducting the sale and replenishing the stock, and credit upon the repurchase price all receipts from sales, and that, should the sums agreed to be paid to him be realized from the sales before December 1, 1925, the sum of $5,000 should be deducted from the repurchase price.

Pursuant to the contract Baer took possession on September 25, 1925, and continued in possession until about November 12, 1925, when a sale of the stock, fixtures, outstanding accounts, and good will was made to a representative of Whitthorne & Swan for $185,097.13. The notice of sale given under section 3440 of the Civil Code was dated November 4, 1925, and signed by defendant by William R. and Harry C. Davis and Albert Baer. At this time there was unpaid to Baer under his contract with the Davises the sum of $72,624.15, and this amount he received by check from Whitthorne & Swan, the balance of $112,472.98 being paid to defendant corporation, which in turn distributed to its preferred stockholders the sum of $77,211.36, the balance of $35,261.62 being received by William R. and Harry C. Davis, the owners of its common stock. In addition it appears that accounts receivable amounting to over $17,000 were retained by defendant, the buyers being of the opinion that they were not collectible. The estimated value of these, however, according to an application made to the corporation commissioner by defendant's officers in January, 1926, was about $9,000.

The evidence shows sufficiently that the Baer transaction was merely an advancement for the purpose of settlement with defendant's creditors, secured by a transfer of a part of its assets. As stated, no further meetings of the creditors or their committee appear to have been held until November 9, 1925, on which date there was a creditors' meeting, at which plaintiff was not represented. The attorney for the board called attention to the filing of the notice of intention to sell to Whitthorne & Swan, and also to the fact that the Mercantile Trust Company had levied an attachment on the store for $120,000. After considerable discussion with defendant's attorney regarding the terms and effect of the proposed sale it was resolved not to interfere therewith, and that the settlement offered by defendant be approved. The matter was further discussed on November 11, 1925, when it appeared that a payment had been made by defendant or the Davises to the Mercantile Trust Company and its attachment released, and on January 14, 1926, when the creditors again resolved to accept defendant's offer. Following this meeting, distribution to the creditors filing releases was made by the board.

[1] As shown, the board received from sales of defendant's stock in trade up to the time Baer took possession about $57,750, which was applied as part of the amount to be paid in settlement of the claims. The exact amount of the stock sold by Baer while in possession does not appear, as neither he nor the defendant was able to produce the accounts covering this period. It is a fair conclusion, however, from the fact that Baer under his contract was to be paid $108,000 with interest at 6 per cent. and the further sum of $10,000 in case of a repurchase before December 1, 1925, and that he was paid by Whitthorne & Swan the sum of $72,624.15 for his interest—the difference, as he testified, having been received from the sales—that the amount of stock sold by him amounted to nearly $50,000. After these amounts had been sold, Whitthorne & Swan paid for the balance of the stock with the accounts receivable, furniture and fixtures, and good will, the sum of $185,097.13;

and this evidence tends to support the court's conclusion that an efficient and economical administration of defendant's estate would have resulted in the payment to the creditors of an amount greatly in excess of the sums received by them, and that defendant was permitted to dispose of its assets and effect a settlement without the fullest investigation as provided by the constitution of the board.

Article II of its constitution provided that "its objects shall be to consider all subjects pertaining to the interests of the wholesale merchants; to prevent settlements by insolvent debtors without the fullest investigation; to resist all inequitable and fraudulent settlements; * * * to bring about joint action in dealing with embarrassed or insolvent debtors and in the collection of debts other than in the usual course of business, and to secure efficient, economical and expeditious administrations of insolvent estates." The by-laws provided that members should be obligated, among other things, to commence suits against common debtors through the attorney of the association or his correspondents, and not to resort to any act, device, secret understanding, connivance, or collusion whereby they might obtain, claim, or seek to obtain any preference or advantage over each other in the collection or settlement of any claims or demands against common debtors. Further, that all payments received or recoveries effected in violation of these provisions should be for the ratable benefit of other creditor members; also that any member might procure the calling of meetings of member creditors of common debtors, at which a committee should be chosen to direct and control whatever action the creditors might agree upon; or, where the creditors referred the case to the committee, to take such action as might seem advisable. Another section provided that "in the administration of cases all questions respecting the action to be taken shall be determined by a majority of the committee, or, if the matter is before the creditors for decision, by members representing a majority in amount of the claims." As to compromises with common debtors, however, section 2 of the by-laws provided as follows: "The unanimous consent to compromises with common debtors shall be necessary, provided, however, that when a composition instrument or release in consideration of a transfer of assets shall have been signed by members representing ninety per cent. of the indebtedness owing to members, or shall have been signed by creditors representing ninety per cent. of the total indebtedness owing to members and nonmembers, the secretary shall sign the instrument or release for and on behalf of members whose claims singly and not collectively are less than $250.00, and such members shall be bound thereby."

Appellants concede that by the last section of the by-laws plaintiff could not be compelled to consent to a compromise of its claim by reason of the acceptance by the other members of defendant's offer; also that, while plaintiff might after the committee ceased to act in the matter maintain an action for the enforcement of its claim, it was its duty in the meantime to act jointly with the other creditors or not at all; and this notwithstanding a transfer of defendant's assets might render valueless a subsequent judgment.

[2-4] As urged by appellants, the constitution and by-laws of the board constituted a contract between its members and in their relation to the association. Hogan v. Pacific Endowment League, 99 Cal. 248, 33 P. 924; Dingwall v. Amalgamated Ass'n, etc., 4 Cal. App. 565, 88 P. 597. The by-laws, however, contain no specific requirement that a creditor member who is not bound to compromise with a debtor shall refrain from action pending the satisfaction of the claims of his fellow members who enter into such an arrangement. And whatever the obligation of a member who joined with others in actions against common debtors, or to abide by the decision of other creditor members or their committee in ordinary cases, where, as here, the other members do not wish to sue, and resolve upon a course which admittedly the plaintiff was not bound to follow, no reasonable construction of the by-laws supports the conclusion that his right of action was suspended pending payment of the claims of the other creditors. The by-laws should be given a reasonable construction (14 Cor. Jur., Corporations, § 439, p. 350); and to give them the effect contended for by appellants where it is clear that the other creditors were not prejudiced by plaintiff's action, or where the debtor would thus be permitted to make away with assets largely in excess of the amount necessary to meet appellants' claims, and as a reasonable probability render fruitless any judgment recovered by plaintiff after the payment of these claims, would work a manifest injustice, a result which the language of the by-laws does not require.

We are satisfied that the trial court correctly construed the constitution and by-laws of the board; that its conclusions that the plaintiff did not resort to any act whereby it obtained or sought to obtain any preference or advantage over its fellow members within the meaning of the by-laws, and that the committee proceeded without the full investigation of the condition of defendant's affairs contemplated by the constitution, were fully sustained; and that plaintiff under all the circumstances shown was justified in bringing and maintaining its action.

The judgment appealed from is affirmed.

116 Cal.App. 360

ENRIGHT v. WILLIAMS, City Auditor.

Civ. 7853.

District Court of Appeal, First District, Division 2, California.

Aug. 27, 1931.

Rehearing Denied Sept. 26, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

1. Municipal corporations 🔑185(6).

Notice of discharge of police officer for "misconduct and violation of rules and regulations" *held* sufficient under charter without being stated in language of indictment (Oakland City Charter, § 81).

Oakland City Charter, § 81, provided that all persons holding positions in the classified civil service should be subject to removal from office for misconduct, incompetency, or failure to perform their duties under or observe the rules and regulations of the department or office.

2. Municipal corporations 🔑185(6).

Notice of discharge of police officer for "misconduct and violation of rules and regulations" *held* sufficient under civil service rules.

Civil service rules provided that, when an employee in the classified service of the city was discharged for any cause from which he has a right to appeal to the civil service board, the commissioner should cause a written notice to be served on the affected employee, such notice to set forth in general the cause for discharge.

3. Municipal corporations 🔑185(14).

Reinstatement of civil service employee not appealing from order of discharge as provided for by charter *held* unauthorized (Oakland City Charter, § 82).

Oakland City Charter, § 82, provided that any person discharged might within five days from the making by the commissioner of the order discharging him appeal therefrom to the civil service board. The employee took no appeal, but, after six years' acquiescence, he applied to be, and was, reinstated.

4. Municipal corporations 🔑186(1).

Allowance of police officer's salary claim by council after previous allowance and rejection by auditor *held* not conclusive on auditor (Oakland City Charter, § 122).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Mandamus proceeding by Joseph M. Enright against Harry G. Williams, as Auditor of the City of Oakland. Judgment for defendant, and plaintiff appeals.

Affirmed.

Myron Harris, Leo A. Sullivan, and John Jewett Earle, all of Oakland, for appellant.

C. Stanley Wood, City Atty., and Homer W. Buckley, Deputy City Atty., both of Oakland, for respondent.

STURTEVANT, J.

Claiming to be a member of the police department of the city of Oakland, the plaintiff applied to the trial court for a writ of mandamus commanding the defendant as auditor to draw his warrant in payment of two salary claims. His application was denied. He made a motion for a new trial, and the motion was denied, and he has appealed from the judgment.

Plaintiff set forth a cause of action to recover two salary claims as a police officer. The defendant as auditor filed an answer denying that the plaintiff was a police officer during the period within which the alleged claims arose. He also set forth certain affirmative defenses. He pleaded the plaintiff's discharge from the service on January 3, 1924—six years before the alleged claims for salary arose. He also pleaded several statutes of limitation. The court made findings sustaining the defendant's claim that the plaintiff was discharged on January 3, 1924, and was not, thereafter, a member of the police department. If that finding was supported by the evidence, other points made in the briefs need not be discussed. The plaintiff vigorously contends that said finding is not supported. He claims that the civil service board duly adopted rules, one of which provided that when an employee is discharged he must be given notice thereof. Continuing the plaintiff claims he was not given any notice. The defendant replies that he was, and that the court not only so found the fact to be, but went further and made a finding that the notice was in writing in the form of a letter which is set forth in the findings, as follows:

"January 3, 1924.

"Mr. Joseph M. Enright, Assistant Inspector of Police, Oakland Police Department, Oakland, California.

"Dear Sir: After analyzing the transcript of testimony of the preliminary hearing held at Martinez, Contra Costa County, California, December 4, 1923, in the matter of charges against you, and after careful consideration of the facts of the case and thorough discussion of the same with the Chief of Police, I have come to the conclusion that for the best interests of the Police Department you should be removed from your position therein.

"Therefore, this is to notify you that the order of suspension made on October 12, 1923, is this day terminated and *you are hereby discharged from your position of Assistant*

Inspector in the Oakland Police Department for misconduct and violation of the rules and regulations of said department.

"Yours very truly, Frank Colbourn,
"Commissioner of Public Health and Safety."

(Italics ours.)

[1-3] Section 81 of the Charter of the City of Oakland provides: "All persons holding positions in the classified civil service shall be subject * * * to removal from office or employment, by the commissioner in whose department they are employed * * * for misconduct, incompetency or failure to perform their duties under or observe the rules and regulations of the department or office. * * *" At this time we pause to remark that the grounds of the discharge of the plaintiff, as stated in the above letter, are clearly within the provisions of the law just quoted, and that the law did not require the specific charge to be stated in the exact language of an indictment. Andrews v. King, 77 Me. 224, and Lindblom v. Doherty, 102 Ill. App. 14. This is particularly true as to the statute we are considering. The charter does not expressly require a trial either before or after a discharge. If no trial is to be had, then there is no object in placing of record any harsh accusations against one who is so unfortunate as to be discharged. But the plaintiff cites section 3, rule VII, enacted by the civil service board, and claims the letter did not comply with said section. That section provides as follows: "When an employee in the classified service of the city is * * * discharged * * * for any cause from which he has a right to appeal to the Civil Service Board, the Commissioner * * * shall within twenty-four hours after the making of the order cause a written notice to be served on the affected employee, said notice to set forth in general the cause for the * * * discharge * * * and the day of the month and the year when same takes effect. * * *" A comparison discloses that the rule does not purport to require the notice to state the specific elements of the offense, but says the notice will "*set forth in general the cause.*" If and when a discharged employee is dissatisfied with the order of discharge, he is given a full and complete remedy. Section 82 of the charter provides: "Any person * * * discharged * * * may within five days from the making by the Commissioner * * * of the order * * * discharging him * * * appeal therefrom to the Civil Service Board, which shall fully hear and determine the matter. The accused shall be entitled to appear personally, and to have counsel and a public hearing. The finding and decision of the Board shall be certified to the official from whose order the appeal is taken, and shall forthwith be enforced and followed by him." The plaintiff took no appeal, but after about six years of acquiescence he applied to be, and was, reinstated. But, as we have shown, the plaintiff was legally discharged and his purported reinstatement was unauthorized.

The defendant contends that section 3 of rule VII enacted by the civil service board conflicts with section 81 of the charter of the city of Oakland and is therefore void. While we have treated it as valid, we do not wish to be understood as expressing any opinion on the subject. Much can be said both for and against the validity. We prefer to wait until a time when the subject can be more fully argued.

[4] When the plaintiff first presented his claim, it was allowed by the council, but it was rejected by the defendant. Thereafter the claim was allowed by a four-fifths vote of the council. This procedure was in accordance with section 122 of the charter. The plaintiff contends that the second allowance was in its nature final. The contention may not be sustained. The point has been decided (Nightingale v. Williams, 70 Cal. App. 424, 233 P. 807) and is not an open one.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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115 Cal.App. 391

McALVAY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7991.

District Court of Appeal, Second District, Division 1, California.

July 8, 1931.

Rehearing Denied July 31, 1931.

Mandamus ⟹60.

Mandamus to require court to issue citation for alleged contempt, relating to orders contained in court's judgment, in serving and filing notice of intention to move court to set action for trial, *held* properly denied, since not constituting claim or assertion of interest, title, or equity in violation of injunction contained in judgment.

Petition by B. D. McAlvay for a writ of mandate to the Superior Court in and for Los Angeles County and another.

Petition denied.

Harry M. Irwin, of Los Angeles, for petitioner.

PER CURIAM.

On petition for writ of mandate to require that respondent court issue its citation in a proceeding wherein certain persons are accused of an alleged contempt in relation to orders contained in a judgment of respondent court. This court being of the opinion that the act of the accused persons in serving and filing notice of intention to move the court to set for trial the action numbered 209683, mentioned and described in the petition herein, is not sufficient to constitute a claim or assertion of any interest, title, or equity in violation of the injunction contained in said judgment, it follows that the petition for writ of mandate should be, and the same is, denied.

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116 Cal.App. 459

BRANDES v. FREITAS.

Civ. 6766.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1931.

1. **Automobiles 🔑218.**

Pedestrian on public sidewalk has right of way over motorist seeking to cross.

2. **Automobiles 🔑167(1).**

In crossing public sidewalk, motorist must use reasonable care to avoid injury to pedestrians.

3. **Automobiles 🔑167(1).**

Driver backing automobile out of private driveway across public sidewalk without looking for pedestrians *held* negligent.

4. **Municipal corporations 🔑705(1).**

No traveler or user of public street may use sidewalk in such manner as to exclude pedestrian, or render sidewalk unsafe for pedestrian's use.

5. **Municipal corporations 🔑705(10).**

Pedestrian may not arbitrarily or unreasonably exercise his preferential right to use of sidewalk, or disregard lesser right of other possible users of sidewalk.

6. **Municipal corporations 🔑705(10).**

Pedestrian, even when about to cross busy business thoroughfare, has no positive duty to stop, look, and listen.

7. **Municipal corporations 🔑705(10).**

Generally, whether pedestrian is contributorily negligent is to be determined by elastic rule whereby average prudent person's conduct in similar circumstances is guide.

8. **Municipal corporations 🔑706(7).**

Generally, determining whether pedestrian has been contributorily negligent conclusively rests with jury or with court in juryless trial.

9. **Appeal and error 🔑1010(1).**

Appellate court *held* bound by finding of trial court, in juryless trial on competent and material evidence, that pedestrian was not contributorily negligent.

10. **Appeal and error 🔑1013.**

Judgment, not being so large as to indicate that it resulted from passion or prejudice of court in juryless trial, could not be disturbed on ground that damages were excessive.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Max Brandes against Ernest L. Freitas. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clay & Handy and W. U. Handy, all of Los Angeles, for appellant.

George C. Mansfield and Martin Forrest, both of Los Angeles, for respondent.

HOUSER, J.

Defendant appeals from a judgment rendered against him in an action for damages for personal injuries.

The injuries sustained by plaintiff were the result of a collision between him personally and an automobile owned and operated by defendant at a time when defendant was backing his automobile a distance of twenty-six feet out of his private driveway across a public sidewalk on which plaintiff was a pedestrian.

The first question presented to this court for its determination is whether the trial court was justified in its conclusion that the acts of defendant in the premises were negligent. Among other facts adduced on the trial of the action appeared the following: Besides defendant, the automobile with which plaintiff collided contained four passengers, three of whom occupied the back seat. Although both immediately prior to the time when such persons became occupants of the automobile, as well as at some time very shortly after they entered the automobile and preceding the time when the accident occurred, each of them gave some attention to ascertain the fact whether any person was on the sidewalk in the vicinity of its intersection with the private driveway of defendant, none of them saw plaintiff, who was in plain and unobstructed view, in broad daylight, and approaching such intersection. The automobile "was going about as slow as a car could go; * * * just moving and that is about all; * * * couldn't possibly have been more than a mile or a mile and a half an hour. * * *"

The specific "care" taken by defendant to see that the automobile operated by him during its course of twenty-six feet should collide with no pedestrian who was using the sidewalk consisted of the fact (as testified by defendant) that his "head was out of the window, backing out; * * * not with the intention of looking up and down the street to see if anybody was there; * * * didn't particularly look for that purpose." No information was given to defendant by either of his passengers relative to the situation of plaintiff, nor did defendant request either of them "to see if the way was clear." As far as defendant could remember, no "warning" was given by him of the approach of his automobile to the intersection of the private driveway with the sidewalk.

[1, 2] It is well-settled law that in the use of a public sidewalk a pedestrian thereon has a superior right of way over an automobile attempting to cross the sidewalk, and that in crossing such sidewalk the driver of an automobile is obligated to use reasonable care to avoid injury to any pedestrian who then may be in the exercise of his preferential right to the use of such sidewalk.

[3] Considering the facts herein relative to the conduct of defendant immediately preceding the happening of the accident, it is apparent that he used no care as far as the particular safety of plaintiff was concerned. He neither saw plaintiff nor knew of his presence in the vicinity where the accident occurred. With reference to the manner in which the automobile of defendant was operated by him, as far as it had any relation to the prevention of injury to plaintiff, defendant might as well have closed his eyes during the time that he was backing his automobile out of his driveway. It was the legal duty of defendant to observe plaintiff's use of the sidewalk and, even to the point of entirely stopping the progress of the automobile, yield to plaintiff his superior right of way at such intersection. The evidence is conclusive not only that defendant did not see plaintiff at all, but that defendant took no care to avoid injuring plaintiff. It is apparent that the failure of defendant to see plaintiff, and thereupon to so operate the automobile as to avoid injury to him, clearly establishes defendant's negligence in the premises.

The second point urged by appellant as a sufficient reason for reversal of the judgment is that plaintiff was guilty of contributory negligence, and hence was precluded from a recovery of damages.

Relating to the conduct of plaintiff on the occasion in question, from testimony given by a witness on the trial of the action it appears that immediately prior to the happening of the accident plaintiff was on the sidewalk "walking with his head down—seemed to be looking down at his feet." When the witness first observed the automobile plaintiff was "about the middle of the driveway; * * * he was nervous and he didn't know just what to do; * * * he went forward just a little and then he went backward, * * * hesitating to decide just what to do; * * * his right shoulder was towards the car to a certain extent and he wasn't directly facing onto the car; he was kind of sideways. * * *" Plaintiff testified that he was going home from his work and was walking on the sidewalk on the opposite side of the street from that on which his home was located, and that: "I was walking on the sidewalk and when I got nearer to my home I looked on the other side, I thought probably some of my family would meet me, which they generally do, and at that time I was hit there. That is all I know."

Combining the salient features of the evidence relating to the asserted negligence of plaintiff, the problem presented to this court is whether, without being considered legally guilty of negligence contributing proximately to a collision between him and an automobile crossing a public sidewalk, a pedestrian thereon may, in broad daylight, and having a clear and unobstructed view, walk "with his head down—looking at his feet," and immediately preceding the accident, caused by curiosity on his part, or otherwise, look "on the other side" of the street.

[4-8] The law appears to be well established that when using a sidewalk in a residential district a pedestrian has a right to assume that at least no one not possessing an equal right to its use will do so without using due care to protect such pedestrian from injury. The sidewalk is a part of the street set apart for the use of pedestrians, and no other traveler or user of the public street is privileged to use the sidewalk adjacent thereto either to the exclusion of a pedestrian desiring to use the same, or in such manner as will render the sidewalk unsafe for the use of the pedestrian; in other words, although not entitled to an exclusive use of the sidewalk, the pedestrian is granted a preferential right to the use thereof to the extent that any other person who may use the same for a different purpose must do so subject to the superior right therein of the pedestrian by at least giving timely and appropriate notice or warning of his intention so to do, and then only with such safeguards to the pedestrian as will adequately and reasonably protect him from injury.

On the other hand, although the pedestrian is possessed of a preferential right in the use of the sidewalk, he may not exercise such right in an arbitrary or unreasonable manner, or without regard to the lesser right of other possible users of the sidewalk. The superior right of the pedestrian to the use of the sidewalk for the purpose of traveling thereon does not go to the extent of legally entitling him to ignore the inferior right of others to put the sidewalk or a portion thereof, to a different use. The pedestrian is obliged to recognize and to permit the use of the sidewalk by others, not only fellow pedestrians, but also by those who may desire to and do use the sidewalk for other legitimate purposes, among which is the crossing thereof by automobiles. And so it comes about that in the use of a sidewalk even by persons whose respective rights to such use are unequal one with the other, each of such persons is bound to take not only reasonable precautions to protect himself from injury, but as well to prevent injury to the other. Manifestly, in a thickly populated residential district in which at least by the owners of a majority of the homes an automobile is owned and operated, ordinarily necessitating the maintenance of a private driveway connecting the garage with the street on which the property of the owner thereof faces or fronts, ordinary care on the part of a pedestrian on a sidewalk to prevent his being injured by an automobile being backed out of such driveway would not be obvious where it appeared that the pedestrian was walking backward on the sidewalk, with his eyes blindfolded. On the other hand, even when about to cross a busy business thoroughfare, no positive duty rests upon a pedestrian to "stop, look and listen." Mann v. Scott, 180 Cal. 550, 554, 182 P. 281; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 342, 208 P. 125, and authorities there respectively cited. Applicable to circumstances falling between such extremes of conduct may be found the elastic rule that the conduct of the average prudent person in similar circumstances is the guide for a determination of whether the pedestrian has been guilty of negligence which contributed proximately to the happening of the accident; and that the duty of determining whether the pedestrian has followed such a course conclusively rests with the jury; or, in its absence, with the trial judge. In the instant matter, with reference to the care exercised by plaintiff at the time in question and the legal consequences thereof, in part the trial judge expressed his views thereon in the following apt, if not legally correct, language: "A pedestrian using the sidewalk in his home neighborhood has a right of way over one who drives a vehicle across the same, and such pedestrian has the perfect right to assume that the sidewalk is safe for him to walk upon. Crawley v. Jermain, 218 Ill. App. 51. It cannot be claimed that it is want of ordinary care for a pedestrian, homeward bound at the end of a day's labors, traveling upon a familiar sidewalk, to fail to observe the comparatively silent moving of an automobile on a private driveway. He has the right to assume that that place of passage reserved for him as a pedestrian is safe, and that no one will back an automobile across it while he is on its course, without warning sufficient to attract his attention. It follows that even though such pedestrian be daydreaming, while traveling the sidewalk under such circumstances, and unconscious of all about him, excepting only those things which present an obstacle to his forward movement, or suddenly beat in upon his consciousness by reason of unusualness, he is not doing anything unusual, nor anything different from what countless others are doing under similar circumstances. It is the common experience of tired humanity when going home after a day's work to become immersed in thought and oblivious to one's surroundings, when traveling in a place of recognized and known safety, and to so travel long distances, without conscious knowledge of one's immediate surroundings, guided safely and correctly by the subconscious mind. *And therein lies no want of ordinary care, as it represents the ordinary conduct of humanity under similar circumstances.*"

[9] It follows that on competent and material evidence, the trial court having reached the conclusion that considering the law and the facts applicable to the instant case plaintiff was not guilty of negligence which proximately contributed to the accident in question, this court is bound thereby.

[10] Appellant raises the further objection to the judgment that it was excessive in amount; but since on an examination of the record herein, and particularly that portion thereof which relates to the injury sustained by plaintiff, it appears that the judgment was not so large as to indicate that it resulted from passion or prejudice on the part of the trial judge, the judgment cannot be disturbed by this tribunal on account of the amount of damages which was awarded to plaintiff.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

116 Cal.App. 191

KING v. WILSON et al. (two cases).

Civ. 452.

District Court of Appeal, Fourth District, California.

Aug. 19, 1931.

Rehearing Denied Sept. 17, 1931. Hearing Denied by Supreme Court Oct. 15, 1931.

1. Infants ⚷87.

Failure to appoint guardian ad litem for minor defendant *held* at most only irregularity, not jurisdictional defect (Code Civ. Proc. § 372).

2. Infants ⚷103.

Failure to appoint guardian ad litem for defendant who did not disclose minority until motion for new trial *held* not irregularity which would justify new trial (Code Civ. Proc. § 372, and § 657, subd. 1).

3. Evidence ⚷222(2).

Statement of defendant in negligence case that he had insurance "to pay for everything" *held* acknowledgment of responsibility, making statement admissible as declaration against interest notwithstanding disclosure of insurance.

4. Trial ⚷127.

Evidence relative to material issue properly in case is admissible, notwithstanding it may disclose existence of liability insurance.

5. Appeal and error ⚷994(2), 1002.

Where testimony is conflicting, jury, not appellate court, are judges of credibility of witnesses and weight and effect of testimony.

Appeals from Superior Court, San Diego County; A. C. Finney, Judge.

Separate actions by Rosebelle King, a minor, by Lucile H. King, her guardian ad litem, and by Lucile H. King, against Ralph Wilson and another, were consolidated and tried together. Judgment for each plaintiff, and defendant named appeals.

Affirmed.

Stearns, Luce & Forward, of San Diego, for appellant.

Adam Thompson, Renwick Thompson, and Gordon Thompson, all of San Diego, for respondents.

Roy Downs, in pro. per.

ALLEN, Justice pro tem.

The first of these two actions grew out of the ordinary automobile accident in which the plaintiff Rosebelle King, a minor, was severely injured and was awarded judgment against both defendants. In the second case the plaintiff Lucile H. King, the mother of Rosebelle King, recovered judgment against both defendants for medical and hospital expenses. The two cases were by stipulation of all parties consolidated and tried together. From these judgments defendant Ralph Wilson urges this appeal, the defendant Roy Downs not appealing.

[1] The first error assigned by appellant is that at the time of the trial he was under the age of 21 years and that no guardian ad litem was appointed in said action in his behalf. The minority of defendant Wilson was not brought to the attention of the court until the hearing of a motion for new trial. The record in this case discloses that the defendant was past 20 years of age at the time of the trial and had no guardian ad litem appointed as provided by the code.

The first question which naturally arises is: Does such failure to have a guardian ad litem appointed go to the jurisdiction of the court? This question was presented in the case of Johnston v. Southern Pacific Co., 150 Cal. 535, 89 P. 348, 11 Ann. Cas. 841. At page 539 of 150 Cal., 89 P. 348, 350, it is said: "It has long and consistently been held in this state that a failure to appoint a guardian ad litem, or to sue by one, while irregular is only that, that the defect is not a jurisdictional one, and therefore the judgment is not void." See, also, In re Cahill, 74 Cal. 52, 15 P. 364; Foley v. California Horseshoe Co., 115 Cal. 184, 196, 47 P. 42, 56 Am. St. Rep. 87. So far as we have been able to find, this is the last word on this point which is decisive thereof.

[2] The most that can be said is that the failure to appoint a guardian ad litem was an irregularity. Was its irregularity then such as would affect the substantial rights of the minor and authorize the granting of a new trial? Section 657, Code of Civil Procedure, pertains to when new trials may be granted. Subdivision 1 thereof is as follows: "Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial."

Before a judgment is reversed under this paragraph, it must be made to appear that the irregularity is such as to affect the substantial rights of the moving party. The facts as disclosed by the record fail to show any irregularities by the court which would justify such reversal. The defendant Wilson, being past 20 years of age, came into court by the filing of his answer to the complaint, announced ready, and proceeded to trial with an attorney; sat all through the trial with the knowledge of his nonage; did not disclose this fact to the court nor

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to his attorney; and then, when judgment was rendered against him, for the first time advised the court on his motion for a new trial that he was a minor. In other words, had the jury found in his favor nothing would have been said as to his age, but since it found against him he now seeks to get out from under the judgment by reason thereof. Such actions are most reprehensible, to say the least. He was willing, by silence, to deceive the court. Such actions should not be countenanced by the court to the extent of declaring it such an irregularity as to warrant a new trial.

The courts in many jurisdictions have held that the failure to appoint a guardian ad litem must affect the substantial rights of the infant. Harris v. Bennett, 160 N. C. 339, 76 S. E. 217; Grauman, etc., v. Krienitz, 142 Wis. 556, 126 N. W. 50; Martin v. Gwynn, 90 Ark. 44, 117 S. W. 754. What loss of substantial rights did the defendant in this case suffer? He was ably represented by counsel in every stage of the proceedings. A trial was had by jury, before whom he submitted his evidence, and his case is ably presented on appeal. Wherein are his rights affected and what different judgment would have been rendered, had he been represented by a guardian ad litem? None is pointed out. It is said in Childs v. Lanterman, 103 Cal. 387, 390, 37 P. 382, 383, 42 Am. St. Rep. 121: "Although it is provided in section 372, Code Civ. Proc., that, when an infant is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court, yet a judgment rendered against an infant in which no guardian ad litem has been appointed is not for that reason void (citing cases); and a judgment rendered against him in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person (Barber v. Graves, 18 Vt. 290; Marshall v. Fisher, 1 Jones [46 N. C.] 111; Townsend v. Cox, 45 Mo. 401)."

The failure to be represented by a guardian was no such error as would warrant the court in reversing the trial court on this ground.

[3] The next complaint charges that counsel for plaintiff is guilty of unprofessional conduct in placing before the jury the fact that defendant Wilson was covered by insurance. During the trial the attorney for the plaintiff Rosebelle King questioned her relative to a conversation she had with defendant while she was in the hospital. In answer to the question, "Well, do you remember any particular conversation you had with him on the second or third time you talked with him?" the plaintiff answered: "Well, I remember before he left the hospital that he phoned. He had been talking quite often and Dr. O'Neill asked him to quit. It was bothering me. I couldn't hold the phone, and before he left he phoned and said he was sorry it all happened but he had insurance to pay for everything." After the answer counsel for defendant promptly moved to have the answer stricken out and urged the court to declare a mistrial. The jury was excused, and after some argument by counsel the court sustained the objection and admonished the jury to disregard it. Appellant claims that plaintiff's attorney knew what the answer to the question would be, as the same answer was made by the same witness in her deposition taken a few months before the trial and that such error could not be cured by any admonition given the jury. The rule laid down by this court is that when an answer is coupled with an acknowledgment of liability, prejudicial error cannot be assigned. In the case of Rowe v. Rennick (Cal. App.) 297 P. 603, 607, the court said: "We think it sufficient to establish the following rules: First, that where the answer disclosing the insurance is inextricably coupled with an acknowledgment of liability, the answer is admissible; second, that, where it appears from the testimony in the record that no verdict could have been rendered for the defendant, the admission of testimony relative to insurance is not alone sufficient to authorize a reversal of the judgment. It must further appear that the judgment returned was the result of passion or prejudice."

[4] We think there might well have been added one other rule where such evidence would be proper, and that is when the evidence is relative to some material issue properly in the case. In automobile damage cases, where it becomes a material issue for plaintiff to prove that the automobile causing the injury was owned by defendant, many courts admit evidence that the defendant made a report to the casualty company wherein he admitted ownership of the automobile. Upon the same issue it has been held competent for plaintiff merely to show that liability insurance had been taken out by the defendant upon the automobile in question. This evidence was offered on the theory of a declaration against interest and therefore comes within the rule stated. Where the evidence does not come within this rule, we think the question propounded to plaintiff would be error.

The remaining question for decision is: Did the answer tend to disclose acknowledgment of responsibility, and would its admission be such as to create a prejudicial error that would warrant a reversal of the judgment of the trial court? It will be noted that the answer purported to relate a conversation had with defendant some time after the accident and was as hereinbefore set out. The last four words of the answer, "to pay for everything," would lead us to conclude that no other inference could logically be drawn therefrom and would constitute such an acknowledgment of responsibility and declaration against interest. This being true, such evidence was admissible. McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23; Nichols v. Nelson, 80 Cal. App. 590, 596, 252 P. 739; Maberto v. Wolfe, 106 Cal. App. 202, 289 P. 218; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644. In an action where there was evidence that a defendant driver of an automobile had made a statement shortly after the accident which was reasonably capable of being construed as an admission of his responsibility for the accident, the trial court did not err in permitting counsel for defendant to introduce in evidence the entire statement, even though it revealed the fact that the defendant driver carried indemnity insurance. Harju v. Market Street Ry. Co. (Cal. App.) 299 P. 788. There would be no prejudicial error in admitting the testimony in question.

[5] The final error urged by appellant is that there is not sufficient evidence to justify the verdict. We have gone over the record and find that there is a substantial conflict in the testimony. Where there is a conflict in the testimony, it is for the jury to judge the credibility of the witnesses and the weight and effect to be given their testimony. The jury having decided this fact, the same will not be disturbed by this court.

For the reasons stated herein the judgment of the trial court is affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

116 Cal.App. 258

SHANNON v. FLEISHHACKER et al.*

Civ. 7843.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1931.

Rehearing Denied Sept. 23, 1931. Hearing Denied by Supreme Court Oct. 23, 1931.

1. Officers 🔑119.

Plaintiff suing public officers for alleged negligence *held* required to bring complaint within statute imposing liability on officers (St. 1923, p. 675; St. 1919, p. 756, § 1).

2. Officers 🔑116.

Statute imposing liability on public officers for injuries sustained under specified circumstances must be construed as limitation upon officers' liability (St. 1919, p. 756, § 1).

3. Statutes 🔑224.

Statutes respectively imposing liability on public officials and on municipal corporations for injuries sustained under specified circumstances must be construed together as stating rule of procedure for enforcement of liability therefor (St. 1923, p. 675; St. 1919, p. 756, § 1).

4. Officers 🔑119.

Plaintiff suing public officials for wrongful death, having failed to plead or prove that deceased was using public property with due care, failed to make case for jury (St. 1919, p. 756, § 1).

5. Officers 🔑119.

Presumption that one exercises due care for his safety is not sufficient in actions against public officers to satisfy statutory requirement that plaintiff plead and prove exercise of due care in use of public property causing injury (St. 1919, p. 756, § 1).

6. Municipal corporations 🔑1016.
Officers 🔑119.
States 🔑191(1).

State, its political subdivisions or officials, may not be sued for damages for alleged negligence without state's consent.

7. Municipal corporations 🔑1016.
Officers 🔑119.
States 🔑191(1).

Legislature may impose reasonable restrictions on actions against state, its political subdivisions or officials, for injuries (St. 1919, p. 756, § 1).

8. Municipal corporations 🔑744.

Park commissioners, being agents of public corporation, *held* not liable to third persons for negligence of subagents or coservants (Civ. Code, § 2351).

9. Master and servant 🔑95.

Fifteen year old boy, employed to take tickets at Ferris wheel and to start and stop machine, *held* not employed in dangerous work in violation of Child Labor Law (St. 1919, pp. 415, 416, §§ 1, 4).

10. Master and servant 🔑96(1).

That 15 year old boy was employed at Ferris wheel without permit from school authorities *held* not proximate cause of injury sustained when minor disobeyed instructions and went to place of danger; hence no liability resulted (Deering's Gen. Laws 1923, Act 7487).

11. Appeal and error 🔑1056(1).

Exclusion of evidence showing dangerous character of Ferris wheel *held* nonprejudicial to plaintiff suing for minor employee's death (St. 1919, pp. 415, 416, §§ 1, 4).

Evidence disclosed that there was no controversy but that the Ferris wheel at which the minor worked, as a whole, was a dangerous piece of machinery within meaning of St. 1919, pp. 415, 416, §§ 1,

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*For opinion of Supreme Court denying hearing, see 3 P.(2d) 1020.

4, Deering's Gen. Laws, 1923, Act 3625, §§ 1, 4, but all the evidence demonstrated that place where deceased was employed was free from danger, and that his death was caused solely by his disobedience of orders in going into a place where he was not employed.

12. Appeal and error ⚿1056(1).

Excluding evidence showing other minors had been employed in park system with officers' knowledge *held* nonprejudicial to plaintiff suing for minor's death, in absence of showing of causal connection between deceased's injuries and failure to obtain working certificate from school authorities (Deering's Gen. Laws 1923, Act 7487).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Nettie Shannon against Herbert Fleishhacker and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Everette C. McKeage, of San Francisco, for appellant.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, for respondents.

NOURSE, P. J.

Plaintiff sued for damages for the death of her minor son, who was employed in the playfield of the Golden Gate Park operated by the city and county of San Francisco. The defendants are the park commissioners, the park superintendent, the superintendent of playgrounds, and the manager of the "Fleishhacker Playfield." The cause was tried with a jury. At the close of plaintiff's case the trial judge granted defendants' motion for a nonsuit. The appeal is presented on typewritten transcripts.

The deceased was a boy of fifteen years, who was employed on Saturdays and holidays in and about the "Fleishhacker Playfield." On May 19, 1929, he was assigned to take tickets at the "Ferris Wheel" operated in said playfield and to start and stop the machine and to open and close the gates to permit the children to enter and leave the cars or carriages on the wheel. The machine was started and stopped by a lever located at the entrance gate where deceased was stationed. The operating machinery was inclosed in a shed on the opposite side of the wheel from the entrance gate, and this shed, as well as the wheel, was surrounded by a high wire fence. A man by the name of Hancock had direct charge of the operation of the machine with the special duty of oiling and greasing its parts and of performing such mechanical work as became necessary. The deceased was frequently instructed not to enter the inclosure where the machinery was housed and not to attempt to oil, grease, or repair any of its parts. On the day of his death he asked defendant Brandon for a rag, saying he wanted to tighten a grease cup. He was told to leave the grease cup alone and to report to Hancock. He asked Hancock for a rag and Hancock told him to leave the grease cup alone and that he (Hancock) would attend to it. Shannon disregarded these instructions, entered the fenced inclosure, and climbed around behind the wheel while it was in motion. He was struck on the back of the head by some portion of the wheel and died soon after.

In the final analysis appellant bases her cause of action upon the theory that all the defendants were guilty of negligence per se because the deceased minor was employed in violation of the Child Labor Law and the compulsory school attendance law. The appeal is argued on the theory that if a violation of either of these statutes is shown a case of negligence per se is made which should have gone to the jury. However, we are not satisfied that the decision should rest upon this ground. By the Act of June 13, 1923 (Stats. 1923, p. 675, Deering's Gen. Laws, 1923, Act 5619), the Legislature changed the entire policy of the state in regard to actions for injuries sustained upon public property. This act made counties, municipalities, and school districts liable for the negligence of their officers in certain instances and prescribed the method for enforcing such liability. Prior to this act no action would lie against a municipality for injuries suffered in connection with the operation of a municipal playground. Kellar v. City of Los Angeles, 179 Cal. 605, 607, 178 P. 505. Theretofore, by the Act of May 18, 1919 (Stats. 1919, p. 756, Deering's Gen. Laws, 1923, Act 5618), the Legislature declared the conditions under which public officers, as distinguished from the public corporation, were liable for such injuries. The pertinent provisions of this act are that: "No officer of any district, town, city * * * shall be liable for any damage or injury to any person * * * resulting from the defective or dangerous condition of any public street * * * or property, unless it shall first appear: (1) That the injury sustained was the direct and proximate result of such defective or dangerous condition, (2) that such officer had notice of such defective or dangerous condition, (3) * * * (4) * * * and then *only when it shall further appear* that such damage or injury was sustained while such public * * * building, work or property *was being carefully used*, and that *due care was being exercised* to avoid the danger. * * *" Section 1. The act was declared not to be an

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

enlargement of the duty or liability of any public officer.

[1] Having elected to sue the officers rather than the municipal corporation, it was incumbent upon appellant to bring her complaint within the terms of the statute which imposed a liability upon those officers. Three acts of negligence were specified in her complaint—the violation of the two employment statutes and negligence in the maintenance of the grounds which was stated in the following language: That the respondents "negligently maintained said Ferris wheel and carelessly and negligently permitted said Ferris wheel to be operated, due to the fact that said Ferris wheel was not equipped with, at the time of its installation or afterwards or at all, a guard to protect persons from coming in contact with the revolving lower part of said Ferris wheel." Two essential elements of the statute are lacking: Respondents' knowledge of the alleged defective condition of the property, and the exercise of due care on the part of deceased. In the recent case of Gorman v. County of Sacramento, 92 Cal. App. 656, 668, 268 P. 1083, 1088, the District Court of Appeal say, in reference to this statute: "An examination of the 1919 act shows that a person suing an officer for negligence has not only to plead, but also to prove, that the injury and damage complained of was sustained while such public street * * * or property was being carefully used, and that due care was being exercised to avoid damage due to such condition, or, in other words, this act changes the general rule that the burden of showing contributory negligence is upon the defendant, and requires an affirmative showing on the part of the plaintiff that he was using the road, bridge, or street with due care."

The "Pridham Act" (Stats. 1911, p. 1115) contained the same language and was given the same interpretation in Ham v. County of Los Angeles, 46 Cal. App. 148, 160, 189 P. 462, as is found in the Gorman Case. And to the same effect is McCain v. City of Oakland, 52 Cal. App. 639, 642, 199 P. 841. The 1911 statute was held unconstitutional upon other grounds in Brunson v. City of Santa Monica, 27 Cal. App. 89, 148 P. 950. The 1919 statute was enacted to cure this constitutional defect and expressly repealed the 1911 statute. In Moore v. Burton, 75 Cal. App. 395, 402, 242 P. 902, 905, the District Court of Appeal, after quoting with approval the language of the Ham opinion upon this phase of the case, say: "This provision having been substantially re-enacted by the repealing act, and having been construed as above, the same construction may reasonably, and on the authority of the case cited should be, given to the later statute."

[2-4] In the three cases cited—the Ham Case, the Burton Case, and the Gorman Case—petitions for hearings were denied by the Supreme Court, and, finding no authority to the contrary, we may take them as stating the controlling rule of law in proceedings of this character. As the statute expressly declares that it is not to be construed as enlarging the duty or liability of any public officer, we must construe it as a limitation upon the liability of such officers for injuries incurred under the circumstances therein enumerated. And this construction becomes the more sound since the enactment of Act 5619 in 1923, which for the first time imposed a liability upon the public corporation for such injuries and which so closely follows the 1919 act in its language as to indicate that the Legislature had that act before it when the later one was enacted. These two acts should, therefore, be read together as stating the statutory rule of procedure for the enforcement of liability for injuries incurred under the circumstances therein mentioned, so that, if the injured party seeks recovery against the public corporation, he must proceed under the 1923 act, and, if he seeks to hold the public officers to their personal liability, he must proceed under the 1919 act (except in the limited cases mentioned in section 1 of the act of 1923). The appellant having failed to plead or prove that the deceased was using the "property" with due care, she has utterly failed to make a case to go to the jury.

[5] The only answer suggested to the foregoing is that, under the rule of Smellie v. Southern Pac. Co. (Cal. Sup.) 299 P. 529, the law presumes that the deceased exercised due care for his safety and hence any evidence of negligence on his part would merely create a conflict which should go to the jury. These considerations were before the court in the Ham Case, where it was said that to so hold "is to offset by a legal presumption the declaration of the statute that the burden is on the plaintiff in such cases to show that due care was used by him." Page 161 of 46 Cal. App., 189 P. 462, 468. To this it might be added that to so hold is to render that portion of the statute nugatory because, if the plaintiff can rely upon that presumption alone, there would be no need of his pleading or proving due care. The proper rule, as we understand the decisions, is that this presumption, which is available to the plaintiff generally, is not sufficient, in actions brought under this statute, to satisfy the demand that the plaintiff must plead and prove the exercise of due care in the use of the public property causing the injury.

[6, 7] There is a justifiable reason for this distinction. Public property is open to the use of the public generally; and the general use of such property is a constant source of danger to the public. To encourage the exercise of due care in the use of public prop-

erty, the Legislature might well limit the public liability to those who exercise such care. And, as the state and its political subdivisions and officials may not be sued for damages in such cases without the consent of the state, the Legislature may properly impose such reasonable restrictions upon actions of this character.

[8] There is another point of difficulty which, like the foregoing, has not been discussed in the briefs, but which effectively stops the case in so far as the respondents, the park commissioners, are concerned. The park commissioners were all officers and agents of the city and county of San Francisco, a public corporation. The park superintendent, his assistant, and the manager of the playfield were all subagents employed in the service of the common principal. As original agents the park commissioners are not liable to a third person for the negligence of their subagents, or coservants. Section 2351, Civil Code, provides: "* * * The original agent is not responsible to third persons for the acts of the sub-agent." In Hilton v. Oliver, 204 Cal. 535, 539, 269 P. 425, 426, 61 A. L. R. 297, the Supreme Court, having this question before it, say: "The rule laid down or approved by the decisions in this state is that an agent is not in general liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or directs or authorizes the particular wrongful act of the subagent, or improperly cooperates in the latter's acts or omissions. Dobbins v. City of Arcadia, 44 Cal. App. 181, 186 P. 190; Baisley v. Henry, 55 Cal. App. 760, 204 P. 399. The defendant trustees can be held liable under the facts shown herein only by reason of the application of the doctrine of respondeat superior. This doctrine has no application as between a public officer and his subordinates, who are likewise in the public service, unless the public officer has directed or countenanced the tortious acts to be done, or has co-operated therein. Michel v. Smith, 188 Cal. 199, 205 P. 113; Whiteman v. Irrigation District, 60 Cal. App. 234, 212 P. 706." This general principle is recognized in Act 5619, where it is provided that supervisors, city trustees, and school trustees are not liable for the negligence of any appointee or employee unless they knew that such appointee or employee was inefficient and incompetent to perform the services delegated to such.

In so far as the respondents the park superintendent and the superintendent of playgrounds are concerned, there is neither pleading nor proof that they had any power or duty to appoint the manager of the playfield, or to employ the deceased, or that they had any knowledge of his employment, or of the alleged defective condition of the Ferris wheel. The allegation is that the deceased was employed by Brandon as manager of the playfield. But Brandon was also an employee, or agent, of the public corporation, and, as such, a coservant of these other respondents. Though he may not have been a "sub-agent" of the park superintendent or of his assistant within the terms of section 2351, Civil Code, he was their subordinate, or "co-agent." It would seem, therefore, that the same rule would apply to these respondents as was applied in Michel v. Smith, 188 Cal. 199, 201, 205 P. 113, 114, where the Supreme Court held that a sergeant of police was not responsible for the negligence of a member of his squad, saying: "A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated therein. 23 Am. & Eng. Ency. of Law, 382; Story on Agency, 319; Robertson v. Sichel, 127 U. S. 507–515, 32 L. Ed. 203, 8 S. Ct. 1286; see, also, Rose's U. S. Notes." Similar holdings have been made in relation to special police officers employed by private persons in Redgate v. Southern Pacific Co., 24 Cal. App. 573, 581, 141 P. 1191, and Maggi v. Pompa, 105 Cal. App. 496, 499, 287 P. 982. There is here neither allegation nor proof that any of the other respondents directed Brandon to perform any of the acts complained of or that they "personally co-operated therein."

In the instant case the failure to plead the exercise of due care might have been excused if the appellant had made proof of that fact; but her proof is all one way—that the machinery was properly safeguarded and that the injury was caused solely by the disobedience by the deceased of the direct orders of his superiors. In this respect the case is analogous to Scott v. City of Long Beach (Cal. App.) 292 P. 664, a suit directly against the corporation under the statute of 1923. The District Court of Appeal affirmed a judgment for defendant, notwithstanding the jury's verdict for plaintiff, holding that plaintiff had not made a case of negligence within the terms of the statute.

For the reasons given the appellant wholly failed to make a case against any of the respondents, other than Brandon, as public officials or in their private capacities and, as to all those respondents, the nonsuit was properly granted.

[9] As to the respondent Brandon the allegation of the complaint being that he employed deceased in violation of the Child Labor Law and the Compulsory Education Law, a consideration of those acts becomes necessary. The provisions of the Child Labor Law (Deering's Gen. Laws 1923, Act 3625, St. 1919,

p. 415) upon which reliance is placed prohibit the employment of any minor under the age of sixteen years "in or in connection with any * * * place of amusement * * *" (section 1) except as may be provided by the provisions of the compulsory school attendance law. Section 4 of the act provides that: "No minor under the age of sixteen years shall be employed, permitted or suffered to work * * * oiling, wiping or cleaning machinery * * * or in proximity to any hazardous or unguarded belts, machinery or gearing, * * * or in any other occupation dangerous to the life or limb, or injurious to the health or morals of such child." This section lists twenty-four different kinds of machines and nineteen separate places of employment where such minors may not be employed and authorizes the bureau of labor statistics to list other places of employment which should be prohibited. Neither the machine nor the place of employment where the deceased met his death is banned by any of these specific regulations. All the evidence, without any shade of conflict, is that the deceased was engaged to perform a safe and nonhazardous duty in connection with a machine that was protected by every known safeguard. He was not *employed* to oil or clean any machinery and was not employed in proximity to any *unguarded* machinery or in any occupation dangerous to life, limb, health, or morals. Thus it is apparent that appellant was not employed in violation of this statute in so far as the machine he was hired to operate is concerned, first, because the Ferris wheel is not a machine listed in any of the regulations, and, second, because this machine was not "unguarded machinery," which is the only general regulation found in the act. All the evidence demonstrates that the wheel was guarded by every known safeguard and that the minor was explicitly directed not to go behind those guards. The exhibits which have been brought up with the transcript plainly show that if deceased had followed these instructions and had remained where he was employed to remain there could have been no possible chance for an injury. Negligence cannot therefore be predicated upon the mere employment of the minor to work the harmless lever of the machine and to take the tickets from the customers. As this was all he was employed to do, the fact that he disobeyed instructions and went over the guard to a place of danger has no relation to any liability of the respondents under the labor statute. To hold that a minor may not be employed in a place of safety because perchance he might disobey orders and wander into a place of danger would make the labor law ridiculous.

In so far as the statute relates to the *place* of employment, it is true that such minors may not be employed in any "place of amusement" without a permit from the school authorities as required by the Compulsory School Attendance Law. If it is negligence per se to employ a minor in such a place of employment without a working permit then appellant has a case. Otherwise not.

[10] This brings us to a discussion of the second point—the effect of the failure of the deceased to present a certificate to work from the school authorities. The Compulsory Education Law upon which appellant relies is the act of March 24, 1903 (Stats. 1903, p. 388, as amended, Deering's Gen. Laws 1923, Act 7487). Though this act was repealed by the School Code adopted in 1929 (page 303) and its main provisions were incorporated in that Code, the repealing act did not become effective until after this cause of action arose. The pertinent provisions of this act required a minor under the age of sixteen years to procure a permit from the proper school authorities permitting him to work and required the employer to ask for and retain the permits so issued to such minors in his employ. It provided that no one should "suffer or permit" a minor to be employed in violation of the terms of the act, and it would thus seem to apply to an agent of the employer such as the respondent Brandon. The act prescribed certain regulations to be followed in the issuing of such permits within the discretion of the school authorities, and these were followed with specifications for the issuance of "vacation permits" which also authorized the minor to work on the regular weekly school holiday. The issuance of such "vacation permits" appears to be mandatory.

Here it is conceded that the deceased minor did not deliver to the respondents a permit to work. For this reason the appellant insists that she has a case of negligence per se. The respondents argue that there is no causal connection between the fact of the absence of the permit and the injuries sustained by the minor. This should also be conceded because it is self-evident. The rule of law applicable is succinctly stated in Arrelano v. Jorgensen, 52 Cal. App. 622, 624, 199 P. 855, 856, where the District Court say: "But it is well settled that the act or omission constituting the violation of law must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it." In Williams v. Southern Pacific Co., 173 Cal. 525, 539, 160 P. 660, 666, the Supreme Court had a case of damages for the death of a minor employed by it under a contract which violated some terms of the Child Labor Law. But the violation of the act did not contribute to the injuries of the employee, and the court say: "So far as that particular accident was concerned, notwithstanding his violation of the statutory duty, the employer was not only not guilty of any negligence per se, but he was not guilty of any negligence at all." And on page 541 of 173 Cal., 160 P. 660, 666, the court say further: "But this connection [the violation of the statute] is not the causal connection—the contributing cause—which the law declares. So fundamentally true is this that even in statutes like this, where the hours of labor are limited by law, it must be shown not only that the employee was laboring during the forbidden or excessive hours, but that his injuries in some proximate way resulted from this fact."

Similar holdings have been made in reference to violations of the California Vehicle Act—that they must have proximately contributed to the injury complained of to be actionable. Ormston v. Lane, 90 Cal. App. 481, 487, 266 P. 304; Berges v. Guthrie, 51 Cal. App. 547, 549, 197 P. 356; Skaggs v. Wiley (Cal. App.) 292 P. 132; Burtt v. Bank of California, etc. (Cal. Sup.) 296 P. 68. We need not go into the niceties of the decisions which question whether in every case the violation of a penal statute constitutes negligence per se, but may accept the principle stated in Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 232, 139 Am. St. Rep. 389, where the court, assuming that it was negligence per se, said: "But to make such negligence actionable it must be a proximate cause of the injury for which the action is brought."

[11, 12] We have purposely confined the foregoing discussion to the two theories upon which appellant sought to recover—the alleged violation of the Child Labor Law, and the alleged violation of the Compulsory Education Law. We have shown that she failed to prove a violation of the Labor Law and that she failed to prove that the admitted violation of the Compulsory Education Law was a contributing cause of the injuries. We have not overlooked any of the many assignments of error on the exclusion of evidence. There was no controversy but that the Ferris wheel as a whole was a dangerous piece of machinery within the meaning of the Child Labor Law, but all the evidence educed by the appellant demonstrated that the place where the deceased was employed was free from danger and that the injury arose solely from his disobedience of orders in going into a place where he was not employed. Hence, the appellant was not prejudiced by the exclusion of additional evidence offered to show the dangerous character of this machinery. Having failed to show a causal connection between the absence of a working certificate and the injuries complained of, she was not injured by the exclusion of the proffered evidence tending to show that other minors had been employed in the park system and that some of the respondents had knowledge of that fact. The criticism of the trial judge in refusing to dismiss the jury while the motion for nonsuit was argued falls with the granting of that motion. The same may be said of the complaint that appellant was not permitted to argue that motion fully. She has had full opportunity to argue it here, and if we are correct in our conclusions, further argument in the trial court could not have availed appellant.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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116 Cal.App. 439

CLINE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8032.

District Court of Appeal, First District, Division 1, California.

Sept. 1, 1931.

Rehearing Denied Oct. 1, 1931.

Prohibition 🔑**13.**

Application to prohibit reopening of compensation proceeding, because made without notice, would be denied, where question presented thereby has become moot (St. 1917, p. 850, § 20 (d).

Application would be denied as presenting a moot question where, since the application to reopen the compensation proceeding was denied, the Industrial Accident Commission had vacated its order to reopen the case and had taken the necessary steps to afford the petitioner an opportunity to be heard on the question of whether or not the case should be reopened.

Application by Thomas Cline for writ of prohibition to be directed to the Industrial Accident Commission to prevent it from proceeding with the rehearing of a proceeding under the Workmen's Compensation Act.

Writ denied.

Charles A. McClory, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

PER CURIAM.

The petitioner has applied for a writ of prohibition to prohibit the Industrial Accident Commission from proceeding with the rehearing of his case before said commission upon the ground that the order granting the petition to reopen said case was made in violation of the requirements of section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850), in that it was granted without notice to petitioner and without giving him an opportunity to be heard; also upon the ground that the commission had lost jurisdiction to reopen the case.

Since the application was presented, however, the commission has vacated its order to reopen the case and has taken the necessary proceedings to afford petitioner an opportunity to be heard upon the question of whether or not the case shall be reopened. That being so, the question sought to be determined by the application for the writ of prohibition has become moot; and upon that ground the application is denied.

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116 Cal.App. 465

BUSING v. MOORE.

Civ. 7963.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1931.

1. Appeal and error 🔑345(1).

Notice of motion for new trial filed over 60 days after entry of judgment *held* not to extend time for appeal (Code Civ. Proc. §§ 939, 953d).

2. Appeal and error 🔑348(1).

Appellant *held* not entitled to written notice of entry of judgment before time within which appeals must be made, begins to run (Code Civ. Proc. §§ 939, 953d).

Appeal from Superior Court, Los Angeles County.

Action by H. B. Busing, as administrator of the estate of Louie S. Dexter, deceased, against Edgar B. Moore. From the judgment, plaintiff appeals. On motion to dismiss appeal.

Motion granted.

Elliott H. Barrett, of Los Angeles, for appellant.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for respondent.

HOUSER, J.

[1] In this motion to dismiss the appeal from the judgment, the record shows that the judgment was entered on December 2, 1930; that the notice of intention to move for a new trial was filed on February 28, 1931, which motion was denied on March 31, 1931; and that the notice of appeal from the judgment was not filed until the 27th day of April, 1931. It thus appears that considerably more than 60 days elapsed after the entry of the judgment before appellant either filed notice of his intention to move for a new trial, or filed notice of appeal from the judgment.

As far as affects the instant matter, section 939 of the Code of Civil Procedure provides that: "An appeal may be taken from any judgment * * * within sixty days from the entry of said judgment. * * * If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

Section 953d of the Code of Civil Procedure is as follows: "Any notice of entry of judgment, or of order granting or denying a motion for a new trial, required by the provisions of section 650, section 659 or section 953a of this code, must be given in writing, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes."

Construing the provisions of said section of the Code with reference to the effect of a notice of intention to move for a new trial upon the right of appeal, in the case of Ransome-Crummey Co. v. Beggs, 185 Cal. 279, 196 P. 487, it is held that (syllabus): "The provision of section 939 of the Code of Civil Procedure extending the time for appeal from the judgment if proceedings on motion for a new trial are pending has no application unless such proceeding is instituted within the sixty days after entry of judgment within which an appeal may be taken from the judgment, in the absence of any new trial proceeding, and if within such sixty days no such proceeding be instituted and no appeal from the judgment is taken, the right of appeal from the judgment is forever lost." To the same effect, see Smith v. Questa, 58 Cal. App. 1, 207 P. 1036.

It therefore becomes apparent that in the circumstances hereinbefore set forth, the filing by appellant of his notice of intention to move for a new trial did not have the effect of extending the time within which he might appeal from the judgment.

[2] But it is contended by the appellant that under the provisions of section 953d of the Code of Civil Procedure, in the absence of any waiver by him in writing of a written notice to him of the entry of judgment, or by oral stipulation made in open court to like effect and the same entered in the minutes, he was entitled to a written notice of the entry of the judgment before the statutory

time within which an appeal from the judgment, as provided by the terms of section 939 of said code, would start to run. However, it appears that the authorities are clearly against the position assumed by appellant in that regard.

In the case of Cook v. Cook, 208 Cal. 501, 282 P. 385, it is held that (syllabus): "Section 953d of the Code of Civil Procedure does not relate to notices of appeal which must be filed within sixty days after the entry of the judgment, * * * but applies only to the notices required by the provisions of section 650 of said code relating to settlement of bills of exceptions, section 659, of said code relating to motions for a new trial, and section 953a of said code relating to preparation of transcript on appeal." See, also, Bley v. Board of Dental Examiners, 101 Cal. App. 666, 282 P. 19.

It follows that the motion to dismiss the appeal herein should be granted. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 478

GALLOWAY v. GALLOWAY et al.

Civ. 7993.

District Court of Appeal, First District, Division 2, California.

Sept. 2, 1931.

1. Husband and wife 🔑298(1, 2).

In suit for separate maintenance, husband's ability to pay when award is made determines reasonableness of award.

2. Divorce 🔑329.

Divorce obtained in another state through fraudulent residence simulated for purpose, and not in good faith, is open to attack in state of true matrimonial domicile.

3. Divorce 🔑329.

Fraud in establishing residence for purpose of divorce is not presumed, but must be proved like any other fact.

4. Divorce 🔑329.

Mere suspicion of fraud in establishing residence for purpose of divorce is not sufficient to attack divorce.

5. Divorce 🔑329.

Evidence of one witness that she thought husband stated he had gone to Mexico to get divorce *held* insufficient to show fraudulent residence, to set aside Mexican divorce.

6. Divorce 🔑329.

Good faith of husband in obtaining divorce in Mexico and integrity of judgment of foreign court is presumed in attack on foreign divorce.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Minna Galloway against Dallas L. Galloway and others. Judgment for plaintiff, and named defendant appeals.

Reversed.

Fred W. Morrison, of Los Angeles, for appellant.

Harry K. Sargent, of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued for separate maintenance. The defendant answered setting up a divorce from plaintiff in the courts of the Republic of Mexico. The trial court awarded plaintiff $75 a month, and defendant appeals upon a bill of exceptions.

[1] Appellant insists that there is no evidence of his ability to pay the amount of the award. The only evidence found is that the appellant was without property, without funds, and without employment. Respondent concedes her failure to make a showing in this respect, but suggests that the court should take into consideration the testimony that appellant had been engaged in the real estate business in Los Angeles prior to his departure for Mexico in 1925. It is the husband's ability to pay when the award is made that determines the reasonableness of the award, and in this respect the record is silent.

[2-6] Appellant also complains of the finding adverse to the decree of the Mexico courts dissolving the marriage. The rule is well settled that when a divorce is obtained in another state through a fraudulent residence simulated for the purpose and not in good faith, such divorce is open to attack in the state of the true matrimonial domicile. Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann. Cas. 1917E, 122; Kelsey v. Miller, 203 Cal. 61, 89, 263 P. 200. But it is as equally well settled that fraud is the basis of the attack (Kelsey v. Miller, supra); that fraud is not presumed but must be proved like any other fact (Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26); and that a mere suspicion of fraud is not sufficient (Everett v. Standard Accident Ins. Co., 45 Cal. App. 332, 338, 187 P. 996; Noll v. Baida, 202 Cal. 98, 100, 259 P. 433. Here there is no proof of fraud. One witness was called who testified that she thought the appellant had told her that he had gone to Mexico to get a divorce. No other testimony was taken. The decree

discloses that summons was issued and that the default of the wife was duly entered. Whether she was personally served does not appear. However, in the absence of evidence, we must presume the good faith of the husband and the integrity of the judgment of the foreign court, and with no competent evidence to rebut either presumption, the judgment appealed from falls for want of proof.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

116 Cal.App. 412

PEOPLE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 7954.

District Court of Appeal. First District, Division 1, California.

Aug. 31, 1931.

Criminal law ⚷1218.

Trial court could not sentence defendant convicted of attempt to commit second-degree burglary to imprisonment in place other than state prison (Pen. Code, §§ 461, 664).

> This was so, since under Pen. Code, § 461, burglary of second degree is punishable by imprisonment in state prison and not elsewhere, and section 664 merely fixes the maximum punishment for attempt to commit a crime at one-half maximum penalty that may be inflicted for completed offense; hence punishment for burglary in second degree being imprisonment in state prison for maximum term exceeding five years, the provisions of section 664, subd. 1 providing that, if the offense so attempted is punishable by imprisonment in the state prison for five years or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison or in county jail, as case may be, applied.

Application for writ of mandate by the People against the Superior Court of the City and County of San Francisco and Louis H. Ward, Judge thereof, to compel respondents to arraign a certain defendant for punishment and sentence him according to law.

Writ granted.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for petitioner.

Frank J. Egan, Public Defender, James A. Toner, and George T. Kerr, Asst. Public Defenders, all of San Francisco, for respondents.

PER CURIAM.

An information was filed in the superior court of the city and county of San Francisco which charged one Leo Buckbee with the commission of a felony, to wit, burglary, and with a prior conviction of a felony in the state of Utah. Upon his arraignment in such cause Buckbee entered a plea of not guilty and denied having suffered a prior conviction. Subsequently on the day set for the trial, with the permission of the court, he withdrew the plea of not guilty and thereupon entered a plea of guilty of attempting to commit burglary, a felony. Thereafter, by stipulation by the district attorney, the court found the degree of burglary to be the second, and upon motion by the district attorney ordered the prior conviction to be dismissed. The court then pronounced judgment, sentencing the defendant to imprisonment in the county jail of the city and county of San Francisco for a term of one year.

It is claimed by the people, represented by the Attorney General, that the court was without authority to sentence a defendant convicted of an attempt to commit burglary of the second degree other than to imprisonment in the state prison, and that its judgment is therefore void.

The present proceeding, in which the people are the petitioners, is for a writ of mandate, directing the court to arraign the defendant for judgment and pronounce sentence according to law.

Section 461 of the Penal Code reads as follows: "Burglary is punishable by imprisonment in the state prison as follows: 1. Burglary in the first degree for not less than five years. 2. Burglary in the second degree for not less than one nor more than fifteen years." And section 664 of the same Code provides: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: 1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half of the longest term of imprisonment prescribed upon a conviction of the offense so attempted. * * * 2. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Respondent claims that the word punishable as used in section 664 of the Penal Code means "may be punished"; and, since burglary of the second degree is punishable by imprisonment in the state prison from one to fifteen years (Pen. Code, § 461), a defendant convicted of an attempt to commit the crime may be punished by a term of imprisonment less than five years, and therefore the provisions of subdivision 2 of section 664 are applicable.

Under section 461 of the Penal Code burglary of the second degree is punishable by imprisonment in the state prison and not elsewhere; and the people contend that section 664 merely fixes the maximum punishment for attempts to commit crime at one-half the maximum penalty that may be inflicted for the completed offense; and that, punishment for burglary of the second degree being imprisonment in the state prison for a maximum term exceeding five years, the provisions of subdivision 1 of section 664 of the Penal Code apply, and defendant was punishable by imprisonment in the state prison, and not elsewhere, for a maximum term of seven and one-half years.

Webster's International Dictionary defines punishable as "deserving of or capable or liable to punishment * * * capable of being punished by law or right * * * said of persons or offenses." The word, as used in similar statutes where the same refer to the offender, has been held to mean liable to punishment or liable to be punished (The Thrasher [C. C. A.] 173 F. 258; State v. Paisley, 36 Mont. 237, 92 P. 566); or, where the reference is to the offense, the same word has been held to mean "may be punished" (Benton v. Commonwealth, 89 Va. 570, 16 S. E. 725; People v. Hughes, 137 N. Y. 34, 32 N. E. 1105; People v. Godding, 55 Colo. 579, 136 P. 1011). And in State v. Culberson, 143 La. 565, 78 So. 941, 942, the court said: "The word 'punishable,' said of offenses or offenders, means liable to punishment."

In State v. Paisley, supra, the court was considering the effect of a statute fixing the punishment in cases where the defendant had suffered a prior conviction. The statute read as follows: "Every person who, having been convicted of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows: (1) If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years. (2) If the subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding ten years." Defendant Paisley was convicted of the crime of robbery, the verdict also finding that the charge of a prior conviction of a felony was true, and he was sentenced to imprisonment in the state prison for five years. The Montana statute provided that robbery should be punishable upon a first conviction by imprisonment in the state prison for a term not less than one year or more than twenty years. It was claimed that subdivision 1 of the statute, which we have quoted above, was only applicable to crimes the minimum punishment for which exceeded five years' imprisonment; and that, since robbery might be punished by imprisonment for a term of one year, the defendant could only be punished under the second subdivision of the act, which provided a maximum of ten years' imprisonment. The court in affirming the judgment, said: "As used in this section (subdivision 1 of the act) we think it ['punishable'] means liable to punishment. * * * In other words, we think this subdivision means that, if the maximum punishment is more, but not less, than five years' imprisonment, then the punishment for the offense for which appellant was being tried * * * could not be less than ten years, and might be extended to life imprisonment."

The same construction was given subdivision 1 of section 664 of the California Penal Code in the case of Ex parte Hope, 59 Cal. 423, where the defendant was convicted of an attempt to commit burglary of the first degree, and sentenced to imprisonment in the state prison for the term of seven and one-half years, this being one-half of the longest term of imprisonment prescribed for a conviction of the offense so attempted. Defendant applied for a writ of habeas corpus on the ground that, burglary of the first degree being then punishable by imprisonment in the state prison from one to fifteen years, the offense of which he was convicted was punishable under subdivision 2 of section 664 of the Penal Code. The court held that the case came within the provisions of subdivision 1 of the section for the reason that burglary of the first degree was punishable "by imprisonment in the state prison for a term which may extend to fifteen years." An indeterminate sentence is in legal effect a sentence for the maximum term (In re Lee, 177 Cal. 690, 171 P. 958); and we are satisfied that the construction placed upon section 664 contended for by the people, viz., that the section merely fixes the maximum punishment that may be inflicted for attempts to commit crime, is correct.

We find no merit in the claim that this construction would result in greater punishments being inflicted for attempts than completed offenses, or that the trial court will be deprived of discretionary power in dealing with attempts, it being clear that, where the trial court has discretion with respect to the punishment for completed offenses, it will likewise have discretion with respect to attempts to commit such offenses.

No other matters require discussion; and in view of the above conclusion we are of the opinion that the trial court was without authority to sentence a defendant convicted of an attempt to commit burglary of the second degree to imprisonment in a place other than the state prison.

It is therefore ordered that a writ of mandate issue, directing respondent court to set aside the judgment entered in the action of the People of the State of California v. Leo Buckbee, No. 2494, in the superior court of the state of California in and for the city and county of San Francisco, to arraign said defendant Leo Buckbee for judgment according to law, and to hear and determine such motions as may properly come before the court.

116 Cal.App. 392

SANCHEZ v. PACIFIC AUTO STAGES et al.

Civ. 7446.

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1931.

Rehearing Denied Sept. 28, 1931. Hearing Denied by Supreme Court Oct. 23, 1931.

1. Carriers 🔑336.

If bus company's agent undertook to conduct passenger across highway to bus, passenger could use less care than would otherwise have been necessary.

> It appeared that, after passenger bought ticket at one of customary places of sale, she started to cross highway to reach point of departure of bus and was accompanied by bus company's agent, and that passenger was struck by automobile operated by third person unconnected with company.

2. Carriers 🔑336.

Although bus company's agent assumed responsibility of protecting passenger in crossing highway to bus, passenger was required to use ordinary care.

3. Carriers 🔑347(14).

Passenger's contributory negligence in accompanying bus company's agent across highway to bus *held* for jury.

4. Carriers 🔑346(½).

Evidence sustained verdict that passenger who, having started across highway accompanied by bus company's agent for purpose of reaching bus, did not look to left or right, was not contributorily negligent.

5. Carriers 🔑320(8).

Negligence of bus company and agent *held* sufficient for jury where passenger, to reach bus, started across highway accompanied by agent.

6. Carriers 🔑320(8).

Whether bus company's agent negligently conducted passenger across highway, and whether company provided safe place to board bus, *held* for jury.

7. Carriers 🔑317(10).

In injured passenger's action against bus company, custom of stopping at particular points or stations of vehicle carriers *held* competent.

8. Carriers 🔑239.

Carrier passenger relationship arises when passenger pays for entrance into conveyance or enters with intent to pay.

9. Carriers 🔑247(1).

Notwithstanding hiatus occurs in carrier passenger relationship, such relationship again exists when buyer of passenger rights is in position to be accepted as passenger.

10. Carriers 🔑247(1).

Carrier passenger relationship exists when one intending bona fide to become passenger goes at appropriate time to place designated for departure and carrier takes some action indicating acceptance of passenger as traveler.

11. Carriers 🔑286(1).

Carriers need exercise only ordinary care regarding condition of station at which passengers are received.

12. Carriers 🔑247(1).

If carrier assumes responsibility of conducting buyer of passenger rights to point of departure, carrier passenger relationship exists, requiring carrier to exercise more than ordinary care.

13. Carriers 🔑306(1).

That bus company had agreement whereby transit company honored bus company's tickets did not affect bus company's liability to its passenger injured when accompanying bus company's agent across highway to transit company's bus.

14. Carriers 🔑287(1).

Absence of express authority from carrier to agent did not relieve carrier from liability to passenger injured while crossing highway accompanied by agent.

15. Carriers ⚷247(1).

Person who, after buying ticket, was injured while crossing highway to reach bus, *held* "passenger," obligating carrier to use utmost care and diligence (Civ. Code, § 2100).

[Ed. Note.—For other definitions of "Passenger," see Words and Phrases.]

16. Carriers ⚷280(1).

Carrier must guard passengers against dangers which might be reasonably anticipated (Civ. Code, § 2100).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Mary Sanchez against the Pacific Auto Stages, a corporation, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Archer Bowden, of San Jose, for appellants.

Alfred Aram, of San Jose, for respondent.

WARD, Justice pro tem.

[1-4] This is an action for personal injuries. The jury returned a verdict in favor of plaintiff for the sum of $2,500. The defendant Pacific Auto Stages, a corporation, operates auto stages upon the San Francisco-San Jose highway. The defendant Gallimore is an employee of the defendant corporation, in charge of a bus running from the center of the town of Mountain View to the San Francisco-San Jose highway. The Peninsula Rapid Transit Company also operates stages upon the main highway and transports passengers holding Pacific Auto Stages' tickets. Just prior to the accident, plaintiff purchased a Pacific Auto Stage ticket from its representative, Gallimore. This token entitled plaintiff to transportation from Mountain View to San Jose. The purchase was made at one of the customary places of sale near the point of departure of the San Jose stage, to wit, the stopping site across the highway of the Mountain View bus. Plaintiff inquired the time of the arrival of the next bus from San Jose and the agent replied, "Soon * * * it is coming—it is here now." Thereupon Gallimore walked with plaintiff in crossing the highway. There is some conflict in the evidence whether Gallimore grabbed or held plaintiff's arm or simply walked beside her as she crossed the highway. Near the point of destination, plaintiff was struck by an automobile and received injuries therefrom. The automobile that struck the plaintiff was operated by a party unconnected with the stage company. Plaintiff testified that after starting to cross the highway she looked straight ahead. If defendant Gallimore, as the agent of defendant corporation, undertook to conduct plaintiff from the point where the corporation had accepted her fare for the purpose of placing plaintiff into or upon the conveyance provided for her transportation, then it would not be necessary that plaintiff use the same degree of care she would be called upon to exercise if she had crossed without the protection of the defendant corporation's representative. Agent Gallimore assumed a responsibility to protect the plaintiff. This did not relieve plaintiff from the use of ordinary care, but it was for the jury to determine if plaintiff was guilty of contributory negligence. The cases cited by appellant deal with pedestrians, bicycle riders, and expassengers of vehicles. The evidence under all the circumstances of this case is not sufficient to warrant a disturbance of the views of the jury upon this issue.

[5, 6] At the conclusion of plaintiff's case, the trial judge was not in a position to say, as a matter of law, that no negligence had been proved. Whether Gallimore negligently conducted plaintiff, and whether a safe and suitable place to board the conveyance had been provided, were questions of fact. The motion for a nonsuit was properly denied.

Appellant contends that the trial court erred in excluding from the evidence an operating agreement between the Pacific Auto Stages and the Peninsula Rapid Transit Company and in permitting testimony with reference to the customary place of stopping of the busses. The terms of the agreement in so far as applicable to the facts in this case were covered by the testimony of the witness Gallimore. The jury received therefrom a clear and true picture of the relationship between the companies.

[7] The custom of stopping at particular points or stations of vehicle carriers is proper evidence. Delmonte v. S. P. Co., 2 Cal. App. 211, 83 P. 269. Through the evidence it was established that the bus that this plaintiff would have entered if she had reached the point of boarding was a bus of the Peninsula Rapid Transit Company. The ticket sold by the defendant company would have been honored by the Peninsula Company; hence the place where the Peninsula bus stopped was material.

Appellant contends that error was committed in twenty instructions in the sixty-odd given to the jury. The opening brief contains the instructions, with portions objectionable to appellant italicized. Brief comments follow each instruction. Many of the comments are found in substance to be repe-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

titions of preceding comments. Only three citations are presented in support of appellant's position. The objections to the instructions may be epitomized as follows: That the court erred in instructing the jury: First, that the case involved the relationship of common carrier and passenger; second, that portions of the Public Utilities Act were applicable to the case; third, that the common carrier is required to afford protection commensurate with the risks involved when a person resorts to that station or stopping place with the intentions of becoming a passenger; fourth, that certain of the instructions omitted the element of proximate cause; fifth, that the agreement between the two companies had no bearing on the duty of the defendant company to exercise care for the safety of its passengers; sixth, that it was an admitted fact that Gallimore undertook to assist the plaintiff across the highway.

[8-12] The relationship of carrier and passenger arises when the passenger enters with intent to pay or pays for entrance into the vehicle or carriage. There may be a hiatus in the relationship in instances too numerous to mention, but, when the purchaser of the rights to be conveyed is in a position to be accepted as a passenger, the relationship is again in force. It is not necessary, in order to create the relation of carrier and passenger, that the passenger should have actually entered the vehicle. The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler. It is true that carriers of passengers are bound simply to exercise ordinary care as to the condition of the station at which passengers are received (Falls v. San Francisco & Northwestern Pacific Railroad Company, 97 Cal. 114, 31 P. 901), but, if the carrier assumes the responsibility of conducting the purchaser of passenger rights to the point of departure, then the relationship of carrier and passenger exists during such period. In the Falls Case the injured party had been waiting for a train. The defendant did not assume to accept her as a passenger until she should board the train. In this case the action of defendant corporation's agent was an invitation to plaintiff to be conducted from the point of sale of the ticket to the point of departure of the stage. The evidence discloses that upon other occasions this plaintiff had been escorted or assisted and other passengers likewise, by Gallimore. Under such circumstances a greater degree of care is imposed upon the carrier.

[13, 14] Appellants claim that the provisions of the Public Utilities Act (St. 1915, p. 115, as amended) are not applicable to this case. The inapplicability has not been pointed out, but counsel leaves us with the mere statement that the instructions are not applicable. The element of proximate cause, though absent from certain instructions, was fully covered in other instructions. The statement of the court that the agreement between the companies did not affect the defendant corporation's liability was correct. If the court erred in instructing the jury that it was an admitted fact that Gallimore undertook to assist the plaintiff across the street, the error consisted only in the use of the word "assist." The evidence proves that he escorted or assisted or led or conducted or accompanied the plaintiff, and in several other instructions the jury was plainly told "that, if they found that Gallimore conducted," etc. The jury was properly instructed as to the degree of care a carrier owes to the passenger. Lack of instructions or the absence of express authority from the master to the servant is immaterial. "Where the carrier through its employees undertakes to assist a passenger to board or alight from its cars, the passenger has a right to rely on its careful performance of such undertaking and may recover of the carrier for injuries caused by the failure to use proper care." 4 Ruling Case Law, p. 1236, and cases cited. Plaintiff having paid the full price for her transportation, with the knowledge, presumptive or actual, that such red cap porter service was part of the consideration entering into the purchase, such service must be held to have been covered by and included in the fare paid for transportation, and the fact that such service might have been dispensed with did not make it gratuitous. Franklin v. Southern Pacific Company, 203 Cal. 680, 265 P. 936, 937, 59 A. L. R. 118. Carrier having knowledge of the custom is liable "though the custom was in violation of its rules." Wieland v. Southern Pacific Company, 1 Cal. App. 343, 82 P. 226. The court instructed the jury that they were to find whether or not Gallimore was within the express or ostensible scope of his employment.

[15, 16] From what has been said before we feel justified in determining from all the facts and circumstances of this particular case that the plaintiff became a passenger upon the payment of the fare; and that immediately the carrier was bound to use the utmost care and diligence for the passengers' safe carriage. See Civ. Code, § 2100. The carrier was bound to guard her "against such dangers as might be reasonably anticipated or naturally expected to occur." Southern Pacific Company v. Ward (C. C. A.) 208 F. 385; Glennen v. Boston Elevated R. Co., 207 Mass. 497, 93 N. E. 700, 32 L. R. A. (N. S.) 470. The evidence indicates the dangers of crossing this particular highway. It was

the duty, therefore, of the defendant corporation to supply a reasonably safe place for the departure of the plaintiff passenger.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

116 Cal.App. 319

GREENAMYER v. BOARD OF TRUSTEES OF LUGO ELEMENTARY SCHOOL DIST. IN LOS ANGELES COUNTY et al.

Civ. 6843.

District Court of Appeal, Second District, Division 2, California.

Aug. 26, 1931.

1. Mandamus 🔑154(10).

Where superior court of Los Angeles county sustained demurrer to mandamus petition, without mentioning leave to amend, petitioner had 10 days from actual notice or service of notice of order of ruling on demurrer in which to file amended petition (Rules of the Superior Court of Los Angeles County, rule 21; Rules Regulating Business of the Superior Court, rule 20, § 6b; rule 28; Code Civ. Proc. §§ 129, 473, 476; Const. art. 6, § 1a, subd. 5).

> Rules Regulating Business of the Superior Court, rule 20, § 6b, providing that, when a demurrer is sustained, with leave to amend, the court shall fix the time within which the amendment or amended pleading may be filed, which, except upon good cause shown, shall not exceed ten days, does not conflict with Rules of the Superior Court of Los Angeles County, rule 21, which provides that, when a demurrer to a pleading shall be sustained, the adverse party shall have ten days in which to amend, unless otherwise ordered by court; the effect of the two rules being that, in the absence of any further order, upon the sustaining of a demurrer, the adverse party may amend, and the time therefor is fixed at ten days.

2. Judgment 🔑143(12).

Judgment taken against petitioner, after petitioner failed to timely amend petition, demurrer to which was sustained, *held* within purview of statute authorizing relief from judgment taken through excusable neglect (Code Civ. Proc. § 473).

3. Judgment 🔑162(4).

Questions of fact raised by affidavits supporting motion to set aside judgment allegedly entered through excusable neglect must be resolved in favor of movant (Code Civ. Proc. § 473).

4. Appeal and error 🔑957(1).
Judgment 🔑139.

Order setting aside default judgment is discretionary and will not be disturbed except on showing of clear abuse of discretion.

5. Judgment 🔑143(12).

Order vacating judgment entered upon failure to timely amend petition to which demurrer had been sustained *held* not clear abuse of trial court's discretion (Code Civ. Proc. § 473).

6. Judgment 🔑158.

Affidavit of merits is required to support motion to vacate judgment so that valid judgment should not be vacated unless it appears, prima facie, that different result would probably result (Code Civ. Proc. § 473).

7. Judgment 🔑160.

Verified answer disclosing good defense satisfies requirement for affidavit of merits on motion to vacate default judgment (Code Civ. Proc. § 473).

8. Judgment 🔑162(4).

Petitioner's counsel's affidavit and unverified amended petition *held* to warrant order vacating default judgment denying mandamus to compel restoration of petitioner to position as school teacher entered after demurrer to petition was sustained (Code Civ. Proc. § 473).

> Affidavit was to effect that petitioner did not have a fair trial before the board of trustees; that the charges against her were frivolous and untrue; that hearsay testimony and rumors of all sort were admitted in evidence to petitioner's prejudice, and in accordance with the advice of counsel who acted as prosecutor as well as counsel for the board of trustees.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Petition for writ of mandamus by Ethel D. Phillips Greenamyer against the Board of Trustees of Lugo Elementary School District in the County of Los Angeles and others. From an order vacating a judgment denying writ of mandate, defendants appeal.

Affirmed.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

A petition for the writ of mandamus was filed by plaintiff in the court below. The defendants interposed a demurrer on general and special grounds which was sustained. Judgment was thereafter entered, and this is an appeal from an order vacating that judgment.

The points now raised by appellants will be more readily understood if we set down all the facts surrounding the making of the order. The petition alleged the removal of respondent, who was classified and employed as a permanent teacher in the Lugo elementary school district, by the board of education of that district upon charges which it was alleged were untrue, frivolous, and concocted for the purpose of depriving her of her means of livelihood; that such removal was null and void, and asking that she be restored to her position. The petition was filed December 7, 1928. As stated, a demurrer was interposed on the grounds that the petition did not state facts sufficient to constitute a cause of action and on the further ground that C. F. Mercer, the superintendent of the district, was improperly joined as a party defendant, with the members of the board of education. The demurrer was submitted on briefs, and on January 14, 1929, an order was made in the following words: "Demurrer to petition is sustained." Judgment was entered thereon on January 28, 1929. On April 30, 1929, the respondent gave notice that she would move to set aside the judgment on the ground that it was entered after a minute order sustaining a demurrer without any notice having been served on her of the ruling thereon as required by law, and on the further ground of inadvertence and excusable neglect. The motion was supported by an affidavit of one of her counsel to the effect that the order sustaining the demurrer was made after the issues of law had been submitted on briefs and was not without leave to amend; that the defendants did not serve any notice of the ruling on plaintiff or her lawyers; that the judge did not designate whether the general or the special demurrer was sustained; that counsel relied upon the law and the rules of court to the effect that the time to file an amended petition commences to run with the service of a notice of the ruling on the demurrer; that as a consequence plaintiff did not know until April 8, 1929, that judgment had been signed and filed; that the neglect, if any, was excusable for the reason that the law governing the procedure in cases similar to the one of the respondent was not certain or clear or decided; that an appeal from the decision of the appellants had been taken to the county superintendent of schools, which required a great deal of time and attention; that in the meantime an action involving identical questions was pending before the Supreme Court entitled Saxton v. Board of Education of the City of Los Angeles, which proceeding had been determined within the preceding ten days, holding that the superior court had jurisdiction to try the charges de novo; that, while it was not stipulated between counsel that no proceedings would be taken pending the appeal to the county superintendent, yet counsel for plaintiff relied upon counsel for appellants to notify him of any action taken in court and therefore made no examination of the record until the decision in the Saxton Case; that in forty-two years of practice affiant had never taken a default on an attorney without first serving him with actual notice or calling him on the telephone and he believed that to be the universal custom among practicing attorneys; and that the demurrer was sustained on the ground of misjoinder of parties and plaintiff was desirous of amending. An unverified amended petition, dropping the superintendent of the district as a party defendant, was tendered with the motion. Affidavits in opposition were filed by appellants, but it is unnecessary to set forth their contents. Respondent also filed counter affidavits in which it was made to appear that the trial judge, in ruling upon the demurrer, felt himself governed by the opinion of the District Court of Appeal in the Saxton Case, not knowing that the Supreme Court had transferred the cause to itself for decision; and that it was not true that counsel for plaintiff ever received any notice of the entry of the judgment, although they did receive a notice from the clerk of the court stating that the demurrer was sustained. It does appear that a decision was rendered by the District Court of Appeal on August 16, 1928, in Saxton v. Board of Education of the City of Los Angeles (see 269 P. 764), holding that mandamus would not lie, and that a plain and adequate remedy at law was provided by an appeal to the county superintendent of schools. However, the case was transferred to the Supreme Court (206 Cal. 758, 276 P. 998) prior to the hearing of the demurrer in the instant case, and the opinion rendered therein was set aside and was of no force or effect. The trial court, therefore, as subsequently developed, erred in its ruling on the demurrer. With this background we turn to an examination of the contentions advanced by the appellants.

[1, 2] Grouping the first two arguments together it is said that the judgment taken against the respondent was not a default judgment, and for that reason it could not be set aside upon a motion made under the provisions of section 473 of the Code of Civil Procedure for the reason that it was not entered as the result or inadvertence or excusable neglect on the part of the respondent. Our attention is directed to section 6b of rule XX (as it existed on January 14, 1929), of the "Rules Regulating Business of the Superior Court" adopted by the judicial council. It

reads as follows: "When a demurrer is sustained, with leave to amend, the court shall fix the time within which such amendment or amended pleading may be filed. Except upon good cause shown, such time shall not exceed ten (10) days."

Rule XXVIII of the same origin as it existed at the time says: "The foregoing rules shall supersede all rules of the Superior Court of the State of California in conflict therewith."

Rule XXI of the superior court of Los Angeles county adopted by the judges thereof and in effect at the time, unless superseded by the judicial council rule already quoted, reads in its pertinent part as follows: "When a demurrer to a pleading shall be sustained, the adverse party shall have ten days in which to amend, unless otherwise ordered by the court." Assuming without deciding that the council has the authority, by virtue of the provisions of subdivision 5 of section 1a of article 6 of the state Constitution which confers upon it the power to "adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force," to supersede or set aside a rule adopted by the judges of the superior court who have acted pursuant to the provisions of section 129 of the Code of Civil Procedure, which says: "Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers, * * *" the first question which arises is: Are the two rules in conflict, or, to put it in another way, does that portion of rule XXI, which we have quoted merely supplement section 6b of rule XX adopted by the council? The one says that the court shall fix the time for amendment when permission to amend is granted; and the other says that, when no further order is made that "demurrer sustained," permission to amend is granted, and the time is fixed at ten days. In the interest of clarity we may assume a county with but one judge who, reading the rule of the judicial council already quoted, adopts and promulgates a rule in the words of the rule of the superior court under consideration. In effect the judge would be saying: "To me is left the discretion of saying when permission shall be granted to amend and how much time shall be given therefor. I now say generally that whenever I sustain a demurrer without further order the adverse party may amend and time therefor is fixed at ten days. If I feel that the party should not have leave to amend I shall say so or if I feel that he should have less or more than ten days to amend I shall say so." We find no conflict between the two, hence the last-quoted rule is still in effect and the respondent had ten days within which to file an amended petition for the writ of mandate, which time began to run from actual notice or the service of notice of the order of the ruling on demurrer. Section 476, Code Civ. Proc.; Barron v. Deleval, 58 Cal. 96; In re Estate of Keating, 158 Cal. 109-114, 110 P. 109. From this it follows that the judgment taken against the respondent was due to the neglect and failure of her counsel to present an amended petition. We are then faced with the question of whether any excuse was shown justifying the court in its action and also whether it was necessary for the respondent to present an affidavit of merits or a verified petition with her motion or whether a sufficient showing was made.

[3-5] Preliminarily it may be said that, if any questions of fact were raised by the affidavits, they must be resolved in favor of the respondent. It is for that reason that we did not set forth the contents of the counter affidavits filed by the appellants. Also it should be added that a motion to set aside a default is addressed to the sound discretion of the trial court and will not be set aside in the absence of a showing of a clear abuse of discretion, it being the policy of the law as well to favor a hearing on the merits. Waybright v. Anderson, 200 Cal. 374, 253 P. 148. We are inclined to believe that, had the motion been denied, it would have been clearly within the discretion of the trial court. But having been granted, we find it difficult to say there was a clear abuse of discretion. The affiant says that in forty-two years of practice he has never taken a default on an attorney without giving him actual notice either oral or written and he believes that to be the universal custom among members of the ancient and honorable profession. That he did so believe is to a degree supported by a quotation he makes in his affidavit from his closing brief filed with county superintendent long after the judgment was in fact filed, a part of which reads as follows: "Counsel has not yet had judgment entered on the demurrer of Judge Tappaan. We presume he has been waiting for the decision on this appeal, which we think is a proper course to take, for if the county superintendent vacates the judgment of the Board of Trustees, there will be no need of further proceedings in mandamus." Furthermore, it is patent that not only the judge but also the attorney was unaware (at least at the time the demurrer was sustained) of the fact that a transfer to the Supreme Court had been ordered in the case of Saxton v. Board of Education. The procedure to be followed in the case, i. e., whether an appeal to the county superintendent was the sole remedy or whether a writ of mandamus in the superior court was the proper remedy, as he says in his affidavit, was greatly in doubt until the decision of the Supreme Court. Taking the entire situation into consideration, we are unable to say that there is a showing of that clear abuse of discretion which would warrant us in overturning the order.

[6-8] The question remains: Was it essential that respondent present an affidavit of merits, or was a sufficient showing of merits made? Under the authority of Saxton v. Board of Education, 206 Cal. 758, 276 P. 998, the original verified petition stated a cause of action although demurrable on account of the misjoinder of parties, and the amended petition, although unverified, stated a cause of action. Had it not been for the mistake of fact under which counsel and the court labored in believing the opinion of the District Court of Appeal to be an existing opinion, the order sustaining the demurrer would probably have indicated that it was sustained solely on account of the misjoinder of parties. The reason for the rule requiring an affidavit of merits is that a valid judgment should not be set aside unless it is made to appear, prima facie, that a different result would probably be reached. Bailey v. Taaffe, 29 Cal. 422; Parrott v. Den, 34 Cal. 79; Nickerson v. California Raisin Co., 61 Cal. 268. Of course an affidavit of merits is not required where the judgment is invalid for want of jurisdiction. Martz v. American Bran Gold Co., 161 Cal. 531, 119 P. 909. Nor is it necessary in a divorce case where the public interest is involved. Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020. Also a verified answer which discloses a good and meritorious defense satisfies the reason for the rule. Sampanes v. Chazes, 54 Cal. App. 612, 202 P. 462; Waybright v. Anderson, supra. This last statement of the law brings us to a point where, if the order is to be sustained, it must rest. Counsel for petitioner and respondent swore that respondent did not have a fair trial before the board of trustees, for the reason that two of them (naming them) "had decided to dismiss her as the evidence shows" (referring of course to the evidence taken before the board). He also swore as follows: "That the charges against" respondent "were frivolous and untrue, as she claims; hearsay testimony and rumors of all sorts were admitted in evidence to the prejudice of Mrs. Greenamyer and in accordance with the advice of * * * counsel, who acted as prosecutor as well as counsel for the Board of Trustees. This is one of the cases mentioned in the Saxton Case in which it was necessary to have a fair, just and impartial trial in a court of competent jurisdiction where the prejudices of members of the school board and political influences shall have no bearing. It will be a denial of justice to refuse to set aside the judgment entered in this case." In order to distinguish this case from some others where the attorney has attempted to subscribe to an affidavit of merits, let us observe that here the statement is unequivocal that the charges were frivolous and untrue; that hearsay and all kinds of rumor were admitted; and that respondent did not have a fair and impartial trial. In the case of Gray v. Lawlor, 151 Cal. 356, 90 P. 691, 692, 12 Ann. Cas. 990, there was an application to set aside a judgment by default in an action to quiet title. The motion was denied and the Supreme Court reversed the order, saying: "From the fact that the relief to be afforded is the privilege of answering 'to the merits of the original action,' the condition is implied that the defendant must have a sufficient answer to present; that is, he must have a good defense to the action on the merits. This being one of the conditions of the statute, the defendant must show that such defense exists. The defendant in this case has complied with this rule. He avers in his affidavit that he is now, and at all times mentioned and for more than 10 years last past has been, the owner of, and entitled to the possession of, the property described in the complaint. This, if true, is a complete defense to the cause of action sued on." In other words, the allegations of fact were a sufficient showing prima facie that a different judgment would probably result. Again the Supreme Court in Re Van Loan, 142 Cal. 423, 76 P. 37, 39, accepted recitals in an affidavit as a sufficient showing of the merits. In that case the paternal grandmother had been appointed as guardian of a four year old minor. The mother made a motion to set aside and vacate the order, and in her affidavit stated "that she was a fit and proper person to have the control, custody, and care of the minor, and could and would, with the assistance of her parents, furnish the minor with a comfortable home, and bestow upon her a mother's affection, care, attention, and control." The Supreme Court in passing upon the appeal from the order granting the motion first said: "The showing thus made by the mother was clearly sufficient to justify the court in vacating the order appointing appellant as guardian, and the letters of guardianship issued to her, so as to enable the mother to be heard upon the question as to the necessity of the appointment of a guardian, and as to whether she should be deprived of the custody of her child." Again it said: "The court could not thereon [upon the motion] determine any question as to the ultimate custody of the child, and the sole question properly before the court was as to whether the mother should be relieved from the proceedings taken against her by surprise and through her excusable neglect. The statements in her own affidavit as to her competency were a sufficient showing of merits in this behalf." So here, if it be true that the respondent was discharged upon charges that were frivolous and untrue and upon hearsay and rumor, and if two of the trustees were prejudiced against her, she ought to have her day in court. From the entire situation we are satisfied that a sufficient showing of merits was made out to warrant the order.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

116 Cal.App. 403

MOE et al. v. GIER et al.

Civ. 7907.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1931.

1. Covenants 🔑84.

Where common owner of subdivision sells some lots with restrictions and others without, purchaser without restrictions could not be forced to build within restrictive limits.

2. Covenants 🔑72.

Where common owner of subdivision sells some lots with restrictions and others without, restricted owner in action to cancel restrictions would be successful as to grantor's right to enforce restrictions against him.

3. Covenants 🔑72.

Owner of restricted lots, where common owner conveyed other lots without restrictions, would be entitled to remove any claim interfering with unrestricted use.

4. Quieting title 🔑46.

In action to quiet title and cancel restrictions on use of lots and restrain grantees from enforcing them as to other lots, plaintiff *held* entitled to have entire controversy adjudicated (Code Civ. Proc. §§ 738, 1060).

5. Covenants 🔑79(1).

To create equitable servitude, there must exist general scheme of uniform restrictions indicating adopted plan throughout common to all purchasers.

6. Covenants 🔑79(1).

To create equitable servitude, general scheme of restrictions and express declaration of mutual and reciprocal rights must appear in all deeds.

7. Covenants 🔑79(1).

To create equitable servitude in other lands of subdivision, deed should designate servient and dominant tenement.

8. Covenants 🔑79(1).

To create equitable servitude in other lots of subdivision, intent to create mutual and reciprocal rights of restrictions must appear in deed.

9. Covenants 🔑79(1).

Terms of deeds from common owner of lots in subdivision *held* not to create equitable servitude in unrestricted lots in favor of owner of restricted lots.

Various deeds from common owner of lots in subdivision did not contain sufficiently uniform scheme or plan for restrictions as to use of lots and character and value of improvements to be erected. Some of deeds contained restrictions while others did not, and restrictions in several deeds varied from each other. Deeds contained no statement that restrictions were for benefit of other lands in tract, and the dominant tenement was not designated. Intent to create mutual and reciprocal rights of restrictions between grantees did not appear when all deeds were considered together.

10. Deeds 🔑144(1).

"Condition" is qualification annexed to estate by grantor upon happening of which estate granted is enlarged or defeated.

[Ed. Note.—For other definitions of "Condition," see Words and Phrases.]

11. Covenants 🔑1.

"Covenant" is an agreement of covenantor only.

[Ed. Note.—For other definitions of "Covenant," see Words and Phrases.]

12. Deeds 🔑144(1).

"Condition" is created by mutual agreement of parties to conveyance, and is binding upon both.

13. Deeds 🔑153.

In construing condition in deed, entire context and not a single clause will determine intention of parties.

14. Covenants 🔑53.

Covenants that run with land are distinguishable from servitudes (Civ. Code, §§ 1460, 1468).

15. Covenants 🔑69(1).

Various restrictions in deeds from common owner of lots in subdivision *held* conditions personal to each lot owner and not covenants running with land (Civ. Code, §§ 1460, 1468).

16. Quieting title 🔑44(2).

In action to quiet title, judgment roll in former action decreeing defendants, common grantors, had no right or title or right of forfeiture based on restrictive covenants as against plaintiffs' predecessors in title, *held* not admissible.

17. Appeal and error 🔑1052(5).

In action to quiet title, admitting judgment roll in former case between plaintiffs' predecessors in title and some of defendants *held* not reversible error, in view of findings.

Findings disclosed that trial court did not find that certain grantees of the com-

mon owner had waived and relinquished their rights to enforce the purported restrictions, and that the order in the former case was directed against the common grantors only.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Samuel Moe and others against Theodore Gier and others. From the judgment rendered, the defendants Thomas M. Gardiner and Grace C. Gardiner appeal.

Affirmed.

Edmund de Freitas and Ralph W. Arnot, both of Oakland, for appellants.

J. W. O'Neill, of Oakland, for respondents.

WARD, Justice pro tem.

This is an action to secure a decree quieting title to real property and to cancel restrictions. In April, 1922, defendant C. W. Boden, the owner and entitled to possession of a tract of land situated in the city of Oakland, county of Alameda, subdivided the tract into lots numbered 1 to 24, inclusive, and 37 to 65, inclusive, as appear upon a map designated as "Lake Knoll." Lots 25 to 35, inclusive, are designated upon a second map as "Resubdivision of Lot No. 25, Lake Knoll." Subsequently, by deed dated January 8, 1925, C. W. Boden retained two lots and conveyed all of the remaining lots to Agnes Boden. In some of the deeds of conveyance there was no provision or statement that the lot thereby conveyed was restricted as to the use of said lot, as to the character or value of improvements to be placed thereon or the position on the lot in which such improvements could be located, or as to the use or uses to which such lots could be put. In some of said deeds there were provisions inserted providing for the character and value and location of improvements which could be placed thereon and the uses to which said lots could be put. In some of the conveyances it was specified that a structure might be erected within four feet of the side line. In one deed five feet was specified. Other deeds did not contain side line restriction. Certain of the deeds contain restrictions relative to the height of fences and hedges prior to January, 1940. Some of the deeds provide that "it is expressly agreed that said parties of the second part take said real property subject to and upon said conditions and restrictions, that the same run with the land, and that in case of the violation of any of said conditions or restrictions by said parties of the second part, their heirs, executors, administrators, successors or assigns, all the right, title and interest of said parties of the second part, their heirs, executors, administrators, successors and assigns, in and to said real property, shall immediately cease and determine, and revert to and vest in said parties of the first part, their heirs, and assigns; it being further expressly agreed that forbearance by the parties of the first part, their heirs, or assigns to take advantage of any breach of said conditions or restrictions shall not constitute or be construed as a waiver of the rights of the parties of the first part, their heirs and assigns, by reason of such or any subsequent breach or default. And the said parties of the second part by the acceptance of this conveyance covenant and agree faithfully to observe and abide by all said conditions and restrictions. That the right to enforce the covenants and restrictions set forth in this deed shall run to each owner of any lot described on the aforesaid map." Many of the deeds are silent relative to restrictions, and, except for the provision above set forth as to certain lots, it is not stated that the land conveyed by the deed is a part or portion of a larger tract, or that the restrictions contained in the deeds are for the benefit of other lands, nor was there in any of the deeds any description or designation of the land which was the dominant tenement, nor was there in any of the deeds, any statement that the restrictions imposed upon each or any of the parcels of land were part of a general plan of restriction common to all the parcels in the tract or designed for the mutual benefit of all the parcels contained in the tract, nor was there in any of the deeds any statement that the parcel thereby conveyed should be subject to restrictions in accordance with any plan for the benefit of all other parcels in the tract, or that all other parcels in the tract should be subject to such restrictions for its benefit. Neither the defendant Boden nor his successor ever made public a formulated and uniform plan for restricting the use of the lots except that a pamphlet was presented to the defendants Thomas M. and Grace Gardiner. There have been erected twenty-one apartment houses, twelve single family residences and at the time of the trial there were thirty-one vacant lots in this tract. Some of the apartment houses are built right up to the property line and others are back from the property line from two to eight feet.

Plaintiffs and respondents are the owners of a certain lot, and seek to have the restrictions canceled. All defendants served permitted a default to be entered except the defendants and appellants Gardiner, who assert the right to enforce the restriction against the lots of respondents. Appellants are grantees of Boden prior to his deeding away the balance of the tract without restrictions. Appellants contend that plaintiffs were not entitled to a decree quieting title as against these restrictions; that the language in the deeds created equitable servitudes; that the language in the deeds constituted covenants running with the land; that the restrictions are enforceable though not running with the land; and that the court erred in admitting the judgment roll of the case of Oakland Title Insurance and Guaranty Co. v. Boden. The decision in Strong v. Shatto, 45 Cal. App. 29, 187 P. 159, 163, cited by appellants, is based primarily upon Brown v. Huber, 80 Ohio St. 183, 88 N. E. 322, 28 L. R. A. (N. S.) 707, and note, wherein it was held: "A change of circumstances cannot be considered, on a petition at law to ascertain the limits of a restriction in a deed, as equitable ground for not enforcing it," and "the covenant will not for that reason, and in advance of a breach, be declared a nullity in a suit instituted by the covenanter." In Strong v. Shatto the court also said: "As there has been no breach of the conditions here, and no attempt to enjoin such a breach or to enforce a forfeiture, we think it premature, at least, to determine the equities of the parties as they might exist at some future time in the event of such breach." The extent of the holding in Strong v. Shatto, supra, is that an action to quiet title against contractual obligation because of changed conditions will not lie. The court there was dealing with changed conditions outside but near the restricted area. The court did not hold that quiet title would not apply under different facts and circumstances. Subsequently one Albert was substituted for plaintiff Strong. A supplemental complaint was filed which has a marked resemblance to the complaint in the instant case. Upon the second hearing (Strong v. Hancock, 201 Cal. 530, 258 P. 60) the trial court gave undue importance to the decision on the former appeal (see concurring opinion of Mr. Justice Shenk), and ordered judgment practically as in the first trial. The Supreme Court held that there was sufficient evidence to sustain the trial court in denying relief, and affirmed the decision, but Strong v. Hancock, supra, did not hold that the supplemental complaint was insufficient.

[1-4] If the common owner sell some lots with restrictions and subsequently sell others without restrictions, surely it cannot be contended that those purchasing without restrictions could be forced to build, etc., within the restrictive limits. An action, under such circumstances, by a restricted property owner against the grantor alone, to cancel the restrictions, would be successful as to the grantor's right to enforce the restrictions against such restricted owner. The restricted owner would have the right to remove any cloud from his property, and any claim by any other restricted owner that might interfere with the privilege of building or using the land unrestrictedly. Hence a suit to quiet title against the remainder of the tract tenants. That quiet title is a proper action in a proceeding such as the instant case, see Bernstein v. Minney, 96 Cal. App. 601, 274 P. 614. The supplemental complaint in Strong v. Hancock, supra, was a quiet title proceeding wherein the court was asked to render a declaratory judgment. In Strong v. Shatto, 201 Cal., at pages 557–559, 258 P. 71, 72, a case growing out of the action of Strong v. Hancock, supra, the court said: "This action in its original inception was an action to quiet title and it retained this character throughout, notwithstanding its amplification both as to parties and as to the relief sought through the filing and service of the substituted plaintiff's supplemental complaint * * * since the terms, restrictions, reservations, and conditions subsequent of each and all of the deeds of each and all of the defendants to this action were fully set forth in the supplemental complaint filed herein, and the court was thereby asked to determine the respective rights and interests of each and all of said defendants thereunder and to render a declaratory judgment so doing, the court * * * did not * * * go beyond the issues tendered in said supplemental complaint." In the case at bar there can be no doubt that there is an actual controversy relating to legal rights between parties interested in a deed or deeds. Plaintiff seeks an adjudication that the purported restrictions are invalid and that defendants be restrained from attempting to enforce them. Section 1060 of the Code of Civil Procedure, enacted subsequent to the original decision in Strong v. Shatto, 45 Cal. App. 29, 187 P. 159, provides in part as follows: "Any person interested under a deed * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief. * * * Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." Under the provision of section 738, Code of Civil Procedure, and section 1060, Code of Civil Procedure, plaintiffs are entitled to have the entire matter adjudicated at this time.

[5-9] The language in the deeds involved herein did not create equitable servitudes. To create an equitable servitude in the grant of lands in a large area, it is essential that there must be a general scheme of restrictions sufficiently uniform in character to indicate unmistakably a designated and adopted plan throughout common to all purchasers of lots. The restrictions must not only appear in one deed, but in all the deeds, and must expressly declare that such restrictions are for the benefit of and run with all other lots in the designated area. In other words, the restrictions must be for the mutual benefit of all parcel owners and each lot imposed with a servitude for the benefit of each and

every other lot. It is necessary to state in the deed what is the servient and what is the dominant tenement. See Berryman v. Hotel Savoy, 160 Cal. 559, 117 P. 677, 37 L. R. A. (N. S.) 5; Werner v. Graham, 181 Cal. at page 174, 183 P. 945; McBride v. Freeman, 191 Cal. 152, 215 P. 678. The intent of the parties to create mutual and reciprocal rights of restrictions between the grantees of the original grantor must appear in the deed. Gamble v. Fierman, 82 Cal. App. at page 182, 255 P. 269.

The deeds provide that the restrictions run with the land and also provide that the right to enforce the covenants and restrictions set forth in a particular deed run to each owner of any lot. To enforce what? To enforce one parcel holder to keep his building five feet away from the side line; to enforce the next holder to keep away four feet from the side line, while many others need not, according to their deeds, pay any attention to side lines? Can it be said that one holder could be forced to erect a $10,000 home while a near neighbor may, unrestricted as to value, erect a shack? The deeds do not contain a sufficiently uniform scheme or plan. Some deeds are silent relative to restrictions; others contain restrictions, but differ in many respects from restrictions in other deeds. No statement appears that the restrictions are for the benefit of other lands in the tract, and the dominant tenement is not designated. The intent to create mutual and reciprocal rights of restrictions between the grantees does not appear when all the deeds are considered which is a requisite to the creation of equitable servitudes.

[10-15] In the deed in question here and in all the deeds except the deed of Boden to his wife, the word "condition" and "covenant" are used referring to the same subject-matter, namely, the restrictions set forth in the deed. "There is a decided distinction between the creation and effect of a condition and a covenant. A condition is a qualification annexed to an estate by the grantor, upon the happening of which the estate granted is enlarged or defeated; and it differs from a covenant in this: That it is created by the mutual agreement of the parties, and is binding upon both, whereas a covenant is an agreement of the covenantor only." Knight v. Black, 19 Cal. App. page 522, 126 P. 512, 514. The entire context, and not a single clause, will determine the intention of the parties. "Condition" is used in the deed synonymously with "restriction." "Conveyance" is used synonymously with "agreement." Covenants that run with the land are distinguishable from servitudes. The qualifications of covenants running with the land are set forth in section 1460, Civil Code. Section 1468, Civil Code, provides: "A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land." There is no expression in the deed—"for the benefit of the land." The varied restrictions in these deeds are not benefits but detriments. The restrictions are not alike as to all purchasers. They are personal to each lot owner, and therefore cannot be enforced against other lot owners. Under such circumstances, no matter how expressed, they cannot run with the land. There is authority in this state holding: "These authorities undoubtedly sustain the proposition that where a proper case is presented, equity will enforce a personal covenant or agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land." Hunt v. Jones, 149 Cal. 297-301, 86 P. 686, 688. In that case there was every equitable reason to enforce the rule. In this case the varied restrictions in different deeds makes the whole project unfair and discriminating. Of course, it is not contended that the restrictions set forth in the Gardiner deed could be enforced against every lot holder in the tract. To enforce the restrictions against some of the lot owners and not against the others or to enforce the restrictions as they appear in each deed would result in a tract of land insufficiently uniform in character, would create a monopoly as to some lot owners, and would be inequitable.

[16, 17] In this case the judgment roll in Oakland Title Insurance and Guarantee Co. v. C. W. Boden and Agnes Boden was introduced. Therein the court decreed that the Bodens did not have any right, title, claim, or interest or right of reversion or right of forfeiture in or to said lots owned by plaintiff in that action, the predecessors of plaintiffs in this action. Its introduction against these defendants was inadmissible, but we think that the findings herein make it plain that the court did not find that the Gardiners had waived and relinquished their rights to enforce the purported restrictions, but that such order in that case was against the Boden defendants.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

116 Cal.App. 510

KENNEDY v. DUTTON.

Civ. 6774.

District Court of Appeal, Second District, Division 1, California.

Sept. 4, 1931.

1. Mechanics' liens 🔑305.

General contractor must pay all lien claims arising by reason of contract with owner.

2. Mechanics' liens 🔑307.

In subcontractor's action against contractor for labor and materials furnished, defendant *held* not entitled to deduction of attorney's fees in materialman's action or amount of materialman's judgment against plaintiff (Code Civ. Proc. § 1193).

> Defendant was general contractor to whom plaintiff's assignor, as subcontractor, furnished labor and materials on several jobs. On three of such jobs materialman filed mechanic's lien and brought action thereon against plaintiff's assignor, defendant and owner. In present action, defendant contended that, under Code Civ. Proc. § 1193, there should be deducted from total amount owed by him to plaintiff's assignor attorney's fees paid by defendant in such materialman's actions, together with amount of judgment rendered in favor of materialman against plaintiff's assignor and owner in one of such actions. However, Code Civ. Proc. § 1193 is applicable only in actions by contractor against owner on lien filed by contractor; and to permit defendant to recover attorney's fees in action in which it was determined he was liable would be to assist him in taking advantage of his own wrong.

3. Interest 🔑37(1).

In subcontractor's action against contractor for labor and materials, balance due bore interest at 7 per cent.

Appeal from Superior Court, Los Angeles County; A. C. Finney, Judge.

Action by L. C. Kennedy against Norville L. Dutton for labor and materials furnished. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

W. W. Kaye, of Los Angeles, for appellant.

F. A. Waters, of Los Angeles, for respondent.

HOUSER, J.

From the record herein it appears that defendant was a general contractor to whom plaintiff's assignor (as a subcontractor) furnished labor and material on each of several different jobs, amounting in the aggregate to an ascertained balance of $2,320.22; that on each of three of such jobs a certain materialman from whom plaintiff's assignor had purchased paint supplies which had been used on such job filed his mechanic's lien, and thereafter brought an action on such claim of lien against plaintiff's assignor, defendant and the owner of the premises upon which such job was being done—and in which action the materialman duly recovered judgment; that in one of such actions defendant was the owner of the property to and for which such labor and materials were supplied; and as to the judgment recovered therein and a judgment in the second of said actions, which in the aggregate amounted to the sum of $1,127.79, defendant herein paid and satisfied the same; but that at the time judgment in the instant action was rendered the judgment rendered in the third of such actions remained unpaid and unsatisfied. However, the last-mentioned judgment ran as against plaintiff's assignor and the owner (not the defendant herein) of the property only. It also appears that for defending each of such actions this defendant paid the sum of $50 as attorney's fees, making a total of $150 paid by defendant herein for such purpose. From a judgment rendered by the trial court in favor of plaintiff for the amount found due, to wit, $2,320.22, less the aggregate sums represented by the said two judgments which were satisfied by defendant, to wit, $1,127.79, defendant appeals to this court.

[1, 2] It is urged by appellant that under the provisions of section 1193 of the Code of Civil Procedure the trial court erred in failing to deduct from the total amount owed by him to plaintiff's assignor the attorney's fees paid by defendant in the three aforesaid actions, together with the amount of the judgment rendered in favor of the materialman against plaintiff's assignor and the owner of the property in the third of such actions. However, on reading the statute to which appellant has directed attention, it becomes plain that it is applicable only in an action brought by a contractor against an owner of property to recover on a lien thereon filed by such contractor. The instant action was brought neither against such an owner of property, nor for the purpose of foreclosing a lien on property; but was for "money due" for labor and materials furnished by plaintiff's assignor to defendant at his instance and request and for which defendant promised to pay an agreed price; besides which, clearly, it was the duty of defendant as general contractor to pay and discharge all just lien claims which arose by reason of the contract entered into between defendant and the owner of the property regarding the job in question. In addition thereto, in the instant action, no pleading was presented by defendant regarding either of such items of claimed damages. Aside from the lack of statutory authority therefor, to permit defendant to recover attorney's fees in an action in which it was determined that he was liable in damages would be to financially assist him in taking advantage of his own wrong—which situation cannot be countenanced in a court of justice.

[3] Appellant also complains that in rendering judgment the trial court erred in allowing interest at the rate of 8 per cent. per annum on the balance found due to plaintiff. In his reply brief respondent concedes the point thus presented by appellant. It appears that the money difference between the interest computed at the lawful rate of 7 per cent. per annum and that allowed by the trial court is the sum of $25.84.

It is ordered that the judgment be modified by deducting therefrom the sum of $25.84. As thus modified, the judgment is affirmed; each party to the appeal to bear and pay his own costs.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 480

GROSS v. WRIGHT & CALLENDER BLDG. CO. et al.

Civ. 6813.

District Court of Appeal, Second District, Division 1, California.

Sept. 2, 1931.

Rehearing Denied Oct. 1, 1931. Hearing Denied by Supreme Court Oct. 29, 1931.

1. Steam 🔑6.

As regards liability of one furnishing steam, manner of receiving notice that steam was escaping into storeroom *held* immaterial.

2. Steam 🔑6.

Notice, to one furnishing steam, of leak in pipe with request for repair, required furnisher to take reasonable precautions to prevent steam causing injury.

3. Appeal and error 🔑197(3).

Complaint that allegation was too narrow to admit of recovery could not be made for first time on appeal.

> The action was for damages from escaping steam, and the record failed to show any objection made by defendant either regarding insufficiency of pleading or evidence introduced respecting omission by defendant either to shut off steam or take any other action to protect plaintiff's property. The issue as to general negligence of defendant was fully recognized by both parties and evidence was freely presented regarding such situation.

4. Appeal and error 🔑1008(1).

Under circumstances, reviewing court *held* powerless to disturb implied finding that loss to plaintiff was attributable to his own acts.

5. Appeal and error 🔑757(4).

Alleged error in instructions cannot be considered, where appellant's brief did not contain all other instructions given which have bearing on point (Rule 8 of District Court of Appeal).

6. Damages 🔑186.

Owner of clothes cleaning and pressing business complaining of damage from escaping steam *held* under evidence not entitled to damages for extra labor or loss of business.

> In the evidence, the vital element of profit, if any, in plaintiff's business, was entirely lacking, and plaintiff testified that his books of account showed no entries of payment for extra help.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Bennie Gross, doing business under the fictitious firm name and style of Band Box Pressing Parlor, against Wright & Callender Building Company and others. From an adverse judgment, named defendant appeals.

Modified and affirmed.

Barker & Keithly, of Los Angeles, for appellant.

Arther C. Verge, of Los Angeles, for respondent.

HOUSER, J.

Plaintiff was the owner and operator of a clothes cleaning and pressing business which he conducted in a storeroom which was a part of a certain building to and for the use of which the defendant furnished steam for heating and other purposes. By means of a tunnel the steam was conveyed in an 8-inch pipe to a point beneath a basement of the building of which plaintiff's storeroom was a part and which basement was directly underneath the storeroom occupied by plaintiff. From the 8-inch pipe in the tunnel the steam was carried by a 2-inch pipe to a boiler in the basement and from which boiler the steam was distributed by the owner of the building, not only to plaintiff for his use in the clothes cleaning and pressing business, but as well to other tenants on the premises. A return pipe about 1½ inches in diameter

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

from the boiler conducted the "dead steam" back through the tunnel to the premises of the defendant.

It appears that a break occurred in a part of the return pipe which was located in the basement, which had the effect of allowing large quantities of steam to escape into the basement, and which break, after notice thereof to the defendant, not having been repaired by it for a continuous period of several months following its occurrence, had the result that, as alleged in plaintiff's complaint, great damage was done not only to the interior of the storeroom occupied by him, but as well resulted in a very considerable loss of patronage to his business. Judgment was rendered in favor of plaintiff, from which the defendant appeals.

On behalf of the defendant it is contended that the steam was delivered by it in the main 8-inch pipe only to the tunnel beneath the basement of the building of which the storeroom was a part; that neither the boiler, the 2-inch pipe, nor the return pipe from the boiler to the tunnel was owned by the defendant; and consequently that it was not liable for any damage which resulted to plaintiff by reason of the steam which escaped from the broken return pipe. However, on the trial of the action some evidence was introduced from which the conclusion might have been reached by the jury that the defendant both installed and paid for all such pipes.

[1-3] But assuming that because all such smaller pipes were so attached to the land they constituted fixtures (section 660, Civ. Code), and consequently were the property of the owner of the land upon which rested the building to which the steam was furnished, it is urged by plaintiff that, notwithstanding such assumed situation, upon notice being given to the defendant that the return pipe had broken, it became its duty to shut off the steam so as to prevent injury from resulting to plaintiff.

In 28 Corpus Juris, at page 594, the rule as to the liability of a corporation furnishing gas to consumers thereof for damages resulting from failure of the gas company, after notice, to remedy a leak in the gas service pipe, is stated as follows: "* * * When the gas company has received actual notice of a leak in a main, or in a service pipe, the company must use reasonable care to discover the cause of the leak and appropriate means to remedy it, and, if necessary, must give sufficient notice of the impending danger. It is immaterial in such case that the pipe where the leak occurred was owned by the consumer." (Citing cases.)

In the syllabus of the case of Memphis Consol. Gas & Electric Co. v. Creighton (C. C. A.) 183 F. 552, the following statement of the law occurs: "A gas company, which through its pipes supplies gas to a house and has control of the apparatus for cutting it off, when notified that gas is escaping in the house and informed of injury and danger to the inmates therefrom, owes a duty to the occupants of the house to exercise reasonable diligence in shutting off the gas therefrom, and it is immaterial that the pipes where the leak occurred were owned by the owner of the house."

And it is likewise immaterial in what manner the gas company may receive information regarding the fact that gas is escaping from its pipes and by reason thereof is causing, or is likely to cause, injury or damage. 28 C. J. 594, and authorities there cited; Luengene v. Consumers' L., H. & P. Co., 86 Kan. 866, 122 P. 1032.

It would seem clear that the doctrine announced in the foregoing authorities respecting the liability of an owner and distributor of gas should apply with equal force in an analogous case wherein the liability of an owner and distributor of steam is concerned.

However, the defendant contends that by the terms of the complaint in the action plaintiff limited himself to a recovery of a judgment against the defendant on a claim that the damages suffered by plaintiff were caused by reason of the failure of the defendant to repair the broken return pipe. With reference to such pleading, it is noted that the allegation therein was as follows: "That plaintiff immediately notified the defendants and each of them regarding the said leak and break in said pipe and further notified them and each of them to remedy and repair the said leak, but that the said defendants and each of them failed, refused and neglected to repair the said leak for a long period of time, to-wit, about six months, and that as a consequence of their neglect to repair the leak, the plaintiff has been and now is damaged in the sum of $25,000.00."

On examination of such allegation it becomes apparent that the notice to the defendant was to the effect that a "leak and break in said pipe" had occurred; "and further notified them (defendants) and each of them to remedy and repair the said leak."

As in substance has hereinbefore been indicated, the manner in which the defendant received notice of the fact that steam furnished by it was escaping in large quantities into the storeroom of plaintiff was immaterial; and manifestly it was not merely the fact itself that a leak had occurred in a steam pipe that was of such moment, not only to plaintiff but to the defendant as well, but it was the injury or damage that would or might result to plaintiff by reason of such leak that was of importance to each of them. It is evident that if loss or damage to plaintiff was to be avoided, action of some sort, either in the way of repairing the leak in the steam pipe, or by closing the valve which controlled the entrance of the steam into the pipe which was broken, was an undeniable necessity, and the conveyance of information to the defendant that a "leak and break in said pipe" had occurred and requesting the defendant "to remedy and repair the said leak," constituted not only a notice of the conditions then existing, but, in accordance with the principle of law announced in the authorities to which reference herein has been had, placed the duty on the defendant to take such reasonable precautions in the premises as would prevent the steam furnished by it from causing loss or injury to plaintiff. Presumably the defendant was in possession and control of its own plant used for the production and distribution of the steam which was furnished by it to the building in which the storeroom and business of plaintiff was located, and its knowledge of the proper steps which should be taken in the existing circumstances to reasonably protect plaintiff from loss was certainly as great, if not greater, than that of plaintiff; and a direction or request by the latter to the defendant that it adopt any particular means of preventing loss to plaintiff undoubtedly would have been regarded by the defendant as unnecessary, if not presumptuous and wholly gratuitous. Although the allegation in the complaint regarding the situation was not as specific as might have been desirable, nevertheless it was sufficient to place the defendant on notice as to the particular act of the defendant which plaintiff asserted constituted negligence, and which situation, if not remedied, was likely to cause loss or damage to plaintiff. Moreover, the record herein fails to disclose that on the trial of the action any objection was made by the defendant either regarding the insufficiency of the pleading, or to the evidence introduced by plaintiff respecting the omission by the defendant either to "shut off the steam," or to take any other action to protect the property of plaintiff from injury. The issue as to the general negligence of the defendant in the premises was fully recognized by both parties to the litigation, and evidence was freely presented regarding such situation. In such circumstances, the claim by the defendant that in effect the allegation of the complaint was too narrow to admit of the recovery of a judgment cannot be sustained.

[4] As a separate defense to the action, in effect the defendant pleaded the contributory negligence of plaintiff. It appears that in operating his business the exhaust steam from two clothes-pressing machines was discharged into the same basement into which escaped the steam from the broken return pipe of the defendant. On the trial of the action evidence was introduced by each of the parties relative to such issue, and the defendant urged the point that plaintiff was not entitled to recover damages if the exhaust steam from the clothes-pressing machines operated by plaintiff contributed in any degree to the injury or loss sustained by him. In substance, at the request of the defendant, the trial court instructed the jury in accordance with such contention of the defendant. It is manifest that by its verdict the jury impliedly found as a fact that no portion of the injury or loss of which plaintiff complained was attributable, even in part, to his own acts or conduct; and in the circumstances herein outlined this court is powerless to disturb such implied finding of fact.

[5] Appellant also complains that the trial court committed prejudicial error in giving to the jury for its consideration certain specified instructions.

Rule VIII of this court in part provides that: "* * * where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in appellant's brief."

Since it appears that appellant's brief fails to contain "all other instructions given" which have a bearing upon the point presented by appellant, it follows that the error suggested by appellant cannot be considered by this court.

[6] The complaint in the action contained no specification of the several items of damage alleged to have been suffered by plaintiff. On demand of the defendant, a bill of particulars was furnished by plaintiff to the defendant, which contained an itemization of his various claims of damage, among which were cost of repairs, etc., to the interior of the storeroom occupied by plaintiff, amounting to the sum of $2,044; extra labor in conducting the business of plaintiff, $840; and for loss of business, good will and patronage, $20,916. The verdict of the jury in favor of plaintiff was for the sum of $3,500. Appellant here complains that the evidence adduced on the trial of the action was insufficient to sustain a verdict in such amount, and the attention of this court is directed, first, to the evidence which related to the damage to the interior of the storeroom, as to which appellant contends that no witness fixed the amount at a greater gross sum than $1,930.50. On the part of respondent, no claim is made to the contrary. As to the item of $840 for extra labor in re-pressing clothes, plaintiff testified: "To tell you the truth, I haven't got any expenses down here at all. I can't find any. My books of account show no entries of payments for extra help employed in re-pressing clothes, and I am not able from any record that I have to make any statement as to what I paid for extra help employed to re-press clothes during the six months June, 1925, to December, 1925."

With reference to the combined items which relate to the loss of business, good will, and patronage, plaintiff produced figures which showed the volume of business transacted by him not only throughout the six months during which the escaped steam was causing the damage to plaintiff's business, but also for a like period both preceding the time when the steam started to enter the storeroom of plaintiff, as well as succeeding the date after the leaky steam pipe had been repaired. In addition thereto, it was shown that the normal and customary increase in volume in the clothes cleaning and pressing business in general, during the particular months in which the damage was suffered by plaintiff, amounted to approximately 40 per cent. more than it did during a like period in the remaining months of the year. However, plaintiff testified that he had no records by which it might appear how many suits of clothes or dresses had been pressed or cleaned by his establishment during any particular period of time; and that: "I lost between 50 and 100 customers and that is how I arrived at the first item of $12,000 in the bill of particulars furnished by me in this action."

From the foregoing it will be noted that in the evidence the vital element of "profit," if any, in such business was entirely lacking. In no part of the evidence introduced in behalf of plaintiff may be found a statement by any person to the effect that the business as conducted by plaintiff ever produced any profit. As far as the evidence discloses, it is not impossible that the business of plaintiff may have been conducted at a loss.

In the case of Gibson v. Hercules Mfg., etc., Co., 80 Cal. App. 689, 703, 252 P. 780, 785, it is said: "In 8 Cal. Jur., p. 777, the distinction is clearly drawn by the text-writer as to when loss of profits may be allowed. If the business is established and is interrupted, past profits furnish the basis for calculating the damage. If the business is unestablished, such anticipated profits are held to be remote, uncertain, and speculative, on the ground that no satisfactory statement of the loss can be made. To state it in different language: No one can say that any profits would ever have been realized. The rules which we are here stating relative to loss of future profits are also clearly set forth in Shoemaker v. Acker, 116 Cal. at pages 244, 245, 48 P. 62. The substance of the holding there is that when the business prevented or interrupted is an established one, a basis for allowing damages is found in the past profits of the concern, but, if no business has ever been done, no profits earned, the possibility of proving profits does not exist, and no court can determine whether there would be profits, or whether the prospective business would not rather result in losses." (Citing cases.)

And in the case of Bird v. United States (C. C. A.) 24 F.(2d) 933, 936, the following statement appears: "Moreover, it is elementary that, to recover for the loss of future or anticipated profits, the burden is upon the plaintiff, not only to show the probable gross income, but the probable cost to him of producing it. The difference between the two is the measure of his loss. * * *"

It follows that neither as to the item of extra labor nor the item which related to the loss of business, etc., is plaintiff entitled to recover any damages from the defendant.

Accordingly, it is ordered that the judgment of the lower court be modified so as to show a total damage to plaintiff in the sum of $1,930.50; and as thus modified, the judgment is affirmed; appellant to recover its costs on appeal.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 388

RICHARDSON v. DAVIS.

Civ. 7847.

District Court of Appeal, First District, Division 2, California.

Aug. 28, 1931.

1. **Contracts** ⟹303(4).

Party to contract has power to stop performance on other side by explicit direction to that effect, subjecting himself to resulting damages.

2. **Damages** ⟹62(4).

One party to contract cannot enhance damages by continued performance after notice of repudiation.

3. **Contracts** ⟹324(2).

After repudiation of advertising contract by one party, other's right of action was for damages only.

4. **Appeal and error** ⟹197(4).

Where evidence showing repudiation of contract was received without objection, point that plaintiff's action was for breach and not for services rendered *held* sufficiently raised in trial court, although not raised by answer.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Joseph A. Richardson against B. D. Davis. Judgment for plaintiff, and defendant appeals.

Reversed.

Norman A. Eisner, of San Francisco, for appellant.

John R. Tyrrell, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued upon a written contract for advertising. The cause was tried by the court without a jury, and judgment went for plaintiff as prayed. The defendant appeals upon typewritten transcripts.

On February 20, 1928, the parties executed a contract in writing under which plaintiff agreed to run thirty feet of advertising film six days a week alternating weekly between the Southern Pacific and Key Route waiting rooms in the Ferry building at San Francisco for the term of fifty-two weeks. The defendant agreed to pay therefor the sum of $30 a week, payable monthly after the first exhibit, which was to start March 1, 1928. The contract provided: "Films may be changed twice monthly."

On February 21, 1928, defendant wrote to the plaintiff that the contract was canceled. On February 27 the parties entered into an oral contract under which plaintiff agreed to furnish the same advertising for a period of two years at $15 a week, or $65 a month, films to be run three days a week instead of six. On April 26, 1928, defendant sent written notice to plaintiff that this contract was terminated as of May 1 following. Plaintiff continued to run the film for the full period of two years, carrying without change an advertisement of a special sale of automobiles conducted by defendant at his places of business at 1521 and 690 Van Ness avenue in San Francisco. This sale was advertised to commence March 1, 1928. The business at 690 Van Ness was discontinued in October of that year.

Plaintiff sued upon the written contract of February 20, alleging however, that there became due under the contract $65 a month, whereas the contract provided for payments of $30 a week. Defendant answered, admitting the execution of the contract pleaded, denying generally that any sum was due under it, and pleading specially that the contract was abandoned and rescinded by mutual consent.

During the trial plaintiff was forced to admit the abandonment of the written contract, and then asked for and was granted leave to amend to conform to the proofs by pleading a new or modified contract in the terms of the oral agreement of February 27. The defendant then proved the cancellation of this contract on April 26 in the manner above set forth. The complaint having been filed before the end of the two-year period, the trial court limited its findings to the fourteen months preceding May 1, 1929, and found that the plaintiff had performed all the terms of the contract as modified, and gave judgment for plaintiff for $780 upon the conclusion of law that said sum was due "for services rendered under said contract."

[1-3] On this appeal the appellant attacks the judgment on the ground that, the contract having been canceled or repudiated by him, respondent's only remedy was to sue in damages for the breach. Appellant rests his case on the well-accepted rule that a party to a contract has the power to stop performance on the other side by explicit direction to that effect, subjecting himself to such damages as will compensate the other party for the breach, and that the party thus forbidden cannot go on and thereby increase the damages. 6 R. C. L., p. 1029; Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783; Danforth v. Walker, 37 Vt. 239, 244; Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Spratt v. Brown-Petzel Lumber Co., 105 Or. 672, 210 P. 700, 701; Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717, 718, 3 A. L. R. 468; Thomas v. Clayton Piano Co., 47 Utah, 91, 151 P. 543, 544; Peck & Co. v. Kansas City M. R. & C. Co., 96 Mo. App. 212, 70 S. W. 169, 170.

The remedy for such a breach is declared in section 3300, Civil Code, to be the amount which will compensate the party aggrieved for all the detriment proximately caused thereby. And section 3358 of the same Code declares that no person can recover a greater amount of damages for the breach of a contract than he could have gained by the full performance.

Under the authorities, the conclusion is unescapable that the respondent's right of action was for damages only, that he could not enhance these damages by continued performance after notice of repudiation, and that the judgment for "services rendered" is contrary to law.

[4] Respondent does not question these principles of law. His only defense of the judgment is that the point was not raised in the trial court. In this he is in error. He pleaded and rested on a written contract. Appellant alleged that this contract was abandoned. The proof showed conclusively that such was the fact. Respondent then obtained leave to plead another contract. No special pleading was filed in answer to this amendment, but all the evidence showing its repudiation was received without objection. There is no doubt that the issue of repudiation was fully tried, and, though the trial court found that the contract was not "mutually abandoned," it did not find on the issue of repudiation. The evidence was there, not merely uncontradicted, but admitted, that the contract was repudiated.

When such is the case, the action must be for damages for the breach and not for services rendered under the contract after repudiation. In a similar case, Thomas v. Clayton Piano Co., supra, the court say: "It is true that the damages may equal the amount stipulated in the contract under certain circumstances; but, if that be so, then the fact must be established by proper evidence. It cannot be established by merely proving that the plaintiff proceeded to perform after the renunciation had been made."

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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116 Cal.App. 500

SCRIMSHER et al. v. RELIANCE ROCK CO.

Civ. 6713.

District Court of Appeal, Second District, Division 1, California.

Sept. 3, 1931.

Rehearing Denied Oct. 1, 1931.

1. **Trial 🔑165.**

As against motion for nonsuit, every favorable inference from evidence must be considered in plaintiff's favor.

2. **Trial 🔑165.**

As against motion for nonsuit, plaintiff must be given benefit of evidence which tends to sustain his averments.

3. **Trial 🔑139(1).**

If plaintiff has introduced proof sufficient to make out prima facie case, nonsuit should be denied.

4. **Master and servant 🔑284(2).**

As against motion for nonsuit, evidence in action for death of employee caused by negligent operation of power shovel hired by employer *held* sufficient to establish that operator of shovel was shovel owner's servant.

5. **Master and servant 🔑301(4).**

Generally, employer who lends his employee, together with some instrumentality within his control, to another for performance of some undertaking, is liable for employee's negligence.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Mamie E. Scrimsher and another against the Reliance Rock Company. From judgment of nonsuit, plaintiffs appeal. Reversed.

F. Ray Risdon, J. L. Kearney, and James D. Randles, all of Los Angeles, for appellants.

Bauer, Wright & Macdonald and Fred E. Pettit, Jr., all of Los Angeles, for respondent.

HOUSER, J.

From the record herein it appears that one Scrimsher while working in the course of his employment received injuries (which later resulted fatally to him) from the negligent operation of a power shovel, which Scrimsher's employer, Oswald Brothers, had rented from the defendant Reliance Rock Company. On the trial of the action brought by the widow and guardian ad litem of the children of the deceased against one Robert C. Barnes, who was the workman in charge of the power shovel (and who hereinafter is termed the operator or engineer), and the Reliance Rock Company, at the close of the evidence presented by the plaintiffs, an order of nonsuit was entered in favor of Reliance Rock Company; and it is from the resultant judgment that the appeal herein is prosecuted.

From an examination of the reporter's transcript of the record of proceedings at the trial of the action, for the purposes here involved, it appears that the power shovel in question was the property of the defendant Reliance Rock Company; that about three weeks prior to the date of the accident Oswald Brothers rented the power shovel from Reliance Rock Company at an agreed compensation of $5 per hour, which included the services of an engineer to operate the same. Relating to the hiring of the power shovel and its operation during the time both immediately preceding as well as at the time when the accident occurred, the testimony given by one of the members of the firm of Oswald Brothers shows that he inquired of a salesman of Reliance Rock Company if Oswald Brothers "could get the use of it (the power shovel), and he said he thought I could, so he went back to his office and came back and said I could get the use of it." At that particular time nothing was said "about whose engineer would run it." But later, "I (the witness) think I called him at that time and asked him if he could not get an operator for me, and he said he thought he could. * * * I told him to try and get one. * * * I asked him if he could get an operator for it, and he said he thought he could."

Also, as shown by the testimony given by the same witness, Oswald Brothers did not hire the operator of the shovel.

"Q. And the Reliance Rock Company furnished the engineer? A. Well, I guess they did. * * *

"Q. When did you hear from him (the representative of Reliance Rock Company), if at all, with reference to whether he could get you a man or not? A. Well, I didn't hear after that at all. The next day the shovel was operating, so I imagine the man was there."

The arrangements made between the operator of the shovel and Reliance Rock Company were shown by the testimony given by the former as follows:

"Q. How did you happen to go on the job? A. Well, Birney Hodges (representative of Reliance Rock Company) came down to my house June 23rd, I believe it was, and asked me if I wanted to go to work, said he had a job working for Oswald Brothers unloading—unloading sand and gravel for Oswald Brothers. I asked him if it would be a pretty steady job and he said yes. * * *

"Q. What did you say to him? A. I told him I would go to work, yes.

"Q. And you went to work the next morning? A. Yes, sir."

The record further shows that the name of the operator was not carried as an employee on the books of Oswald Brothers.

"Q. And you (Oswald Brothers) never did pay for the services of the engineer aside from the rental for the shovel? A. Well, we never carried him, no. The bill came in and we paid the bill.

"Q. Whom did you pay it to? A. The Reliance Rock Company."

The fact stands admitted in the record that Reliance Rock Company originally paid for the services of the operator of the power shovel, and that the compensation later paid by Oswald Brothers to Reliance Rock Company for the use of the shovel included the compensation paid by the latter to the operator thereof for his services. The record herein is silent as to the existence of any agreement between Reliance Rock Company and Oswald Brothers to the effect that in any way the former surrendered or resigned control of its employee other than that Oswald Brothers had authority to direct him "what to do in the performance of the work." Billig v. Southern Pacific Company, 189 Cal. 477, 485, 209 P. 241, 244.

[1-3] In determining the question of whether a nonsuit should be granted, some of the settled principles of law which should be taken into consideration are that: "'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiff. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. * * * The plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in a light most favorable to plaintiff's claim. * * * The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied.'" (Citing cases.) Rabe v. Western Union Tel. Co., 198 Cal. 290, 294, 244 P. 1077, 1078.

[4] Considering that one of the issues in the action upon which depended the case for the plaintiffs as against the defendant Reliance Rock Company was whether the operator of the power shovel at the time of the happening of the accident was an employee of said defendant, by application of the principles of law to which attention hereinbefore has been directed which relate to the determination of a motion for nonsuit, it becomes apparent that for such purpose the evidence introduced by the plaintiffs on the trial of the action, if it did not clearly establish the fact itself, readily would admit of the inference that the operator of the power shovel was an employee of the defendant Reliance Rock Company at the time in question.

[5] Although it may be admitted that in some jurisdictions an employer who lends his employee, together with some instrumentality within his control, to another for the performance either of a general or a special undertaking is freed from liability arising from the negligence of such employee, generally speaking the rule in this state, as attested by many authorities, is to the contrary.

In the case of Stewart v. California Improvement Co., 131 Cal. 125, 63 P. 177, 724, 52 L. R. A. 205, it appeared that an engineer was employed and paid by the defendant corporation to operate a steam roller which, with the services of such engineer, had been hired at a per diem rate by a city from the defendant corporation. In an action for damages for personal injury which arose from the alleged negligence of the engineer, it was held that the engineer was the servant, not of the city to which his services had been lent, together with the steam roller, but of the defendant corporation, and that the latter was liable for such damages as resulted to the plaintiff from the negligent operation of the roller.

In the case of Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241, 244, a situation was involved similar to that here under consideration, and the doctrine announced in Stewart v. California Improvement Co., 131 Cal. 125, 63 P. 177, 724, 52 L. R. A. 205, was affirmed. Among other things, it is there said: "Whatever the rule and its variations may be in other jurisdictions, it is the settled rule of law in this state, applicable to cases of the character under consideration here, that a general employer is not freed from responsibility for the negligent acts of an employee merely because the employee has been hired out by the employer to a third person, to be used by the latter in the performance of his work. * * *"

And reiterating the principle, the court also said: "It would appear, therefore to be the rule in this state that, when a master hires out, under a rental agreement, the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner, and not that of the hirer, of the instrumentality." (Citing authorities.)

To the same effect, see Umsted v. Scofield Engineering Const. Co., 203 Cal. 224, 263 P. 799; Peters v. United Studios, 98 Cal. App. 373, 277 P. 156; Valdick v. LeClair, 106 Cal. App. 489, 289 P. 673.

It follows that the judgment herein should be reversed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 398

NISHI v. INOGUCHI et al.

Civ. 6801.

District Court of Appeal, Second District, Division 1, California.

Aug. 29, 1931.

1. Evidence ⚿222(10).

Admissions against interest by one defendant are not admissible to establish liability of other defendant.

2. Evidence ⚿317(1).

In action for money had and received, testimony disclosing conversations between defendant who admitted liability and third party *held* inadmissible as against other defendant, being hearsay.

One of the defendants admitted his liability to the plaintiff. Such defendant was permitted to testify concerning conversations had between him and third party in defendant's absence regarding money received from plaintiff.

3. Appeal and error ⚿125.

Defendant who admitted liability and consented to judgment cannot on appeal question its validity on ground of alleged errors in admission or rejection of evidence.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by K. Nishi against Fred Inoguchi and others. Motion for nonsuit was granted as to the defendant Hiroshi Nakamura, and from an adverse judgment, defendants Fred Inoguchi and LeRoy Reames appeal.

Affirmed in part, and reversed in part.

James R. Jaffray and LeRoy Reames, both of Los Angeles, for appellants.

J. Marion Wright, of Los Angeles, for respondent.

HOUSER, J.

This action was brought by plaintiff to recover the sum of $3,000 alleged to have been had and received by defendants for the use and benefit of plaintiff. Motion for nonsuit was granted as to defendant Nakamura. At the time of trial, by a pleading called a "supplementary answer," Inoguchi not only admitted that he was indebted to plaintiff in the sum for which the action was brought, but as well consented that judgment be so entered against him. A like judgment was also rendered in favor of plaintiff and against defendant Reames. The evidence showed that Inoguchi received the sum of $3,000 from the plaintiff, to be used as bail for a Japanese named Fukasaka, but that instead of depositing the cash bail, Inoguchi procured a bond from a bond company for such purpose and thereafter appropriated to his own use the money intrusted to him by plaintiff.

As tending to establish the liability of defendant Reames, plaintiff introduced in evidence a certain letter purportedly signed by Reames, but regarding which Reames testified that although he dictated the letter he never signed the same, nor authorized his signature to be attached thereto, but, to the contrary, that the letter "was signed and mailed by his secretary in ordinary course of business, but without his (Reames') knowledge or consent." A copy of such letter is as follows:

"For your information and for your files please be informed that we have received the $3,000.00 bond posted in re Fukasaka. Said amount we have applied to your indebtedness to this firm leaving a balance due of $1,200.00 as per our agreement. We now have several important matters pending for you and please be advised that June 1st, it will be necessary for you to make new arrangements for the forecoming year.

"Thanking you for your patronage in the past, we remain."

Other than testimony (hereinafter referred to) given by a so-called impeaching witness, which related to certain alleged conversations had between him and defendant Inoguchi without the presence of defendant Reames, no further evidence was introduced by plaintiff relative to the liability of defendant Reames. However, both Inoguchi and Reames testified that the latter "did not receive any of the money in question from Inoguchi or at all."

Appellants urge that as to defendant Reames prejudicial error was committed by the trial court in admitting in evidence, over the objection of defendants, those certain conversations which were shown to have occurred, not in the presence of defendant Reames, but only between defendant Inoguchi and a witness named Fujii. The testimony given by the so-called impeaching witness was in narrative form and included the following: "Mr. Inoguchi told me that he got $3,000.00 from Mr. Nishi and he said that this money was given to him to put up as security for a bond for $3,000.00 for the release of his brother-in-law. The bond was exonerated and the money was refunded to his lawyer, Mr. Reames. He said, 'He keeps that money and he refuses to return that money to me. I can't pay the money back to Mr. Nishi.' He said that he had consulted some Japanese lawyer, I think he named the name of Attorney Iwamaja and Mr. Iwamaja told him in his opinion he wouldn't be able to recover this money from Mr. Reames because there was no evidence to show that the money had ever been paid to Mr. Reames, and he said 'Therefore I am very sorry that I can't get this money back for Mr. Nishi. I am willing to make a note and pay it to him some day.'" The witness also testified to other conversations to the same effect which took place between him and Inoguchi without the presence of defendant Reames.

[1, 2] Such conversations were admitted in evidence, not on the theory that they constituted admissions against interest as far as Inoguchi was concerned, but solely on the claim by plaintiff that they were in the nature of impeachment of testimony given by Inoguchi, who by his pleading already had admitted his liability and consented that judgment be rendered against him, but who, under the provisions of section 2055 of the Code of Civil Procedure, was called as a witness for plaintiff. From the record, although it appears that the testimony included in such alleged conversations was contradictory to that given by Inoguchi, for the reason that no proper statutory foundation was laid for the testimony given by the witness Fujii, it is manifest that in no proper sense did the evidence thus adduced constitute an impeachment of the testimony given by Inoguchi by a showing that at other times he had made "statements inconsistent, with his present testimony." Section 2052, Code Civ. Proc. But even if such testimony had been properly admitted in evidence for the purpose of impeaching the testimony of Inoguchi, it is clear that evidence to the effect that at some definite time and place Inoguchi made statements which were inconsistent with the testimony given by him on the trial of the action, merely reflected upon *his* credibility; and neither established, nor tended to establish, the truth regarding the matter concerning which Inoguchi made such alleged statements. Nor from any standpoint developed by the evidence adduced on the trial of the action was the testimony given by the so-called impeaching witness competent or admissible as against defendant Reames. He was a defendant in the case wholly independent from Inoguchi. Assuming (without conceding) that considering the fact that Inoguchi had already consented that judgment be rendered against him, any admission against interest made by Inoguchi might have been introduced in evidence as against him individually, it is universally attested by authorities that in circumstances like those here present such admissions necessarily would affect the case of Inoguchi only and could not be considered in evidence as in anywise tending to establish the liability of defendant Reames. Bituminized B. & T. Co. v. Simons Brick Co., 183 Cal. 687, 192 P. 528; Ambrose v. Hyde, 145 Cal. 555, 79 P. 64; Bell v. Staacke, 141 Cal. 186, 74 P. 774; Dean v. Ross, 105 Cal. 227, 38 P. 912.

In view of the fact that the properly admitted evidence in support of plaintiff's action against defendant Reames was very slight, it becomes apparent that the improperly admitted evidence against him probably had the effect of inducing the judge who presided at the trial to render the judgment which is the subject of this appeal. In the case of Smith v. Westerfield, 88 Cal. 374, 383, 26 P. 206, 208 (where, however, a different situation was involved), it was said: "This is not a case where an incidental and collateral fact which may not be seriously contested had been shown by incompetent evidence, but the testimony of the witness bore directly upon the main point in issue. In such a case all the evidence upon that point becomes material, and the introduction of any incompetent testimony is presumed to cause an injury to the opposite party. We cannot determine the weight which the court below gave to the testimony of this witness in reaching its conclusion upon this controverted point."

Likewise, in the case of Estate of James, 124 Cal. 653, 655, 57 P. 578, 579, 1008, it is said: "If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale, and lost the case to the appellants. This must, of necessity, be the rule wherever improper evidence has been admitted, which, upon its face, tends in any degree to affect the final conclusion of the court."

[3] As far as concerns defendant Reames, it becomes unnecessary to consider other questions presented by him on this appeal. Defendant Inoguchi, having by his pleading admitted his liability to plaintiff for the amount for which the action was brought, and at the same time having consented that judgment might be entered against him for the amount prayed for in the complaint, is not entitled on appeal to question the validity of the judgment because of any alleged errors committed by the trial court either in the admission or the rejection of evidence.

It is ordered that as to defendant Inoguchi the judgment be and it is affirmed; but as to defendant Reames, the judgment be and it is reversed.

We concur: CONREY, P. J.; YORK, J.

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116 Cal.App. 422

SANTA ANA SUGAR CO. v. SMITH (two cases).

Civ. 6672.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1931.

1. **Evidence ⚷444(6).**

Maker claiming conditional delivery of notes could not modify provisions thereof by proving alleged contemporaneous oral agreement making payment dependent on returns from beet crop.

2. **Guaranty ⚷20.**

Limitation of actions ⚷15.

Payee's threat to sue on notes *held* not "duress" which would invalidate maker's waiver of limitation statute and guaranty of payment of another's notes.

There was no evidence that payee was aware of fact that maker had signed false statement at his bank with reference to indebtedness, and was therefore afraid that, if payee brought suit on notes, it might involve maker in trouble with bank.

[Ed. Note.—For other definitions of "Duress," see Words and Phrases.]

3. **Guaranty ⚷5.**

Where notes were outlawed by limitation, third person's subsequent guaranty of payment thereof *held* valid.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Two actions by the Santa Ana Sugar Company against Carlin G. Smith were consolidated for trial. Judgment for defendant, and plaintiff appeals.

Reversed.

O'Melveny, Tuller & Myers and H. R. Snyder, all of Los Angeles, for appellant.

Freston & Files and Charles H. King, all of Los Angeles, for respondent.

YORK, J.

This is an appeal from a judgment covering two cases—Nos. 162584 and 171792—which two cases were consolidated for trial and were tried together upon the same evidence.

The first of these actions was brought to recover on twenty-five promissory notes, the complaint alleging that the defendant for a valuable consideration waived any right which he (the respondent here) thereafter had to plead the bar of the statute of limitations against any and all actions which might be commenced on said indebtedness evidenced by said promissory notes, provided action should be commenced within one year from the date of the agreement of November 13, 1924. It was further alleged that, although the defendant had paid the plaintiff certain amount on account of said promissory notes, there was still due on such notes the sum of $45,190.38, together with interest at 8 per cent. per annum from the date of the notes, and reasonable attorney's fees, costs, etc.

In the second action—No. 171792—the complaint alleged that the defendant guaranteed the payment of seventeen promissory notes (other and different than those sued on in the first action) which notes were executed by the defendant's wife. It is also alleged that on November 13, 1924, defendant for a valuable consideration guaranteed in writing the payment not later than December 13, 1924, of all sums then due from defendant's wife on said notes, whether such sums were then or might thereafter become barred by the terms of the statute of limitations. The complaint then prays for judgment in the amount of $8,677.50, alleging that this was the amount unpaid on the seventeen promissory notes mentioned, together with interest, reasonable attorneys' fees, costs and other relief.

In both of these actions the defendant answered, and after admitting the execution of the promissory notes and the guaranty of the notes executed by the wife of the defendant, and after admitting the agreement purporting to waive the bar of the statute of limitations signed November 13, 1924, set up affirmative defenses in both cases which sought to avoid the liability incurred.

The first of these affirmative defenses was that, prior to and at the time of the execution of the notes sued upon, an oral agreement was entered into and in effect between the parties providing that certain advances made by appellant to respondent, evidenced by the notes in suit, should be paid only out of crop returns credited to respondent, that any deficit in one year's crop should be carried over to the succeeding crop year, and so on, until such advancements were paid; and if a deficit remained when respondent should for any cause cease growing sugar beets, the amount of the advances then remaining unpaid should fall upon appellant. It is alleged in this defense that the defendant refused to sign, make, execute, or deliver the notes in question when the same were presented for that purpose, and that plaintiff, through its agent, represented that the purpose of the execution and delivery of said notes was merely to protect plaintiff in its claim to the crops as against third parties, and that the foregoing agreement would still control and defendant would not be obliged to pay the notes in question. Upon this understanding and with that single purpose, the notes were then executed. It is also alleged in the answer that these promises and representations of the plaintiff were false and were made without any intention of performing the same. As further affirmative defenses, it was alleged by defendant that when he signed the agreement of November 13, 1924, there was no meeting of the minds of the parties, and also that the contract of November 13, 1924, was executed and delivered under duress.

The trial court in its findings found everything in favor of the defendant, and particularly: That on said day, November 13, 1924, and for some time prior thereto—without specifying the time—the defendant had been ill, and defendant's condition of mind and his nervous and physical condition were such that he did not have any clear conception of what he was doing or what it meant to him when he signed and executed the said waiver of any right to plead the bar of the statute of limitations and the said guarantee of said notes of Helen Keating Smith (his wife), as aforesaid, and that he did not freely or understandingly give assent or consent thereto, and that he did not know the nature and consequence of his act or acts.

Therefore, the only questions involved are:

1. Is appellant correct in its contention that the trial court erred in admitting evidence to prove an oral contemporaneous agreement, changing, modifying, and practically contradicting the clear and unambiguous terms of the promissory notes sued upon?

2. That even if such evidence could have been admitted, still as a matter of substantive law, can such evidence modify or vary the legal effect of the written promise?

3. Did the court err in admitting evidence to prove oral conversations between Gerhart, the appellant's agent, and one of the executive officers of the company, by which it was sought to establish that Gerhart was given authority to make any arrangement he saw fit with the defendant to induce him to raise sugar beets?

4. Did the court err in admitting oral evidence as to the conversations which occurred at the time the defendant executed the agreement of November 13, 1924?

5. Whether or not appellant is right in its contention that (irrespective of whether such evidence was properly admitted) the facts alleged as a basis for escaping from the obligations of said contract were and are, as a matter of law, insufficient to justify a finding that it was obtained under duress, or insufficient to relieve defendant from the obligations of the contract?

From an examination of the entire record, it clearly appears that the plaintiff was entitled to judgment, unless the so-called affirmative defenses were good. As stated by appellant, the whole case boils itself down, therefore, to these issues:

First. Could the court receive evidence of the alleged oral understanding, which it is claimed was made at the same time the notes were executed, to the effect that defendant would not have to pay them under certain contingencies; and even if such evidence were received, does it in law constitute a defense to the action?

Second. Can the defendant escape the legal effects of his contract of guaranty and waiver of the statute of limitations made November 13, 1924—which it is admitted he executed—on the plea that he did so under duress, because if he had not signed the same the plaintiff would have brought suit on the notes before the statute of limitations expired, or can he escape liability on the plea that he did not fully understand said contract?

[1, 2] Conditional delivery refers to conditions *precedent* and not to conditions *subsequent*, and may or may not depend upon conditions concurrent. There is no question but that the terms of a written agreement cannot be modified by parol (20 A. L. R. 421, at page 490, and annotations supplemental thereto in 54 A. L. R. 702, at page 717), although it is also true that a conditional delivery may be so proved, if not in direct conflict with the express wording of the written agreement itself. But the attempt to show that the de-

livery of the notes in this case was conditional fails: First, because it is in direct conflict with the written agreement (Leonard v. Miner, 120 Cal. 403, 52 P. 655; Lompoc Valley Bank v. Stephenson, 156 Cal. 350, 104 P. 449); and, second, because the only proof of conditional delivery was evidence of conversations that took place after the delivery of at least a portion of the consideration for the notes in question. Further, it appears in evidence that on November 13, 1924, an additional agreement was made guaranteeing the payment of the notes and waiving the statute of limitations, upon the express condition that a suit should be brought upon said notes within a certain length of time. And as we view it, this operated as a republication of the notes of the defendant. The claim of respondent that this agreement was signed by reason of duress, in that he was afraid that suit would be brought, is not legally good, because this in itself would not constitute duress. A threat to exercise a valid, legal right cannot be construed to be an act of duress. There is no evidence that the plaintiff was aware of the fact that the defendant had signed a false statement at his bank with reference to his indebtedness, and was, therefore, afraid if suit was brought it might cause him trouble with the bank. There is no evidence that defendant was without any understanding on November 13, 1924; in fact, the only evidence as to his mental status was that he did not remember at the time of trial what was said on the date when he signed the agreement waiving the bar of the statute of limitations against the notes, except that he was physically in bad health at or about the time he signed this agreement, no definite date being fixed as to when he was physically in such ill health. There is, in fact, no evidence whatever as to his physical condition or as to his mental incompetency or condition on the particular day when the agreement of waiver was signed.

As a part of the same agreement made on November 13, 1924, the defendant agreed as follows: "Debtor hereby guarantees the payment, not later than December 13, 1924, (or if suits aggregating more than $2500.00 are pending or instituted, as aforesaid, then at the time such suits are instituted), of all sums now due from Helen K. Smith (sometimes known as Helen Keating Smith or H. K. Smith) to Creditor, whether such claims are now or may be hereafter barred by the statute of limitations."

The consideration for this agreement was that Smith desired the creditor to defer bringing action on any of the indebtedness which he admitted was due from him at that time, and the creditor agreed to defer bringing such action only upon condition that Smith enter into the agreement in the form as signed. The creditor forbore to institute at any time before December 13, 1924, any action against Smith based on any or all of his indebtedness, unless the action or actions pending or instituted against Smith involved in the aggregate more than $2,500. The consideration was ample and the only questions raised are: First, whether or not the agreement of guaranty is good even though made for a consideration; and, second, whether or not respondent Smith was entirely without understanding at the time he signed this agreement on November 13, 1924. As to his mental incompetency, we have covered that point in a preceding portion of this opinion.

[3] As to the question of whether or not an agreement to pay the debt of another is good when the indebtedness of the other has been outlawed by the statute of limitations, that is a question that has been determined differently in different jurisdictions, usually depending upon the particular facts and circumstances attending the particular transaction. Upon the face of the record, it appears that all of the notes of his wife that were guaranteed by the defendant had become outlawed before his agreement to pay all of these notes was made. There was ample consideration, as we have said before, for the making of this agreement. The trial court found that this guaranty in writing of the notes signed and executed by Helen Keating Smith was signed at a time when "the defendant had been ill, and defendant's condition of mind and his nervous and physical condition was such that he did not have any clear conception of what he was doing or what it meant to him when he signed and executed the said waiver of any right to plead the bar of the statute of limitations and the said guarantee of said notes of Helen Keating Smith as aforesaid, and that he did not freely or understandingly give assent or consent thereto and that he did not know the nature and consequence of his act or acts.

"That prior to November 13th, 1924, the plaintiff threatened the defendant to institute proceedings against him to recover on said notes and to issue and levy attachments in said legal proceedings.

"That the defendant was conducting his business with money borrowed from his bank and that in order to obtain such credit, it has been necessary for the defendant to submit to the said bank a financial statement, and upon making up such statement the defendant has failed to list thereon any debt or debts evidenced by the promissory notes aforesaid in that the said defendant believed at that time that the said plaintiff would not require him, the defendant, to make any payment thereon or thereunder.

"That at the time the defendant was requested by the plaintiff to enter into the contract of November 13, 1924, the plaintiff threatened the defendant that unless he entered into such contract it would cause action or actions to be commenced against him and would attach and levy upon any and all property which it could discover as belonging to him, and the defendant informed the plaintiff that such action or actions instituted against him would ruin his credit with his bank and make it impossible for him to carry on and continue his business, which was that of a real estate dealer or broker. That notwithstanding the representations made by the defendant to plaintiff as aforesaid and notwithstanding the defendant's physical and nervous condition, the plaintiff continued to threaten to commence legal proceedings against the defendant and to issue attachments, and that by reason thereof the defendant was unduly influenced by such threats and was compelled to and did sign the said contract or contracts dated November 13, 1924, and that the defendant did not understand the nature and consequence thereof or the obligation or obligations he was assuming thereby, and that by reason thereof there was no assent or consent on his part, as aforesaid."

There is, however, in the evidence before us, nothing which would justify the said findings or any part thereof, except only that the plaintiff did threaten defendant to institute proceedings to recover on his notes and to issue and levy attachments in such legal proceedings, and, as we have said before, a threat to exercise a legal right cannot in itself constitute duress. The court does not find, and it is not in evidence, that the plaintiff was aware of the fact that the defendant had concealed from his bank when borrowing money any knowledge of the notes signed by him in favor of the plaintiff. There is evidence that the defendant discussed at this time, when the court finds that he was incompetent, the fact as to what effect the bringing of the suits would have upon his credit with the bank, and also otherwise as to his business in general. There is no evidence that would justify the court in finding that the defendant did not understand the nature or consequence of the contract of November 13, 1924, or the obligation or obligations that he was assuming thereby.

Under all the circumstances shown by the evidence, we are of the opinion that the agreement of November 13, 1924, was also valid in so far as it constituted a guaranty of the notes executed by the wife of the defendant, and made him liable to the plaintiff therefor.

One judgment having been entered in the two consolidated actions, the order of this court is that the judgment of the lower court be, and the same is hereby, reversed.

CONREY, P. J.

I concur in the judgment. There are two principal questions in the case. The first relates to the admissibility of testimony offered by defendant to prove that he was not legally obligated on the notes signed by him. The second relates to the validity of defendant's guaranty of his wife's notes, these notes having been outlawed at the time when the guaranty agreement of defendant was made.

The notes executed by defendant were promises to pay money, "in gold coin of the United States." Each note contained this further statement: "All amounts hereafter coming due to me from said Santa Ana Sugar Company are hereby assigned to it to be applied in payment of this note until it is fully paid." Defendant's answer admits that the moneys received by him were advances made to him for the purposes of planting and cultivation of his beets "until the crop was ready for marketing, when the plaintiff would purchase such crop from the defendant." It is thus established that the oral evidence received by the court, to the effect that in certain contingencies the defendant would be excused from liability, was testimony received for the purpose of modifying the express provisions of the notes. The objections to such evidence should have been sustained.

The second question seems to be not very difficult, when one keeps in mind the fact that the notes given by defendant's wife had become outlawed *before* the guaranty agreement was made. This fact at once excludes such cases as Anderson v. Shaffer, 98 Cal. App. 457, 277 P. 185, which are authority for the proposition that where the obligation of the principal debtor has been allowed to expire by limitation *after* the time of making of the guarantor's promise, the creditor may not, under such circumstances, enforce the guaranty. But there is no rule or policy of law which should prevent one from entering into an agreement of guaranty of payment of a barred debt, where the guaranteed obligation is not itself tainted with any element of illegality.

I also agree with the conclusion that the evidence does not support the finding of the lower court that defendant was not competent to make the contracts, or the finding that they were made under duress.

HOUSER, J.

I dissent. In the first action it appears that, based upon a proper pleading which was supported by sufficient evidence, the trial court made specific findings of fact which constituted fraud on the part of the plaintiff in inducing defendant to sign and to deliver physical possession of each of the instruments upon which such action was founded. In addition thereto, as expressly provided by the terms of section 3097 of the Civil Code, as between the immediate parties to a negotiable instrument, "the delivery may be shown *to have been conditional, or for a special purpose only*, and not for the purpose of transferring the property in the instrument." Numerous authorities fully support the conclusion that, having established either fraud in the inducement of the execution of the asserted instrument, or that no legal delivery thereof was either intended or had by its maker, no recovery of a judgment may be had on such instrument by its immediate payee.

As to the second action, since it appears that the assumed guaranty by the defendant of each of the promissory notes in question was made after an action on each of such notes was barred by the statute, it is clear to my mind that the attempted guaranty created no legal obligation in favor of the payee of either of such notes as against the quasi guarantor.

116 Cal.App. 506

LUSARDI v. PRUKOP.

NOLES v. SAME.

Civ. 7811.

District Court of Appeal, First District, Division 1, California.

Sept. 4, 1931.

Rehearing Denied Oct. 3, 1931. Hearing Denied by Supreme Court Nov. 2, 1931.

1. Evidence 🔑373(1).

Hospital records and witness' testimony based thereon introduced to determine if defendant had been admitted to hospital *held* inadmissible, in absence of testimony that entries were made under witness' supervision, or that he recognized handwriting or knew party making entries (Code Civ. Proc. §§ 1920, 1926).

2. Trial 🔑194(1).

Court is not permitted to comment on weight of evidence.

3. Evidence 🔑502.

When evidence of descriptive physical condition borders on opinion evidence, cross-examination should be permitted.

4. Evidence 🔑314(1).

Hearsay rule is applicable to written instruments as well as to oral statements.

5. Evidence 🔑320.

Testimony based on memoranda made by others when witness has no knowledge of facts except from such memoranda is hearsay evidence.

6. Appeal and error 🔑1170(7).

Permitting witness to base testimony that defendant had "alcoholic breath" when admitted to hospital after automobile accident on hospital records introduced without sufficient foundation *held* prejudicial error (Code Civ. Proc. § 1845; Const. art. 6, § 4½).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Consolidated actions by Mary Lusardi and by Clifford Noles against John Prukop. Judgments for plaintiffs, and defendant appeals.

Reversed and remanded for new trials.

Edmund J. Holl, of San Francisco, for appellant.

J. E. McCurdy, of San Mateo, for respondent.

WARD, Justice pro tem.

These are actions for personal injuries consolidated for trial wherein judgments were entered for each plaintiff. The cases have likewise by stipulation been consolidated on appeal.

[1-3] Defendant Prukop filed a cross-complaint against the plaintiff Noles wherein he claimed damages. During the trial plaintiffs deemed it material to establish the particular hospital to which defendant had been taken after the accident. Accordingly witness Monahan, the storekeeper of the Central Emergency Hospital in San Francisco, who had charge of the records of all emergency hospitals in San Francisco, "when the books are filled up," was called as a witness. He testified that the records were correct, but it was clearly demonstrated that Monahan had reference simply to the fact that it was a record containing the names of patients. There was no testimony that the entries were made under the witness' direction or supervision or that he recognized the handwriting or even knew the party or parties who had made the various entries. The evidence does not disclose whether these entries were made by any person in the performance of a duty enjoined by law (see section 1920, Code Civ. Proc.) or under the direction or in the presence of an officer of any board authorized to make such entries (see section 1926, Code Civ. Proc.). Respondent contends that the only purpose of the introduction of this evidence was to determine if Prukop had been admitted to the Mission Emergency Hospital. Without laying the proper foundation this evidence was admitted. Up to this point defendant was not prejudiced, though the objection to the introduction of the record and the testimony of the witness Monahan should have been sustained. Plaintiff's attorney pressed the matter further after eliciting the residence of the defendant, the time of his arrival, etc., by asking the following question: "What do you find in that book of the record that is made there of the condition of John Prukop when he was brought into the hospital." This question brought forth an objection that "no foundation has been laid and that it is hearsay evidence" to which the court agreed. Later, the following appears in the transcript: "Q. The

condition of the patient. A. The condition of the patient in the book is 'alcoholic breath.'" Counsel for defendant moved to strike out the answer, assigned the asking of the question as misconduct, and requested the court to instruct the jury to disregard the testimony. Further on the witness repeated "Condition of patient. Alcoholic breath." Again counsel for defendant repeated his objection motion, etc., and the court commented as follows: "As far as it goes, the testimony does not hurt you, as far as it goes now." Respondent contends that, if it was error to admit this evidence, it was cured by the statement of the court. The court is not permitted to comment upon the weight of the evidence. Respondent further contends that the witness did not testify that the defendant had an alcoholic breath, but that the record book stated that defendant had an alcoholic breath; that it was not hearsay evidence from the witness but a fact from the record. The answer to this contention is that the record was hearsay. When evidence of a descriptive physical condition borders upon opinion evidence cross-examination should be permitted. The defendant in this case was precluded from interrogating the person who wrote in the hospital record the fact or opinion that the defendant had an alcoholic breath.

[4, 5] The statement that Prukop had an alcoholic breath would immediately give rise to a conclusion that there was some lack of sobriety or that he was intoxicated. Such evidence has a tendency to raise a prejudice against the driver of an automobile and this is particularly true of a case wherein the defendant filed a cross-complaint alleging negligence on the part of plaintiff and cross-defendant. Section 1845, Code of Civil Procedure, provides as follows: "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible." In the case of Stevens v. San Francisco & North Pacific Railroad Company, 100 Cal. 554, the court said, at page 570, 35 P. 165, 169: "Intemperance, sobriety, and drunkenness are facts to be proven like other facts. The proffered evidence was hearsay, concerning which Greenleaf, at section 99, vol. 1, of his work on Evidence, says: 'Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge.'" The hearsay rule is applicable to written instruments as well as to oral statements. 10 Cal. Jur. p. 1039. Testimony based upon memoranda made by others when the witness has no knowledge of the facts except from such memoranda is hearsay evidence. See Barlow v. Frink, 171 Cal. at page 172, 152 P. 290. The verdict of a coroner's inquisition is inadmissible. Estate of Dolbeer, 149 Cal. at page 246, 86 P. 695, 9 Ann. Cas. 795; Hollister v. Cordero, 76 Cal. 649, 18 P. 855; Rowe v. Such, 134 Cal. 576, 66 P. 862, 67 P. 760; Mar Shee v. Maryland Assurance Corporation, 190 Cal. 3, 210 P. 269. The report of a grand jury of a county is hearsay. Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899.

[6] The evidence was conflicting as to the exact spot that the impact occurred. Just prior to the impact plaintiff was driving on the south-bound car track; defendant on the north-bound street car tracks. Needless to say, if they had continued on their respective way, this accident would not have occurred. Each side contended that the other driver had swerved over to the wrong side of the street. Under such circumstances a jury is very likely to decide against a driver with an alcoholic breath. There was considerable conflicting evidence relative to the proximate cause of this accident. A different verdict could have been and might have been reached if this prejudicial evidence was absent. This is not a case wherein we can apply the provision of section 4½ of article 6 of the Constitution. The evidence was inadmissible as presented; it was prejudicial to the rights of the defendant and precluded him from having a fair and impartial determination of his case.

The plaintiff, Mary Lusardi, was a passenger in the car driven by plaintiff Noles. The main issue in her case was whether or not Prukop was negligent. If the jury had returned a verdict in favor of Prukop against Noles, they could not have reached a verdict in favor of Lusardi against Prukop. The conclusion reached upon this point eliminates the necessity of considering other assignments of error.

The judgments are reversed and the causes remanded for new trials.

We concur: TYLER, P. J.; CASHIN, J.

116 Cal.App. 294

CARL et al. v. THOMAS.

Civ. 902.

District Court of Appeal, Fourth District, California.

Aug. 25, 1931.

Rehearing Denied Sept. 17, 1931. Hearing Denied by Supreme Court Oct. 22, 1931.

1. Continuance 🔑**7.**

Generally, application for continuance is addressed to trial court's discretion.

2. Continuance 🔑**19.**

Refusing continuance for defendant's involuntary absence where neither defendant nor his counsel were at fault *held* abuse of discretion (Code Civ. Proc. § 595).

> Facts disclosed that the defendant was an officer of the Coastal Guard; that he had arranged his leave of absence to cover period set for trial; that defendant's counsel sent him letter, notifying him that case had been set for trial; and that defendant's statement that he did not receive such letter, and that he could and would have been at the trial if he had received it, was unimpeached.

3. Continuance 🔑**35.**

Admission in court by plaintiffs' counsel, unaccepted by defendant's counsel, that defendant, if present, would have testified contrary to plaintiffs' testimony, *held* not to correct error in refusing continuance for defendant's involuntary absence.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Suit by Mary C. Carl and another against Earl J. Thomas. From adverse judgment, defendant appeals.

Reversed.

Curtis Hillyer and W. E. Hardenburg, both of San Diego, for appellant.

Edward H. Whelan, Thomas Whelan, Philip Smith, and Vincent Whelan, all of San Diego, for respondents.

FINNEY, Justice pro tem.

The original complaint in this action sets forth two causes of action: First, an action to quiet title, containing the usual averments; and second, a cause of action for cancellation, as to the defendant, of a deed from one Hartley, conveying to all of the parties, as joint tenants, the property described in the complaint, on the ground that the defendant's interest in the property had been obtained by him through fraud and deceit. The answer denied all the material allegations of the complaint, except the conveyance to and from Hartley, and set up full ownership in the defendant of the property in question.

The defendant was an officer of the Coast Guard attached to the United States steamship Seminole, with headquarters at Stapleton, New York, and the vessel was engaged in chasing rum-runners. The defendant employed his attorneys through correspondence and had never personally consulted with them.

It should be noted here that the plaintiff Thomas and the defendant Thomas intermarried November 9, 1911, and were divorced in 1927, the final decree being entered May 22, 1928. The plaintiff Carl was the mother of the plaintiff Thomas, and much of her testimony was devoted to relating the evil traits of her former son-in-law, the defendant Thomas. In fact, the unhappy domestic relations of the parties, in former years, as the plaintiffs conceived it, gave a dark color to their testimony, and in this instance, absence did not make their hearts grow fonder. No mention of the property involved in this suit was made in any of the papers in the divorce action, although the property had been acquired long prior thereto.

In November, 1928, this case, at the request of the defendant was replaced on the court's waiting list in such order that it would be called for setting at the second March call of the court's calendar and would result in a setting for trial after April 1, 1929. The defendant was duly notified thereof by his attorneys in a letter dated November 26, 1928, and in the same letter was requested to be in San Diego a few days in advance of the date of the trial, "of which we will advise you in due course." Acknowledging receipt of this letter from his attorneys, the defendant wrote, on December 17, 1928, "I will make every effort to be present at the date mentioned in your letter." In the latter part of February, 1929. the defendant wrote his attorneys that his application for a leave during the first part of April had been denied. However, on March 6, 1929, the defendant wired his attorneys as follows: "Set case, my leave approved. Will be present." And on March 12, 1929, he, wrote them as follows: "My application for leave has been reconsidered and approved so that I may be present when the case is called. Therefore it will not be necessary for us to put the case off. I feel as if we have a fair chance to win." On March 18, 1929, the case was regularly set for trial on Friday, April 12, 1929, and on the same day, March 18, 1929, defendant's counsel wrote him as follows:

"This case has been set for trial on April 12, next. I would suggest that you time your departure from New York so as to reach here two or three days at least before the trial, as there are many things I want to take up with you. Be sure and bring with you all records, letters, agreements, deeds, and other papers relating to transactions between yourself and the plaintiffs concerning this property or concerning any matter relevant thereto. As you know, I have only an imperfect understanding of your version of the case and must familiarize myself with all of the facts. It is our custom to collect our fees before trial. In addition there will be some small charges for costs and possibly service of process. Hoping to see you several days before the 12th, I remain,

"Yours very truly, W. E. Hardenburg."

This communication was placed in a sealed envelope addressed to the defendant at his last known address, and with postage prepaid, deposited in the United States mail at San Diego. It has never been returned to the sender, although it bore on the outside of the envelope a request for return and his name and address. On April 12, the day of the trial, the defendant had not appeared, nor in any way explained his absence, and his counsel, appearing at the opening of court on that day on the call of this case, so stated to the trial judge and called his attention to the facts and circumstances substantially as set forth above, and to the further fact that they had already on that day sent a wire of inquiry back to New York, and thereupon counsel asked for a continuance of the case for a few days until they could find out what had become of the defendant. The court thereupon continued the trial until 2 p. m., at which time the attorneys for defendant reported they had received no reply to their telegram and thereupon the court ordered the parties to proceed with the trial. Testimony was taken during the remainder of the day and at 5 p. m. the case was continued to Monday, April 15, 1929. At the opening of court on April 15th, counsel for defendant informed the court that on April 12th they had wired defendant as follows: "Case set for today, stop, for information of court wire reason for failure to appear." And on April 13th they had received a telegram from him as follows: "I did not receive any notice from you whatsoever the case was to be called today, if so would have been present. Please inform me the action of the court and set case ahead as far as possible. I depart for sea voyage early tomorrow morning." Counsel also presented to the court a wire which they had sent to J. L. Ahern, the defendant's commanding officer, as follows: "Where is Earl Thomas: his trial is proceeding: wire answer collect." And the reply received from Ahern, as follows: "Earl Thomas is aboard this vessel: ship now at sea." Thereupon counsel urged the court to continue the case twelve or fifteen days so that the defendant would have a chance to attend the trial and offered to consent, at the expiration of said period, to proceed with the trial without objection, if the defendant did not appear. The motion for continuance was denied, and the taking of testimony was resumed. On each foregoing occasion, after the denial of their motion for a continuance, defendant's counsel asked and obtained permission from the court to prepare and file an affidavit embodying the matters orally set forth as the basis of such motions respectively, and such affidavits were duly filed.

Thereafter, on April 17, 1929, counsel for plaintiffs, having discovered the existence of a deed which purported to be signed by the plaintiffs and to convey to the defendant the entire interest of the plaintiffs in the property in question and which had been filed for record in the recorder's office on June 8, 1928, several months after the filing of this suit, asked and obtained leave to amend and supplement their complaint by adding thereto a third, fourth, and fifth cause of action, one of them—the third—being directed against, and asking for the cancellation of, the above-mentioned deed, which was received in evidence as Defendant's Exhibit A. It is not necessary to detail the fourth or fifth causes of action, except to say they raised new issues which, however, could have been added appropriately to the original complaint when it was filed.

Counsel for the defendant objected vigorously to the court's action in permitting the filing of the amended and supplemental complaint upon the ground that it worked a surprise on the defendant and that it set up several wholly different causes of action under the guise of an amendment. This objection was overruled and the defendant excepted, and thereupon his attorneys moved the court for a continuance until May 20, 1929, on the grounds of surprise, lack of opportunity to consult with their client regarding the new causes of action and the receipt of a letter from their client dated April 12, 1929, which read as follows: "I depart Saturday, April 13. Will be at sea for five days. Will be able to be present any time but now there has been a mixup, if it is put forward to May 15, I will be able to get excursion rates to California." The motion for a continuance was denied and, late in the afternoon of the same day, after taking further testimony, the plaintiffs rested. Thereupon defendant's counsel again moved for a continuance, which was denied, and an exception was taken. Being directed to proceed, the defendant's attorney, Mr. Hardenburg, then stated to the court: "The defendant will also have to rest. We have no testimony to offset this new testimony. We have already introduced this deed (Defendant's Exhibit A) in evidence, and that is a complete answer to all causes of action in the original complaint; but we have no evidence to offer on the allegations contained in the amended and supplemental complaint and the various causes of action stated therein." The court then directed the parties to proceed to the argument.

The court found that the plaintiffs did not know, until the Hartley deed had been delivered, that the defendant's name appeared as grantee therein; that upon discovery of said fact, the defendant promised to pay plaintiff Carl $25, and plaintiff Thomas $50, per month for the remainder of their lives; and that plaintiffs relied upon said representations, although they were made with the intent to deceive and defraud the plaintiffs.

As to the deed, dated December 22, 1925, received in evidence as Defendant's Exhibit A, the court found that the defendant induced plaintiffs to sign it upon the false representation that it was an application for an allotment of a portion of his pay; that the defendants were in fear of him at the time, but nevertheless believed his statement, and did not see nor understand that the paper was a conveyance of real estate; that the plaintiffs had no knowledge of the form of deeds except those written on a printed form; and that the plaintiffs never acknowledged the deed and never received any consideration for such conveyance.

The judgment ordered that the Hartley deed be canceled in part by striking out and obliterating therefrom, annulling and voiding therein the name of "Earl J. Thomas." It further adjudged that the deed identified as Defendant's Exhibit A was not the deed of the plaintiffs and "did not convey, and does not operate as a conveyance to, said real estate." The judgment concluded by quieting title of the plaintiffs as against the defendant Thomas and all persons claiming by, through or under him.

Within due time after the entry of said judgment, defendant filed and served notice of his intention to move for a new trial on the grounds of: (1) Newly discovered evidence; (2) accident or surprise; (3) irregularity in the proceedings of the court; (4) insufficiency of the evidence; (5) errors in law; the motion being supported by affidavits.

Defendant takes this appeal from the judgment entered against him pursuant to the findings and order of the court made herein.

[1-3] While many questions are raised and discussed in the briefs, in the view we take of this matter, it will not be necessary for us to consider any of them except the rulings of the court in denying defendant's several motions for a continuance. While it is true, as a general rule, that an application for a continuance is addressed to the sound discretion of the trial court and that postponements of trials are not favored (Swayne & Hoyt v. Wells-Russell & Co., 169 Cal. 204, 146 P. 686), we think, nevertheless, the facts in this case disclose a clear abuse of discretion. There is no evidence in the record that the defendant received from his counsel the letter dated March 18, 1929, notifying him that his case had been set for trial April 12, 1929, except the presumption that a letter deposited in the mails will arrive at its destination and be delivered to the one to whom it is addressed, or be returned to the sender, if it bears his name and address on the outside. But we know many letters are lost in the mails, both with and without "returns" on them, and this presumption, standing alone, cannot prevail against the positive statement of the defendant, otherwise unimpeached, that he did not receive the letter, and that he could and would have come to the trial if he had received it. Neither counsel nor defendant was in any way at fault for defendant's failure to appear. Timely notice had been sent by counsel, defendant had arranged his leave of absence to fit this particular period, and we must conclude, on the showing made, that the defendant would have been on hand for the trial, if he had received the letter referred to.

We think the court erred in each instance in denying the applications for a continuance, on the showings made, the first two of which showings were, with the permission of the court, subsequently reduced to writing in the form of an affidavit by defendant's counsel, as required by section 595, Code of Civil Procedure. The defendant was the only person, except the plaintiffs, who, so far as the record shows, had personal knowledge of many of the important issues decided by the court and was, therefore, the only person who could have corrected the plaintiffs' testimony on those issues, if it was in error. The trial of this case, in the involuntary absence of the defendant, amounted to a denial to him of his day in court and the admission in court by counsel for the plaintiffs, unaccepted by defendant's counsel, that defendant, if present, would have testified contrary to the plaintiffs' testimony, will not correct the matter. Moreover, there was no showing that the plaintiffs would have suffered any injury or prejudice by a short continuance in this case, except that it appeared that the plaintiff Carl is an elderly lady and in feeble health. This situation might have been met by taking her deposition or allowing the continuance after she had given her testimony in the case, and thus the time and expense wasted in this trial would have been avoided.

For the reasons indicated the judgment appealed from is reversed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

116 Cal.App. 489

SCHLAGETER et al. v. CUTTING.

Civ. 7594.

District Court of Appeal, First District, Division 1, California.

Sept. 3, 1931.

Rehearing Denied Oct 3, 1931. Hearing Denied by Supreme Court Nov. 2, 1931.

1. Contracts 🔑333(5).

Where agreement forming basis of action was pleaded in haec verba, whatever designation parties gave agreement would not limit terms thereof.

2. Mines and minerals 🔑34.

Where lease of mining claim contained option to purchase and required lessee to make regular payments, lessor *held* entitled to payments made by lessee to escrow holder after taking possession, whether such payments were deemed rental or payment on purchase price.

3. Mines and minerals 🔑18.

Conflict, if any, in calls of mining claim, *held* immaterial where there remained enough in notice of location to identify ground appropriated.

4. Mines and minerals 🔑29(1).

In common parlance, full mining claim is one exhausting allotment of one location.

5. Mines and minerals 🔑18.

One may locate as mining claim smaller area than maximum permitted.

6. Mines and minerals 🔑34.

Where vendor agreed to convey mining claim as described in location notice, presumption obtained that purchaser knew of boundaries of location prior to purchase, in absence of effort to reform.

7. Mines and minerals 🔑18.

If, by any reasonable construction, in view of surrounding circumstances, language employed in describing mining claim will impart notice to subsequent locators, it is sufficient.

8. Mines and minerals 🔑18.

Description of mining claim purporting to commence at northwest center monument of another claim *held* sufficient to designate boundaries of claim under circumstances, although first claim ran in northerly and southerly direction.

> The circumstances disclosed that the language was employed for purpose of adopting the north center monument as distinguished from south center monument.

9. Mines and minerals 🔑18.

Locator of mining claim could describe its boundaries by accepting monument of adjoining claim as his point of commencement.

10. Mines and minerals 🔑17(1).

Where location of mining claim is made before discovery, subsequent discovery before any adverse rights intervene cures original defect (Civ. Code, § 1426).

11. Mines and minerals 🔑38(17).

Evidence *held* to establish sufficient discovery to validate location of mining claim, even if there had been no discovery before location (Civ. Code, § 1426).

12. Deeds 🔑36.

Conveyance need only use word "grant" to convey estate in fee simple absolute.

13. Deeds 🔑121.

Deed containing phrase that grantors "grant, bargain, sell, remise, release, and forever quitclaim" *held* to convey absolutely whatever rights grantors had, notwithstanding word "quitclaim."

14. Trial 🔑397(5).

Where findings on allegations of counterclaim disposed of issues raised by cross-complaint, court *held* not required to make finding on cross-complaint.

15. Mines and minerals 🔑38(21).

Evidence *held* insufficient to establish vendor evicted purchaser from mining claim but rather that purchaser abandoned property.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by C. C. Schlageter and another against H. C. Cutting. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Mark R. Averill and M. S. Hamilton, both of Oakland, for appellant.

Louis J. Trabucco, of Oakland, and Louis T. Milburn, of Mariposa, for respondents.

PER CURIAM.

This action was brought by plaintiffs to recover from defendant the sum of $2500, alleged to be due under the terms of a certain written agreement. The case was tried by the court, without a jury, and judgment went for plaintiffs, as prayed. Defendant appeals.

On October 5, 1928, the plaintiffs as parties of the first part, and defendant as party of the second part, executed a certain instrument designated by its terms as an agreement of lease and option to purchase. It might be here noted that another party was associated with defendant in the beginning, but inasmuch as defendant had acquired all of the right, title, and interest of his associate prior to the events surrounding the present controversy, it is conceded here that the latter has no interest in the proceedings. Therefore, further reference to this feature of the agreement will be omitted and the discussion which follows will include only the parties to the action.

The salient parts of the agreement may be epitomized as follows: "The parties of the first part hereby lease to the parties of the second part, * * * the following described mining ground with an option to purchase same, on the terms and conditions herein set forth." The property referred to consisted of two mining claims described as: "The Patricia Mining Claim located in Quartzburg Mining District, Mariposa County, California, and recorded in Vol. 3 of Quartz Records, Mariposa County at page 333 and the Charles Mining Claim located in said district and same county and recorded in Vol. S, at page S." (sic), the claims being further described as adjoining claims. The parties of the first part guaranteed immediate and undisturbed possession for a period of two years from date of agreement and agreed further to place in escrow a good and sufficient deed for said mining ground made to parties of the second part within six months from the date of agreement, provided that the parties of the second part began work on the ground within ten days and continued said work and paid to the escrow holder for the parties of the first part, or their order, a royalty of 15 per cent. of the gross values extracted from ores taken from said ground until such royalties should aggregate the sum of $17,500, which is the full purchase price for said claims; it being specifically provided, however, that should the royalties fail to reach the amount of the payments in the instrument provided, any difference must be made up by the parties of the second part. The payments provided for were as follows, namely: Twenty-five hundred dollars on May 1, 1929; $5,000 on October 15, 1929; and $10-000 on October 15, 1930. The remaining provisions of the contract are unimportant, as far as the present controversy is concerned.

Under this agreement defendant entered upon the property and did commence active mining, embracing exploration and extraction and such development work as the agreement required. On May 1, 1929, defendant was still in possession of the property and in compliance with the agreement delivered to the escrow holder the sum of $2500 by check, which was subsequently reduced to cash and still remains with the said depositary. As will be noted from the terms of the instrument, the parties of the first part were to place in escrow a good and sufficient deed conveying the property to the parties of the second part within six months after the date of the agreement. This provision would require that the deed be so deposited on or before April 5, 1929. It is conceded that the deed was not deposited until May 22, 1929, or thereabouts. No point is made on this delayed deposit, excepting in a rather perfunctorily inclusive way. Appellant here concedes that if the deed deposited meets the requirements of a good and sufficient deed, the question of the delay is unimportant. In any event, the record discloses that all parties acquiesced in the delay and appellant made his payment to the escrow holder, to be held until the deed was deposited. Clearly, under the record before us, the date of delivery becomes unimportant, inasmuch as appellant remained in possession of the property, continued operating the same, and suffered no loss, directly or indirectly, through the failure of respondents in this respect. After the deposit of the deed, appellant refused to permit the release of the money to respondents, claiming that the deed of conveyance was insufficient and did not convey the property contemplated in the agreement. Thereafter appellant removed from the ground.

[1, 2] Appellant, in seeking a reversal of the judgment, urges several grounds which will be taken up in the order presented. First, appellant argues that the instrument in question was nothing but a mere option to purchase and was so found by the trial court; that the option was never exercised and therefore no cause of action exists against him. It is true that in the pleadings the agreement is denominated an agreement for the purchase and sale of certain property, but as a part of the allegation the agreement is pleaded in haec verba. Therefore whatever designation the parties might choose would not limit the terms of the instrument. The writing itself shows the nature of the agreement, and from that writing it is obvious that while an option to purchase was given appellant, yet also the instrument is in the nature of a lease having a fixed term, with regular payments reserved at stated intervals. These payments were independent of the purchase, though in the exercise of the option by final payment all intermediate payments would be credited upon the total price. The terms of the lease provided that appellant should operate the property and from the ores extracted should pay respondent 15 per cent. of the gross values of all ores extracted, and that should appellant determine to exercise the option contained in the lease then all such payments as royalties should be applied on the stipulated purchase price. Yet, irrespective of the royalties, there were certain definite payments provided for, upon which payments possession of the premises was conditioned. Whether these payments were in the nature of

an exercise of the option to purchase or in the nature of rental under the terms of the lease could be determined only after the final payment had been made. It seems clear that if appellant had remained in possession and had made the first two payments and thereafter decided that he would not exercise the option by payment of the final installment, in which event there could have been no sale, the first two payments could not be classed as payments on the purchase, but rather as rental under the lease. On the other hand, appellant under his option was privileged to exercise the same through installment payments applying on the purchase price. Therefore the payment of $2,500 to the escrow holder under the terms of the agreement must be deemed a payment either as rental or on the purchase price. Appellant, here contending that the entire transaction was but an option to purchase, must then concede that the payment was made in the exercise of the option and if so made thereupon, at least pro tanto, and to an extent sufficient for present purposes, the transaction became one for the purchase and sale of the property. Whichever view we take, ample support is found for the trial court's conclusion that the amount of the payment, namely $2,500, was due to the respondents under the terms of the contract. Appellant next raises the question as to respondents' ownership of the property involved. It is urged the record discloses that the ground involved is still unappropriated public domain and that respondents could not by any form of conveyance transfer title thereto. And, further, that irrespective of the form of the deed, no title could thereby be conveyed by reason of respondents' lack of ownership.

[3-6] It is argued that the Charles Mining Claim is not a full claim. In other words, that the ground embraced in the Charles Mining Claim does not embrace the usual twenty acres; that it is not fifteen hundred feet long and six hundred feet wide. This contention is based upon the wording of the location notice, which reads: "Commencing at a shaft * * * and running from said shaft * * * a distance of 750 feet in a Northerly direction and thence in a Southerly direction 750 feet to a stake." It is obvious that this description would take in only seven hundred fifty feet of the lode, inasmuch as the second call was merely a retracing backward of the first line. We deem it unnecessary to go into any elaborate discussion of the rules governing construction of certificates of location. It is conceded that these notices are liberally construed and are to be read as a whole. If there are conflicting calls, it is of no consequence if there remain enough in the notice of location to identify the ground appropriated. The entire subject is discussed in Lindley on Mines (3d Ed.) vol. 2, § 379. The further description contained in the location notice would serve to identify the ground in any event. After the words quoted hereinbefore, the notice reads: "To a stake in mound of rock at each end center, * * * The corners and side lines of this location are distinctly marked by stakes in mounds of rocks, and the same is situated about 2½ miles westerly from the town of Bear Valley, and was formerly * * * owned by Angelo Sperriero and recorded by him in book H. of Quartz Records at page 363 and 364 of said book, Mariposa County Records." We know of no law or statute, and none has been cited to us, which either expressly or by construction requires that a mining claim be fifteen hundred feet long and six hundred feet wide. One may locate as much of the public domain as he desires, providing that each location shall be no larger than the area specified. In common parlance, a full claim has been deemed to be one exhausting the allotment of one location, but there is nothing to prevent a location of a smaller area. There is nothing in the agreement which specifies the Charles Mining Claim to be other than that ground located and described in the recorded notice, which notice is used as the means of description of the area involved. All that respondents agreed to do was to convey the Charles Mining Claim as the same appeared in the location notice recorded and this was what appellant agreed to accept, pursuant to the terms of the contract; the obligation of appellant being of course optional. In any event, the subject of the contract was the mining ground described, and in the absence of any effort at reformation or correction, we must conclude that appellant knew of the boundaries of the location prior to his execution of the instrument.

[7, 8] Appellant next argues that the Patricia Mining Claim did not exist at all and that there was no valid location of the ground attempted to be embraced within the location. The description of the claim is as follows: "Commencing at the Northwest center monument of the Charles Mine and running in a Northwesterly direction 1500 feet along the course of vein, lead or lode, to a stake. * * * The corners and side lines of said vein are distinctly marked so that the boundaries can be readily traced. Said location being situated in Sec. 19, Twp. 4, South, Range 17 East and is on the Easterly slope of Bear Valley Mountain about 2 miles Northwesterly from the town of Bear Valley, and being the Northwesterly Extension of said Charles Mine and was formerly known as the Golden Gate Mine." Appellant contends that there can be no such point as the northwest center monument of the Charles Claim for the reason that the latter claim, being a north and south claim, could have no northwest center monument. Referring again to the text, Lindley on Mines, and the numerous authorities therein cited, we accept the doc-

trine therein announced that if by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient. If, as is true, there could be no northwest center monument, it is manifest that the descriptive word of location could not change the center. The notice did state that the claim commenced at the center monument and, as appellant points out, there could be no other center than that point actually midway between the east and west lines. The further description that the ground claimed was the northwest extension of the Charles Mining Claim would sufficiently identify the point of commencement. And, it being accepted that the course of the Charles lode or claim was northwest and southeast, the language employed was obviously for the purpose of adopting the north center monument as distinguished from the south center monument.

[9] Next, appellant claims that there was no discovery sufficient to support the location of the Patricia, the location therefor being invalid. His argument goes to the effect that the discovery must be at the point of commencement or near thereto, and that the point of commencement being on the end line of located ground there is no unappropriated ground available for discovery. If the locator had made his discovery within two feet or two inches of the end line of the Charles Mining Claim, he surely could adopt the monument of the latter claim as descriptive of his point of commencement. In any event, he is entitled to fifteen hundred feet of the lode or vein discovered, and if the north end line of the Charles Mining Claim intersected the vein we see no reason why he could not make his discovery within a thousandth part of an inch from this line, and monument his claim, and describe its boundaries, by accepting the monument of the Charles Claim as his point of commencement.

[10, 11] Passing this point, appellant then urges that, irrespective of the place of discovery, there was in fact no actual discovery made at any time or at any place upon the Patricia Claim. The only direct testimony in the record is that of the locator that he found mineral upon the ground prior to his location. The statutes contemplate the discovery shall be of mineral bearing rock, earth or quartz in place or, as the Code section words it, a discovery of "a vein or lode of quartz, or other rock in place, bearing gold, silver," etc. Civ. Code, § 1426. Here the direct testimony discloses no such discovery. However, there is the same liberality given to the construing of this section as to other provisions of the mining code or the statutes relating to the location of mines and mining claims. The location notice states the location to be in full compliance with the laws governing. The claim is an extension of another claim whereon there seems admittedly to have been a valid location subsequent to discovery. And further, the record discloses no intervening or conflicting claims to the area embraced within the location. The record further discloses that subsequent to the location and under the contract before us the property has been mined and developed, and as a result of such work there has been taken therefrom gold in the value of in excess of $1,200, aside from a quantity of specimen ores valued at approximately $500 or in excess of said amount. A location, otherwise good, with a discovery made after location and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery, and generally from the first act towards claim and appropriation; this by relation. If the location be made before discovery but is followed by a discovery before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid. 1 Snyder on Mines, p. 354; Morrison's Mining Rights (11th Ed.) 32; Creede, etc., Mining Co. v. Uinta, etc., Mining & Transportation Co., 196 U. S. 337, 345, 25 S. Ct. 266, 49 L. Ed. 501; Tuolumne Cons. Mining Co. v. Maier, 134 Cal. 583, 66 P. 863. From the facts as hereinbefore stated, we conclude that respondents have made a sufficient prima facie case to warrant the holding that there has been a sufficient discovery to validate the location, even if we concede that there was no such discovery before location. The two claims here involved were worked together under the contract and ore was discovered and extracted in paying quantities. The appellant, in possession, as the lessee of respondents, can hardly deny this discovery, nor does he so do.

[12, 13] The foregoing disposes of the principal points urged by appellant. His attack upon the sufficiency of the deed seems to be on the theory that the deed in question is a mere quitclaim deed. Without passing upon the sufficiency of such a deed to convey title to unpatented mining claims, it will suffice to say that the deed before us is not a quitclaim deed. True, the words of conveyance include the term "quitclaim" but the full wording of the phrase of conveyance is "grant, bargain, sell, remise, release, and forever quitclaim," which phrase embraces every idea of transfer without warranty. And incidentally the deed runs to the heirs of the grantee. It is only essential that a deed or conveyance should use the word "grant" to convey an estate in fee simple absolute. Northwestern Pacific Railroad Co. v. Humboldt Milling Co., 186 Cal. 599, 200 P. 9. In the transfer of unpatented mining claims it is always to be borne in mind that the paramount title rests in the sovereign, the right of the holder or owner being classed for all purposes as the fee, subject to defeasance through failure to comply with the statutory regulations governing. In the deed before us,

the grantors have conveyed absolutely whatever right or claim they may have had to the premises and in addition thereto quitclaimed their defeasible right. We think the deed sufficient to convey the entire title of the grantors, which title we have found to be a good and marketable title based upon valid locations.

[14] It is also urged that the findings of the trial court are not responsive to the pleadings, in that there is no finding on the allegations of the cross-complaint of appellant. The said cross-complaint was but a repetition of the allegations of a counterclaim interposed upon which complete findings were made. It would be an idle thing to require a repetition of the findings on the allegations of the cross-complaint, inasmuch as the findings made completely disposed of the same issues.

[15] Appellant throughout strenuously argues that if we determine that the judgment should be affirmed then it must follow that plaintiffs' only right to the money involved is conditioned upon appellant's exercise of the option, and that if the option was exercised then appellant was entitled to the continued possession of the property and is entitled to damages for his ouster therefrom. This does not necessarily follow. After the money was delivered to the escrow holder and respondents had fully complied with the conditions surrounding the delivery to entitle them to receive the money, appellant refused to permit the release of the said fund. Appellant, at that time, was indebted to respondents on account of royalties due under the agreement, and the payment was made pro tanto in discharge of this liability, as well as for rental and purchase. As we have hereinbefore pointed out, this money was due respondents whether or not appellant desired to exercise the option of full purchase, as long as appellant held the property. Appellant did make the payment to the escrow holder to be delivered to respondents when a sufficient deed was deposited. This having been done, respondents' title to the money became absolute. Thereafter, while both the money and the deed remained in the hands of the escrow holder, appellant continued in possession of the property, extracting ore therefrom or at least working to that end, all of the time refusing to permit the escrow holder to pay the money to respondents. If the situation had been permitted to remain thus indefinitely, the value of the property could have been exhausted and destroyed and, according to appellant's contention, no liability result.

The evidence is in conflict as to the actual departure of appellant from the property. However, there is sufficient in the record to indicate that, instead of appellant being put off the property, he left because he was afraid he would not be put off. The evidence sufficiently shows that respondents, upon their failure to obtain the money, repeatedly demanded that appellant release the same; that appellant refused to do so upon the claim that the locations were invalid as hereinbefore set forth. On June 7th, in a final effort to get the money, respondents informed appellant that if there were no release they would "close him up," to which appellant replied that he did not care what respondents did. Appellant in this connection testified that he could not afford to be tied up with any lawsuit, and that upon the threat of respondents to close him up, he pulled out his machinery and left the property. We think this falls short of an eviction or even of a threat to evict. A reasonable interpretation of the testimony supports the conclusion that the respondents intended to prevent further working of the property until payments had been made under the terms of the agreement and in this they were within their rights. If the appellant had released the money and withdrawn the next day, the situation would have been no different than the one before us. As we have attempted to show, appellant had no further claim on the money paid to the depositary and the situation was identical with one wherein the money was paid without dispute, there being no reasonable ground for dissatisfaction or disagreement. There being no eviction, appellant's surrender of the premises was in the nature of and was an actual abandonment, and moneys theretofore paid under the contract were the property of the respondents.

The judgment is affirmed.

CARSTENSEN et al. v. GOTTESBUREN et al.*

Civ. 407.

District Court of Appeal, Fourth District, California.

Aug. 25, 1931.

Rehearing Denied Sept. 11, 1931. Hearing Granted by Supreme Court Oct. 22, 1931.

1. **Replevin** ⚷11(4).

Demand for possession of property served on one partner *held* sufficient as regards action for claim and delivery (Civ. Code, §§ 2332, 2429).

2. **Judgment** ⚷112.

Defendant making default in trial admitted allegations of complaint.

3. **Appeal and error** ⚷176.

Where one partner, by defaulting, admitted that plaintiff demanded possession of prop-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 9 P.2d 831.

erty before commencing action of claim and delivery, appealing partner could not raise such question as to defaulting partner.

4. Appeal and error ⇨1010(1).

Finding supported by evidence will not be disturbed on appeal.

5. Replevin ⇨11(4).

Demand necessary as basis for bailors' action for claim and delivery against bailee need not be made by bailors personally; it being sufficient if it is made by person authorized to act for bailors.

6. Replevin ⇨72.

Finding that demand for possession was served on bailee prior to commencement of action for claim and delivery *held* supported.

7. Replevin ⇨11(4).

Demand for possession signed by bailors, by their attorneys, where authorized by bailors, *held* sufficient to form basis for action for claim and delivery.

8. Bailment ⇨1.

Intention of parties to purported lease of personalty must be ascertained from terms of instrument itself.

9. Bailment ⇨1.

Terms of purported lease whereby one leased fishing barge to another for specified terms for agreed sum *held* to create bailment (Civ. Code, § 1925).

10. Bailment ⇨22.

Assignment of undivided interest in fishing barge did not authorize bailors to cancel bailment contract, where clause prohibiting assignment did not provide for cancellation.

11. Bailment ⇨22.

Where bailment contract contained no clause for forfeiture in case of assignment of contract in violation thereof, court could not read forfeiture into contract.

12. Bailment ⇨22.

Failure of bailee to pay consideration expressed in bailment contract did not authorize bailors to cancel contract containing no clause for forfeiture for nonpayment.

13. Contracts ⇨318.

Courts do not favor forfeitures.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Hans Carstensen and another against E. F. Gottesburen and others. Judgment for plaintiffs, and the named defendant appeals.

Reversed.

Arthur T. French, of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego (Overton, Lyman & Plumb and William R. James, all of Los Angeles, of counsel), for respondents.

ALLEN, Justice pro tem.

Plaintiffs, Hans Carstensen and U. W. Hall, had judgment against E. F. Gottesburen and George Sheldon in claim and delivery. Defendant Gottesburen appeals.

A sufficient statement of the facts determinative of the errors presented is that the allegations of the complaint are for claim and delivery of personal property and are in the usual form, praying for the possession of a fishing barge known as the Point Loma. Defendant Gottesburen's answer denies the ownership of the property to be in plaintiffs, and alleges that he is entitled to the possession thereof; denies demand for possession by plaintiffs; denies refusal to deliver, and denies that at the time the action was filed he was retaining possession without the consent of the plaintiffs; admits his possession; and prays for a return of the property with damages.

Defendant Gottesburen obtained possession of said property by and under a certain lease executed by the plaintiffs. The Point Loma was to be used as a fishing barge upon the payment of certain rents. Later lessee sold a one-half interest in the lease to defendant Sheldon, who became a partner with Gottesburen in the business of operating the boat as a fishing craft for profit.

[1-3] The first error complained of is that there was no sufficient demand for possession of the property before the commencement of this action. Gottesburen and Sheldon being partners, appellant claims it became necessary to make demand for possession of the property on both defendants. Since appellant Gottesburen and his codefendant Sheldon were partners and in possession of the property, a notice or demand for possession of the property served on one of such partners was sufficient. Section 2429, Civil Code, makes an individual partner an agent for the partnership in the transaction of its business, and under section 2332, Civil Code, notice to the agent is notice to the principal. Defendant Sheldon made default in the trial court, and in so doing admitted the allegations of the complaint that plaintiff demanded possession of the property. Appellant cannot therefore raise this question as to Sheldon.

[4-7] The court found that before the commencement of this action and while defend-

ants were in possession of the property the plaintiffs demanded possession from defendants and that defendants refused and continued to refuse to deliver possession to the plaintiffs. This finding was supported by the evidence and will not be disturbed by this court. However, appellant claims that the demand was insufficient, in that it consisted of a written notice, signed by Hans Carstensen and U. W. Hall, by Overton, Lyman & Plumb, their attorneys, and that the attorneys did not have authority to make a legal demand. The demand need not be made by plaintiff personally; it being sufficient if it is made by a person authorized to act for him.

In the instant case respondent Carstensen testified that he employed the firm of attorneys above referred to and that he authorized one Cecil Borden, who was connected with said firm, to prepare and serve the demand on appellant. This evidence is sufficient to support the finding of the court that demand was served prior to the filing of the suit, which demand and service were sufficient to comply with the law.

The next error goes to the right of appellant's possession. On February 1, 1927, respondents leased to appellant the property in question for the term of three years; the lessee (appellant herein) agreeing to pay the lessors (respondents), as rentals therefor, one-third of the gross receipts collected as admission fees to said barge charged to persons using the same. Such sums so collected were to be paid to the lessors on or before the 5th day of each month for the preceding month. The lease provided that it should not be assignable and that the lessee should not let any part of said barge without the written consent of the lessors.

On April 16, 1927, appellant sold, assigned, transferred, and conveyed to his partner and codefendant Sheldon an undivided one-half interest in the lease. Subsequently appellant failed to pay the rent provided for in the lease. Said lease contained no clause providing for a forfeiture in case of nonpayment or assignment. Time was not declared to be the essence of the contract.

[8, 9] Contracts of this character have frequently been presented to the courts for construction. The question has generally arisen in actions for determining the right of possession or ownership of the property involved in the transaction, and, when it appears from the terms of the instrument that the intention of the parties was to make a lease of the property, the courts will give such construction to the instrument irrespective of the name by which the parties have designated it. Intention, however, is to be ascertained from the terms of the instrument itself. The question is to be determined wholly by the intent of the parties expressed in and deducible from the contract itself.

The instrument is entitled "lease" and by its terms the respondents "leased" the property therein described to the appellant for the term of three years, and the appellant agreed to pay to respondents for the use of the property the amount specified in the contract, at the time and in the manner designated in the instrument. These are terms peculiarly appropriate to instruments of hire or lease, and not only do not confer upon the appellant any right in the property except to use it as bailee during the period prescribed, but expressly impose upon appellant an obligation to pay the respondents for such use. The terms of the contract are sufficient to warrant the court in determining this construction to be given to the instrument as creating a bailment to appellant without any right in the property, with the obligation upon appellant to pay for its use according to the terms of the contract.

This transaction comes squarely within the law of bailment. Bailments in California are classified under three heads: First, those for the sole benefit of the bailor; second, those for the sole benefit of the bailee; and, third, those for the sole benefit of both parties. This case falls within the third class. Under this class the courts have placed contracts of hire, of which the contract in this case is one. This class of bailments has been defined as one wherein one person gives to another the temporary use and possession of the property, other than money, for reward, and the latter agrees to return the same to the former at a future time. Civ. Code, § 1925; Oakland Barge & Lighter Co. v. Foster, 25 Cal. App. 193, 143 P. 83; Harron, Rickard & McCone v. Cutting, 19 Cal. App. 780, 127 P. 827.

[10-13] In determining the right of the respondents to terminate the lease, we must look to the instrument and the intention of the parties. The contract contains the clause that "this lease shall not be assignable nor shall the lessee sublet any part of said boat without the written consent of the lessors." There is nothing in the lease reserving in respondents the right to cancel the lease except in the event one-third of the gross receipts do not amount to the sum of $2,000 for any year during the season that the barge is to be operated. In that event the lessors "shall have the right to cancel the lease and upon the assertion of such right by lessors, the lease shall become null and void."

In the clause relative to assignment there is nothing said about cancellation in case such transfer is made. Under these facts, was the assignment of an undivided one-half interest in the lease to appellant's partner such a violation of the contract as to authorize respondents to cancel the lease, and after the violation of this clause of the contract did respondents have this right? When one holding a lease on property enters into a contract with another, agreeing to the use and possession of the property in the business, a valid interest in the lease is thereby vested in the partnership. Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601; Lamb v. Hall, 147 Cal. 44, 81 P. 288. The lease contained no clause for forfeiture, and this court is not permitted to read one into it. Parties who make a contract must embody therein all the terms upon which they agree and a failure to do so is at their peril. This same rule applies to the nonpayment of the consideration expressed in the contract. No penalty was specified in the event of failure to pay on the 5th of each month. We cannot read into the contract the forfeiture when not expressed therein, and when there is no evidence showing this to be the intention of the parties. It has been held that courts do not favor forfeitures. The courts will not declare a forfeiture where it is not provided in the contract, and there is no evidence to support the intention of the parties that such was to be a part of the contract.

For the reasons herein expressed the judgment of the trial court is reversed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

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116 Cal.App. 441

EVANS v. ROBERT MARSH & CO., Inc., et al.

Civ. 7571.

District Court of Appeal, First District, Division 1, California.

Sept. 1, 1931.

As Modified on Denial of Rehearing Oct. 1, 1931. Hearing Denied by Supreme Court Oct. 29, 1931.

1. **Pledges 🔑58(6).**

Where maker of note has defense not good against pledgee, but good as against pledgor, pledgee can recover only to extent of debt secured by pledge (Civ. Code, § 3108).

2. **Bills and notes 🔑353.**

Pledgee's agent purchasing collateral note at public auction, but not paying pledgee anything therefor, *held* not holder in due course for full value (Civ. Code, § 3133).

3. **Pledges 🔑58(6).**

Where pledgee sold note at public auction to its own agent who did not give value therefor, agent stood in place of pledgee; hence could recover from maker only to extent of debt secured by pledge (Civ. Code, §§ 3108, 3133, 3140).

4. **Bills and notes 🔑526.**

Finding that note was presented for nonpayment *held* unsupported.

5. **Bills and notes 🔑526.**

Finding that due notice of presentment and nonpayment was given to indorsers of note *held* unsupported.

6. **Bills and notes 🔑419.**

Copy of notice of protest not specifying manner or place of presentment and not containing seal of notary *held* insufficient (Civ. Code, §§ 3153, 3154; Pol. Code, § 795, as amended by St. 1927, p. 840).

Appeals from Superior Court, City and County of San Francisco; C. P. Vicini, Judge.

Action by E. Evans against Robert Marsh & Co., Inc., and another. From the judgment, both plaintiff and defendants appeal.

Affirmed in part, and reversed in part, with directions.

C. H. Sooy, of San Francisco, for plaintiff.

Clyde C. Shoemaker, of Los Angeles, for defendants.

WARD, Justice pro tem.

Robert Marsh & Co., a corporation, gave its note, the subject of this action, to United Finance Company, for $6,496.86 indorsed by Robert Marsh. This note was transferred before maturity to J. H. Scales, the president of the United Finance Company. Scales, individually, borrowed the sum of $3,500 from the Pacific National Bank, giving his promissory note therefor and the $6,496.86 Marsh Company note as collateral security. The Scales' note was renewed. A payment of $750 was made thereon, leaving a balance of $2,750 due from Scales to the Pacific National Bank. No further payment being made by Scales, the bank, after maturity of the Marsh Company note, caused the $6,496.86 note held as collateral to be sold at public auction for the sum of $525 to an employee, E. Evans, the plaintiff in this action. As against Scales and the Pacific Finance Company, there were equitable defenses in favor of the defendants. The bank and the plaintiff were innocent holders, not having knowledge of the facts constituting the defenses. Judgment was rendered in favor of plaintiff against Robert Marsh & Co., Incorporated, and Robert Marsh in the sum of $2,750, interest, etc. The court held that the plaintiff Evans, as well as his predecessor, the bank, would be deemed a holder for value only to the extent of the lien, i. e., the indebtedness owing to the pledgee. Defendant appealed from that portion of the judgment whereby the amount was fixed at $2,750. Plaintiff appealed from the whole of said judgment.

[1, 2] Plaintiff contends that the judgment should have been entered for the full amount of the note, to wit, $6,496.86, and not for the smaller sum which was equivalent to the unpaid balance of the loan from Scales to the bank. If the bank had instituted this action, judgment could only run for the amount pledged. See section 3108, Civ. Code. When part payment was made by Scales to the bank, the pledged note was security only for the unpaid balance. Where the maker of a negotiable promissory note has a defense not available as a bar to a recovery by the pledgee, but good as against the pledgor, the pledgee will be allowed to recover only to the extent of the debt for which the collateral is held as security. If the bank assigned this note to a stranger, the stranger could take only the rights held by the assignor. The plaintiff in this action was not a stranger but a note teller in the Pacific National Bank, the pledgee. The note was sold to the plaintiff, but he did not pay and the bank did not receive anything for the collateral note. Plaintiff is the nominal but the real holder of the note is the bank. Plaintiff did not buy this note in good faith for the full amount or face of the note. He is not therefore a holder in due course for the full value of the note. See section 3133, Civ. Code. Plaintiff simply stands in the position as the nominal holder of collateral security, the property of the bank. He may be considered a bona fide holder of the note as the agent of the bank, but the bank's property right in the collateral note is limited to the sum of the unpaid balance upon the loan note from Scales to the bank.

[3] Plaintiff contends that the purchaser of a collateral note, sold in foreclosure of a pledge, is entitled to recover the full amount of the collateral note, and cites Woolf v. Clarke, 17 Cal. App. 696, 121 P. 407. In that case the defendant gave a promissory note to one Nicklaus for $1,000. Subsequently the payee transferred the note to a bank as collateral security for a loan to him. The amount of the bank's loan to Nicklaus is not stated in the opinion, so we assume it was for a like amount, namely $1,000, and we are warranted in this assumption by the following quotation from that opinion: "* * * The maker of the note not being shown to be in any way prejudiced by the transfer and sale of the note cannot be heard to complain." In that case, if there were equitable defenses against the payee of the note and the collateral was in excess of the loan made by the bank to the payee of the collateral note, the maker would have been materially prejudiced. In Shafer v. Spruks (C. C. A.) 226 F. 922, and Turner v. Metropolitan Trust Company (C. C. A.) 207 F. 495, 500, equitable defenses against the payee were not interposed. In Turner v. Metropolitan Trust Company, supra, the opinion holds that the pledgee may sell "his own interest and all the right which the pledgor could have empowered him to sell at the time the contract of pledge was made." In the case at bar the bank may only sell the collateral because it did not have knowledge of the equitable defenses of the maker. The pledgor, Scales, could not have legally empowered the pledgee to sell the $6,496.86 note because the note was obtained from the defendants by reason of false and fraudulent representation and inducements and the court so found. In Burns v. New Mineral Fertilizer Company, 218 Mass. 300, 105 N. E. 1074, the effect of existing equities was considered, and the court held that, when the pledgee sells and the purchaser buys in good faith third party notes held as collateral, the purchaser buys under the pledgee's rights and can enforce the amount of the note, although he bought for less than par. The question of equitable defense, that is, that the collateral note was made without consideration, did not enter the case. The other citations submitted by plaintiff are not parallel with the case at bar.

The $6,496.86 note was executed without consideration. The bank, without knowledge of its fraudulent character, received it as collateral and thereby became an innocent holder to the extent of $2,750. By the judgment rendered herein the law decrees to it the right to a just, proper, and exact compensation. By selling to its own agent, it sold to itself and sold only the rights it theretofore possessed. We cannot hold that by going through the form of an auction it could gain equitable rights theretofore nonexistent. To do so would be an approval of the use of the provisions of the Code, adopted in part for the protection of lenders as a means to infringe upon the rights of others, namely, the defendant who made this collateral note through deception and fraud and had a good equitable defense against all parties up to the time that the bank as an innocent holder could obtain judgment to the extent of its lien. Bell v. Bean, 75 Cal. 86, 16 P. 521, was not a case of sale but of assignment; however, the principle involved is the same as the case at bar. The defendant in that case was induced to execute a note because of threats made by the payee upon a claim for damages, although the defendant was not liable. A renewed note was made and pledged by the payee to the plaintiffs as security for a smaller amount borrowed by the payee. The court gave judgment for the lesser sum, and at pages 90–91 of 75 Cal., 16 P. 521, 523, the court said: "We do not perceive how that tribunal could have rendered any other judgment than it did. * * * They are fully reimbursed for all they can claim by virtue of the security they held. * * *" In the defendant's appeal from the judgment, it is contended that the Pacific National Bank of San Francisco was not a holder of the note in due course, having been put on notice by the fact that Scales, as an officer of United Finance Company, was pledging the company's note as security for his own personal obligation. Section 3140 of the Civil Code provides as follows: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course." But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. There was evidence in the case of fraud practiced by the United Finance Company upon the Marsh Company. "Upon proof by the defendant of fraud or illegality in the inception of the instrument, the burden is cast upon the indorsee to show that he is an innocent holder. This he may do by showing that he purchased the instrument before maturity or from an innocent indorsee for value in the usual course of business. When this is done, unless the evidence shows that the instrument was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that plaintiff took the instrument with notice of defendant's equities." 19 Cal. Jur., at p. 1039. Irrespective upon which side the burden rested from all of the facts and circumstances in this case and in particular upon the testimony of witness Wilson, we approve of the court's finding that the bank had no knowledge of the fraud perpetrated by the finance company upon the defendant Marsh Company.

[4-6] We cannot approve of the court's finding that the note was presented for nonpayment, and that due notice of presentment and nonpayment was given to each of the indorsers, and that they were duly notified that the holder of said promissory note would look to them for payment. This evidence admitted over well-timed and well-grounded objections of the defendant consisted of a copy of a communication from the Pacific National Bank to the Merchants' National Trust & Savings Bank of Los Angeles inclosing the note for collection with directions of protest for nonpayment. At best this was secondary evidence without a proper showing for its introduction. The reply, presumably from the Los Angeles Bank, was admitted without any identification of its authorship. Finally, a copy of the notice of protest, not properly identified and not authenticated, was introduced. Section 795 of the Political Code (as amended by St. 1927, p. 840) provides as follows: "The protest of a notary, under his hand and official seal, of a bill of exchange, or promissory note, for nonacceptance or nonpayment, specifying: (1) The time and place of presentment; (2) The fact that presentment was made and the manner thereof; (3) The cause or reason for protesting the bill; (4) The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found; is prima facie evidence of the facts recited therein." The copy of notice of protest does not specify the manner of presentment or the place of presentment. If the original contained the seal of the notary, then it was not a true or correct copy. Referring to section 795 of the Political Code, the court in Whitcomb v. Huse, 37 Cal. App. 248, 173 P. 597, 598, said: "The section makes the 'protest' prima facie evidence of things of which it ordinarily would be no evidence at all. It allows a departure from the usual rules of evidence, and those who would avail themselves of its provisions must therefore bring themselves clearly within its terms." The presentment must be made at the address given or at the usual place of business or residence at a reasonable hour, etc. See Civ. Code §§ 3153, 3154. The record is silent as to any notice of dishonor given the defendant Robert Marsh.

The judgment against Robert Marsh individually must be reversed, and this cause remanded, with direction to the trial court to permit the plaintiff to attempt to supply the deficiency of evidence relative to the notice of presentment and nonpayment and to determine therefrom whether or not defendant Robert Marsh, under the provisions of section 3170 of the Civil Code, is entitled to be discharged from liability. Otherwise, the judgment as entered will stand affirmed. Each party to bear his own costs on this appeal.

We concur: TYLER, P. J.; CASHIN, J.

213 Cal. 502

DE MUND v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 12674.

Supreme Court of California.
Aug. 28, 1931.

1. Trial 🔑387(1).

Party litigant is entitled to decision upon facts by judge who hears evidence.

2. Judgment 🔑564(2).

Interlocutory decree operates only until disposition of cause by final judgment.

3. Appeal and error 🔑1172(1).

Final judgment unauthorizedly entered did not permanently destroy valid interlocutory decree previously entered by another judge, and, when final judgment was reversed, parties could proceed from point where error came into proceeding, and trial de novo was not necessary.

> Trial de novo was not necessary, since the error for which the final judgment was reversed occurred after the entry of the interlocutory decree, and did not affect the validity of the interlocutory decree, and it would have been error upon reversal of the final judgment upon grounds unrelated to the validly entered interlocutory judgment for the reviewing court to have directed the reversal of the interlocutory decree, in addition to which the reviewing court's order, "judgment reversed," did not show an intention to annul the interlocutory decree.

In Bank.

Certiorari to Superior Court, Los Angeles County; J. O. Moncur, Judge.

Petition by Mary C. De Mund for writ of certiorari to the Superior Court in and for the County of Los Angeles, and another, to review an order of respondent court, appointing a referee, in an action by Thomas A. Hughes against petitioner.

Writ denied.

Superseding opinion in 291 P. 861.

Hewitt, McCormick & Crump, A. I. McCormick, and Leslie R. Hewitt, all of Los Angeles, for petitioner.

Charles E. Hobart and Alfred W. Hare, both of Los Angeles, for respondents.

SEAWELL, J.

This proceeding in certiorari is before us upon hearing granted after decision by the District Court of Appeal, Second District, Division 2 (291 P. 861), refusing to annul an order of the superior court of the county of Los Angeles made by Judge Moncur of Plumas county, sitting as judge pro tempore in said court, which order appointed, or confirmed the previous appointment of a referee to take an accounting in an action brought for the dissolution of a partnership. The petitioner herein is the defendant in said action. Two previous appeals from an order and judgment made in the action have already been taken to the Appellate Court. Hughes v. De Mund, 70 Cal. App. 265, 233 P. 93; Hughes v. De Mund, 96 Cal. App. 365, 274 P. 405. The effect of the latter decision was to leave in doubt the course to be followed in future proceedings in the action. Because this uncertainty was not removed by the decision of the Appellate Court in the instant application for writ of review, this court deemed it advisable to grant the petition for hearing in order to make plain the course to be pursued in advance of further action, rather than to compel the parties to await a decision upon a later appeal.

Thomas A. Hughes, plaintiff in the action for a dissolution and accounting, alleged the existence of a partnership between himself and petitioner, Mary C. De Mund, organized to deal in real estate; the ownership of twenty-one lots as partnership property; and the misapplication of partnership funds by said petitioner and her refusal to account therefor. Petitioner denied the existence of a partnership, and also denied the charge of misapplication of funds. Judge Moncur, sitting in said superior court of Los Angeles county, upon the consideration of oral testimony covering several days, found that a partnership existed and entered an interlocutory decree dissolving said partnership and ordered that an accounting be taken. The defendant took an appeal from the subsequent order denying a new trial, which the appellate court dismissed on the ground that the order decreeing the existence of a partnership was not final, but interlocutory, and hence the motion for a new trial did not lie. 70 Cal. App. 265, 233 P. 93.

[1-3] Thereafter the superior court appointed one Charles C. Montgomery referee to take the accounting ordered. Said referee reported his findings to the court. A motion made by plaintiff to set aside said findings came on for hearing before Judge Collier of said superior court together with a motion made by defendant to confirm said findings. Judge Collier set aside the findings of the referee, and after consideration of all evidence taken in the case, including the transcript of testimony taken before Judge Moncur, as well as the referee's report and oral evidence taken upon the hearing of said motions, found, contrary to Judge Moncur, that plaintiff and defendant were not partners; that

a joint adventure existed between them as to seven of the lots described as partnership property, but plaintiff had no interest in the remaining fourteen lots. The seven lots were ordered sold and the proceeds applied in accordance with the rights of the parties as determined by the decree. Said judgment was reversed on appeal on the ground that in the absence of a consent or waiver Judge Collier could not without a trial de novo determine a cause partially tried before Judge Moncur, relying in part on the testimony taken before Judge Moncur. 96 Cal. App. 365, 274 P. 405. A party litigant is entitled to a decision upon the facts by the judge who hears the evidence. It is the opinion rendered upon this judgment of reversal which casts doubt upon the future course to be pursued in the action.

Judge Moncur, who was again sitting as judge pro tempore, construed the reversal as authorizing him to take up the cause at the point he had reached when Judge Collier came into the case, and to proceed to final judgment without a trial de novo, considering the great volume of evidence previously taken before him. Relying on this interpretation, Judge Moncur entered the order which petitioner attacks in the instant proceeding. Said order makes reference to the decision of the appellate court, from which, the court states, it appears that Judge Moncur "still has jurisdiction in the above matter, and is the only judge who can proceed in the action * * * without a trial de novo." It confirms the appointment of Charles C. Montgomery, the referee first appointed, and orders him to take a full account to date. We are satisfied that Judge Moncur, who is a judge of the superior court of the state of California assigned to the county of Los Angeles, is acting in accordance with law.

Petitioner contends that the effect of the unqualified reversal of the judgment of Judge Collier, who undertook to make a final disposition of the proceeding, is to place the case in the same position as if it had never been tried, and it must be tried de novo; and that the evidence taken before Judge Moncur may not be considered for any purpose, with the result that an accounting has been ordered and a referee appointed upon the pleadings, which deny the existence of a partnership, without even a prima facie or any showing that the case is one in which petitioner may be compelled to submit to an accounting. Therefore, petitioner contends, the order is beyond the jurisdiction of the court and void. Properly construed, the judgment of reversal can have no such effect.

The judgment rendered by Judge Collier was reversed for error occurring after the entry of the interlocutory decree and not affecting the validity of said decree. It would have been error upon the reversal of the final judgment upon grounds having no application to the validly entered interlocutory judgment for the court to have also directed the reversal of said interlocutory judgment. It is not to be presumed from the order "judgment reversed," which concludes the opinion disposing of the appeal from the unauthorized final judgment, that the court, acting contrary to law, intended also to annul the interlocutory decree.

Although an interlocutory decree from its nature operates only until disposition of the cause by final judgment, an abortive final judgment entered by an unauthorized judge does not permanently destroy the effectiveness of said interlocutory decree nor impair the validity of the proceedings which led to its entry. Upon the reversal of the final judgment, the rights of the parties to proceed from the point where error came into the proceeding are revived. The cases cited by petitioner as authority for the rule that upon an unqualified reversal the case must be tried de novo did not involve an interlocutory decree which had been properly entered.

Plaintiff concedes that the interlocutory decree, which determined the existence of a partnership as grounds for appointing a referee, will not bind Judge Moncur to enter a final judgment in accordance therewith. Upon the appeal reported in 96 Cal. App. 365, 274 P. 405, plaintiff contended that although the interlocutory decree was not final and appealable in the sense that it was a complete disposition of the cause, the findings of Judge Moncur were nevertheless final and binding on the issues to which they related. The appellate court rejected this contention. One of the cases which the court cited as authority was Doudell v. Shoo, 159 Cal. 448, 114 P. 579, 582. In that case the court said in regard to a judgment similar to that in the instant case: "We are satisfied that the judgment is not to be construed as a final determination of the rights of the parties with respect to any of the matters embraced therein. In the first place, our system of procedure contemplates that there shall be but one final judgment in a cause (citing cases), and, in the absence of a clear showing, it is not to be presumed that the court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy."

Petitioner places much reliance on the appellate court's statement upon the last appeal that no useful purpose would be served by passing on the questions arising out of the accounting which was had prior to Judge Collier's action because there could be no proper accounting until it had first been determined whether a partnership existed between the parties and what property belonged to the partnership. 96 Cal. App. 370, 274 P. 405. This statement does not mean that before an accounting may be undertaken in the lower court, the question of the existence of a partnership must be considered again, and a trial de novo had, but rather that a final settlement of the account cannot be had without a final determination of the partnership issue. This being the case, it would serve no purpose for the appellate court to consider questions arising on the accounting, which depend on the solution of the partnership issue, where there has been no final judgment on that issue by an authorized judge.

It would be an unjust rule which would permit unauthorized action by a judge who did not hear the evidence to place upon plaintiff the burden of commencing the proceeding anew, notwithstanding testimony has been taken covering almost one thousand typed pages, merely because in the first instance the judge may have ordered an interlocutory decree which is not necessarily conclusive against defendant as to the final issue.

For the reason that the order of Judge Moncur entered after reversal of the Collier judgment is proper in all respects, it becomes unnecessary to consider the other points raised, including the question whether a writ of review would be available as a remedy had said order been improper.

The application is denied, and the writ dismissed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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213 Cal. 620

CISLER v. RAY.

S. F. 14122.

Supreme Court of California.
Aug. 31, 1931.

Rehearing Denied Sept. 28, 1931.

1. Brokers ⚷24(1).

Under contract with broker, laws, regulations, rules, customs, or usages of stock exchange were binding on customer, regardless of whether he knew of their existence.

2. Brokers ⚷24(1).

Under evidence, brokers *held* not negligent in delaying to inform customer of rejection of cancellation orders, and execution of buy and sell orders.

> The evidence showed that an emergency verging on a panic existed, and that trading in stock in question was suspended because of emergency prevailing in trading in such stock on floor of exchange.

3. Brokers ⚷24(1).

In action to recover difference between price at which certain stock was sold and same stock bought pursuant to customer's order, evidence supported finding that five-minute period before opening of trading when cancellations were given same status as buy and sell orders was extended to 10 minutes, when rule extending period for rejecting buy and sell orders became effective.

4. Brokers ⚷24(1).

Effect of rule, giving 10-minute period before opening of trading when cancellation and buy and sell orders may be rejected, should continue when by reason of abnormal flood of orders that period was necessarily extended.

> Evidence was uncontradicted that, during any period required for purpose of permitting specialists to make up a book, it was customary to refuse all orders including cancellations.

5. Brokers ⚷24(1).

Reasonableness of rule or custom of stock exchange was immaterial, where broker's customer expressly contracted to be bound by rules, regulations, customs, and usages of exchange.

> LANGDON, CURTIS, and SEAWELL, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action upon a margin contract by Herman J. Cisler against Harris A. Ray. Judgment for plaintiff, and defendant appeals.

Affirmed.

For former opinion adopted herewith and superseding opinion in 291 P. 606, see 299 P. 62.

Rehearing denied; Seawell, Curtis and Langdon, JJ., dissenting.

Thornton Wilson, of Oakland, for appellant.

A. H. Crook and Sloss & Ackerman, all of San Francisco, for respondent.

PER CURIAM.

After a further consideration of the merits of this appeal upon rehearing, we have concluded that the opinion written by Mr. Justice SHENK and filed herein on April 30, 1931, expresses the present opinion of this court in determining the issues presented on the appeal. Said opinion is therefore adopted as the opinion and decision of this court, and is as follows:

This is an appeal by the defendant from a judgment for the plaintiff in an action to recover the sum of $8,590, which represents the difference between the price at which 100 shares of Bank of Italy stock were sold and the price at which 100 shares of the same stock were bought pursuant to orders placed by the defendant with and executed by the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

plaintiff's assignors on June 12, 1928, plus commissions and interest.

The plaintiff's assignors are Duisenberg-Wichman & Company, stock and bond brokers, who owned at the times herein involved a seat on the San Francisco Stock Exchange and maintained offices in Oakland and San Francisco. The defendant, according to his own testimony, spent his time and effort in investing his own funds, principally in buying and selling stocks as a business for the purpose of making a profit. He had maintained a margin account with Duisenberg-Wichman & Company since April 29, 1927, and had employed them to execute his orders for the purchase and sale of stocks on the San Francisco Stock Exchange. At the commencement of his relations with that company, the defendant had executed and delivered to it an agreement which, among other things, provided: "All transactions are subject to the rules, regulations and customs of the exchange or market (and its clearing house, if any) where executed. In all transactions wherein you act as my agent, I agree to wholly indemnify and save you free and harmless from any loss, damage or liability arising out of such transaction, howsoever same may occur. This agreement shall continue until revoked by me in writing. * * *" Prior to June 12, 1928, the defendant had closed the margin account, but early on the morning of that day he entered the Oakland office of Duisenberg-Wichman & Company for the purpose of resuming trading.

At this point it should be noted that about two years previously the "post system" had replaced what was known as the "call system" on the San Francisco Stock Exchange. By the system in operation on June 12, 1928, the trading room of the exchange was divided into posts to each of which was assigned the trading in one stock or more, each of which was in charge of a specialist who was selected from the membership of the exchange. After the commencement of this system, brokers placed the customer's order with the specialist to whom was assigned the trading in the stock desired to be bought or sold. The method of operation under the post system differs generally from the call system, in that under the latter system only one security was called and traded in at a time. Under the call system, therefore, a broker was able personally to execute the orders of his customer. Under the post system, however, the order is executed through the specialist unless the broker also has an order on the other side of the transaction, which, under the rules of the exchange, he may "cross" or "accommodate" at the market price, if the specialist makes no objection. One of the most important functions of a specialist under this system of trading is the exercise of the privilege given to him by the rules of the exchange to make the first bid or offer at the opening of trading on each market day. The exercise of this function entails the necessity of computing an opening price. The process by which the specialist computes the opening price consists in offsetting or crossing the buy and sell orders in his hands, including so-called market orders which are orders to buy or sell at the market price, and by mathematical deductions arriving at a figure which will accommodate a majority of such orders. This process is termed "making up a book."

On June 11, 1928, trading in Bank of Italy stock had assumed such proportions that the spread between the high and low prices for a share of that stock on that day amounted to as much as $155. Mr. Holt, who was the specialist in Bank of Italy stock on the San Francisco Stock Exchange at that time, testified that, by reason of the closing price of about $220 per share on the preceding day, on the morning of June 12, 1928, there was such a preponderance of sell orders in his hands that had he opened trading at the customary hour of 9:30 the opening price for a share of the stock would have been about $125. Accordingly, pursuant to a rule of the exchange, he announced sellers in that stock and delayed the opening until sufficient buy orders had been received by him to justify a higher market price. On that morning the defendant had been in the Oakland offices of Duisenberg-Wichman & Company since about 6 o'clock watching the reports of proceedings on the New York Stock Exchange. At 9:30 o'clock the San Francisco Stock Exchange ticker recorded sellers in Bank of Italy stock. At 9:36 o'clock Mr. Ray in Oakland gave an order to sell 100 shares of Bank of Italy stock at the market. This order was received by Mr. Isenberg, the representative of Duisenberg-Wichman & Company, on the floor of the exchange at 9:37. At 9:55 the specialist opened trading in Bank of Italy stock at $150.25. There being no objection on the part of the specialist, Mr. Isenberg crossed the defendant's order to sell 100 shares of Bank of Italy stock with a buy order for 100 shares at the market of the same stock, which at 9:31 he had received from a Mr. Adams, at the opening price. At 9:56 Mr. Ray in Oakland placed an order to buy 100 shares of Bank of Italy stock at the market. This order was received at the San Francisco office of Duisenberg-Wichman & Company at 9:57, and by Mr. Isenberg on the floor of the exchange at 9:58, and was immediately placed with the specialist. Between 9:56 and 10 o'clock, or approximately at 9:58, there being an avalanche of buying orders in Bank of Italy stock, and after consulting with members of the floor trading committee, the specialist in Bank of Italy declared a suspension in trading to enable him to make up a new book and announce another or second opening price in that stock. At 10 o'clock Mr. Ray in Oakland was in the act of giving another order to buy when news was received that trading was suspended. Mr. Ray thereupon withdrew the contemplated additional buy order and at 10:12 ordered his brokers to cancel his previous sell and buy orders. At 10:13 the cancellation orders were received by Mr. Isenberg's clerk who immediately handed them to the specialist who refused to accept them on the ground that it was "too late to cancel." Trading was reopened at 10:31 and at that time the execution of Mr. Ray's order to buy 100 shares of Bank of Italy stock was announced at the new opening price of $230. Information that both the sell and buy orders had been executed, and the terms thereof, was received by Mr. Ray at the Oakland office at 11:15, whereupon he immediately refused to confirm either of said orders. Subsequently this action was commenced to recover the loss sustained by the brokers by reason of the refusal of Mr. Ray to confirm the execution of his orders to sell and buy, plus interest and commissions.

The trial court found, among other facts, that the defendant, at the time he gave the orders here involved, was an experienced trader and had knowledge of the conditions affecting the trading in Bank of Italy stock on the San Francisco Stock Exchange at that time; that the written agreement executed by the defendant in April, 1927, was unrevoked and in full force and effect, and that on the 12th day of June, 1928, the following rules, regulations, customs, and usages of the San Francisco Stock Exchange were in effect: "First: That a broker having orders on both sides of a transaction may cross such orders by placing stock on record at the opening sale price, if the specialist shall not object, which transactions are known as 'accommodation sales' and may be recorded on the ticker if not objected to. Second: That a broker may entrust the execution of a customer's order to another broker or a so-called 'Specialist.' Third: That the specialist has a right to delay the opening of the market on any stock allocated to his post. Fourth: Specialists may refuse to accept orders in an emergency. Cancellations are considered as orders. Fifth: Specialists may suspend trading in an emergency. Sixth: The specialist has the right to make the opening bid and offer of stock, provided such bid and offer shall be made immediately one after the other. Seventh: Specialists may decline to receive orders for a period of ten minutes prior to the opening so as to enable the specialist to make up his book. Orders include cancellations."

The court also found that the defendant's order to sell 100 shares of Bank of Italy stock at the market was promptly executed at 150¼, the opening price, and that the defendant's order to buy was received too late to participate at the opening of trading; that shortly thereafter trading in said stock was suspended because of an emergency then and there prevailing in the trading of said stock on the floor of the exchange, and that trading in said stock was not normal and was close to a panic. The court found further that orders of cancellation are included and come within the rule of the exchange which provides that a specialist may refuse orders in an emergency and that the defendant's brokers acted with the utmost diligence and care in the performance of their duty, and did everything within their power to carry out and execute promptly and expeditiously the defendant's orders.

An additional finding that the contracts of the parties contemplated actual deliveries of shares of stock and that there was no violation of the provisions of section 26 of article 4 of the state Constitution, lifts out of the case any contention that the contracts or transactions involved were illegal. It is conceded that the specialist in Bank of Italy stock was acting as the agent of Duisenberg-Wichman & Company.

The serious dispute on this appeal arises over the contention of the defendant that the evidence does not support the trial court's finding that cancellations are considered as orders within the rules, regulations, customs, or usages of the exchange so as to make the defendant liable under the circumstances here presented, and that nevertheless the brokers' delay in advising the defendant of the refusal of the specialist to honor the cancellation orders and of the execution of the sell and buy orders constituted negligence which was the proximate cause of the loss sought to be recovered.

[1, 2] It is conceded that no written rule or regulation of the stock exchange at that time contained the language "cancellations are considered as orders" or "orders include cancellations" used by the trial court in the portion of its statement of the rules, regulations, customs, and usages designated respectively as "Fourth" and "Seventh." It is not disputed that the rules or regulations passed by the governing board of the stock exchange in effect and pertinent to the privilege of the specialist to refuse to accept orders are: A rule dated April 11, 1927, providing that "the presentation of cancellation of orders to be the specialist during the five-minute period prior to the opening is subject to the same rules and limitations to which buying and selling orders are subject when presented to the specialist during that period"; a rule dated April 19, 1928, providing in part, "All orders whether or not they are for odd lot stocks must be in the hands of the specialist ten minutes prior to the opening to participate therein"; and the rules that "the specialist has the right to suspend trading in

an emergency" and "specialists may refuse to accept orders in an emergency." It will be noted here that the defendant's cancellation orders were handed to the specialist and rejected by him eighteen minutes prior to the second opening. The question resolves itself then into whether the trial court's finding that the word "orders" contained in the rule that "specialists may refuse to accept orders in an emergency" includes "cancellations of orders" is supported by custom or otherwise. No contention can be made, in view of the contract of April, 1927, executed by the defendant, that the laws, regulations, rules, customs, or usages of the stock exchange would not be binding on the defendant whether or not he knew of their existence. Thomson v. Thomson, 315 Ill. 521, 146 N. E. 451. The trial court found that an emergency verging on a panic existed, and as to this finding there is no dispute. We may also add at this point that this undisputed finding compels a conclusion that we may not find as a matter of law that the defendant's brokers were negligent by reason of the delay in informing the defendant of the rejection of his cancellation orders and the execution of his buy and sell orders. Whether the result might be different in normal times is not the question here, but under the particular circumstances presented by the record we must conclude that the finding that the brokers were free from negligence is sufficiently supported by the evidence.

[3, 4] The defendant, however, is asking for a reversal of the judgment against him on the ground that as the evidence showed that no emergency other than that which existed under the facts of the present case had occurred with respect to trading on the floor of the San Francisco Stock Exchange since the rules and regulations here involved became effective, no custom or usage to the effect that in an emergency cancellations may be treated as orders could have become established. Nevertheless, the record is replete with testimony to the effect that the system of post trading is impracticable and unworkable unless the specialist during the period required to make up a book may refuse any order or direction which will necessitate a change in the entries in his book during that period. The evidence substantially supports the finding of the trial court that, as a result of this condition, by implication, custom or otherwise the five-minute period before an opening when cancellations were given the same status as buy and sell orders was also extended to ten minutes when the rule of April 19, 1928, extending the period for rejecting buy and sell orders to ten minutes became effective. This period was placed at ten minutes for the reason that experience had shown that that was the time generally required by a specialist in a normal market to make up a book which would comprise all of the orders, including market orders, then in his hands. It must be obvious then that an avalanche of orders such as was presented to the specialist prior to the second opening in Bank of Italy stock on June 12, 1928, could not be accommodated without a new book being made up and the result of such an avalanche was to extend the period required by the specialist to make up his book beyond the ten-minute normal period prescribed and that this necessary extension of the normal time was in fact the emergency so created. We see no reason, and the appellant has presented none, why it was not competent for the trial court to conclude that the effect of the rule relating to the ten-minute period prior to an opening when cancellation and buy and sell orders may be rejected should not continue when by reason of an abnormal flood of orders that period was necessarily extended beyond the ten-minute regulation, inasmuch as the evidence was uncontradicted that during any period required for the purpose of permitting a specialist to make up a book it was customary to refuse all orders, including cancellations.

[5] We also fail to perceive how a question of reasonableness of the rule or custom may enter into the discussion. The defendant expressly contracted to be bound by the rules, regulations, customs, and usages of the exchange, without any limitations or restrictions or conditions, and, as indicated in Thomson v. Thomson, supra, he must therefore either conform to or repudiate and terminate his written contract.

On the record presented we must conclude that the defendant has shown no ground for a reversal.

The judgment is affirmed.

LANGDON, J.

I dissent.

It seems to be conceded, and it could hardly be denied, that the specialist, although an officer of the exchange, acts in the capacity of agent of the brokers who deal in the stocks which he handles; and the broker would ordinarily be liable to the customer for negligence or willful breach of duty on the part of the specialist. See Murphy v. Bishop, 182 App. Div. 805, 170 N. Y. S. 342; Meyer, Stock Brokers and Stock Exchanges, p. 487. It is true that the defendant entered into an express agreement to be bound by all rules, regulations, and customs of the exchange, but a study of the record reveals no custom and no rule to support the finding of the trial court. Indeed, plaintiff admits that no custom exists, not only because of the lack of any positive evidence to that effect, but because the particular situation which existed was without precedent in the San Francisco Stock Exchange, and no custom could possibly have become established. Plaintiff's theory is that the finding is an interpretation of the rules themselves, and that this interpretation is compelled by the necessities of the post trading system. It is said that the purpose of a suspension of trading is to permit the specialist to make up his book, and that it is essential that this operation be undisturbed. If a new order to buy or sell were forced upon him, his figures would have to be changed, and his computation of a new opening price would be delayed. Exactly the same result would follow, it is contended, by forcing him to accept a cancellation; and the testimony of the specialist is to this effect. But I see no reason for holding that a heavy loss should be borne by a client of a broker because the brokers operating on the exchange have adopted a system which becomes unworkable in an emergency. If the system requires, at the discretion of the specialist, a power to disregard the directions of a client, it is essential that this power be provided by express rule, so that the client may know in advance of the existence of this extraordinary modification of the usual principles of the law of agency. Of course, it is settled that the customer normally has the right to cancel any unexecuted order. Wahl v. Tracy, 139 Wis. 668, 121 N. W. 660; Meyer, Stockbrokers and Stock Exchanges, p. 273. In short, I cannot accept the proposition that the rule contended for must exist because the exchange could not function effectively without it. Our sole inquiry is as to whether such a rule was actually made and became part of the contract of defendant with his brokers. The answer to this inquiry necessitates the application of the ordinary doctrines governing the interpretation of contracts.

There are four rules of the exchange covering the powers of the specialist which are considered by plaintiff to be relevant in this connection. One provides that "all *orders* * * * must be in the hands of the specialist *ten minutes prior to an opening* to participate therein." Another provides: "The presentation of *cancellations of orders* to the specialist during the five-minute period prior to an opening is subject to the same rules and limitations to which *buying and selling orders* are subject when presented to the specialist during that period." A third gives the specialist "the right *to suspend trading* in an emergency"; and a fourth provides that the specialist "may refuse *to accept orders* in an emergency." The term "trading" is not defined in the rules, but it can hardly be deemed to include cancellations of orders, the very opposite of trading. The particular ground upon which the lower court seems to have proceeded was that the term "orders" in the fourth rule included "cancellations," and it is upon this rule that plaintiff chiefly relies.

The difficulty with this view is that the very rules which are being interpreted use the terms in a specific and not a general sense, and they distinguish clearly between orders and cancellations. The "five-minute" rule, above quoted, expressly provides that "cancellations of orders" are, under the particular conditions set forth, subject to the same rules and limitations as "buying and selling orders." Nothing could more clearly indicate an understanding of the terms as being distinct and different in their meaning. No reasonable person, reading the rules, and observing this special use of each term, could have any doubt of this intended meaning. Moreover, to refuse to accept an order to buy or sell during a suspension means to delay it until the supension is over, and to deprive the customer of the benefit of the opening price. Ultimately it is executed and the customer merely loses the advantages which an earlier execution might have given him. But to refuse a cancellation is to act contrary to the customer's directions, and to execute an order which has been revoked. This fundamental difference in their legal effect removes all logical ground for considering that "cancellation" is included within the meaning of "order." But even if it were conceded that there still is uncertainty as to the meaning of the term "orders," which calls for its construction, it does not follow that the construction must be determined by the alleged necessities of the exchange. The rules were drafted by the members of the exchange, representing all the brokers who did business there, and an ambiguity, if any exists, must be resolved against the brokers. "The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. * * *" Cal. Civ. Code, § 1654. See Robert Marsh & Co. v. Tremper (Cal. Sup.) 292 P. 950; Klapp v. Bache, 135 Misc. Rep. 508, 239 N. Y. S. 129; 6 Cal. Jur. 307; 13 C. J. 544, § 516.

The other ground upon which defendant attacks the judgment is that the broker was guilty of a breach of duty in failing to notify the defendant of the refusal of the specialist to accept the cancellation until about one hour had elapsed. It appears that the defendant was in the offices of the brokers throughout this entire period, and that he continuously requested a report on his cancellation. The explanation offered by the broker is that an unusual volume of business had caused them to utilize their wires almost exclusively for new orders, and that they were too busy with the orders to handle such reports. This is, in effect, to say that the opportunity to accept new and profitable business constitutes a justification for rendering poor service to customers whose business was already undertaken. Unwarranted delay in reporting the status of a customer's orders constitutes a breach of the obligation assumed by the broker, and there can be no doubt, from the explanation given by the brokers, that this delay was unwarranted. The contention that it worked no injury to defendant is absurd on its face. Had he been aware of the circumstances he might have accomplished something in the nature of a cancellation by placing a sell order to offset his buy order; and though he would not have secured the opening price, the order would probably have been executed at a figure near that price.

My conclusion is that the cancellation directed by defendant should have been given effect by the specialist, and that for his unwarranted refusal the broker is responsible as his principal. We are also of the view that the failure of the broker to report promptly to the defendant the fact of this refusal was a breach of the contractual obligations assumed toward him. On both of these grounds defendant was justified in denying liability for the loss suffered through the executed order to buy. The judgment of the lower court should have been reversed.

We concur: CURTIS, J.; SEAWELL, J.

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213 Cal. 582

HOOGBRUIN v. ATCHISON, T. & S. F. RY. CO.

L. A. 11017.

Supreme Court of California.

Aug. 31, 1931.

Rehearing Denied Sept. 28, 1931.

1. Commerce 🔑8(6).

Exclusive remedy of railroad employee, injured while employed in interstate commerce, was under federal act (Federal Employers' Liability Act [45 USCA §§ 51–59]).

2. Commerce 🔑8(6).

Courts 🔑97(5).

Where railroad employee engaged in interstate commerce is injured, question of substantive liability is determined by Federal Employers' Liability Act and federal decisions construing such provisions (Federal Employers' Liability Act [45 USCA §§ 51–59]).

3. Commerce 🔑8(6).

State laws on subject of employers' liability to employee injured in interstate transportation by rail *held* superseded by federal act (Federal Employers' Liability Act [45 USCA §§ 51–59]).

4. Courts 🔑97(5).

State court *held* bound by construction placed on federal act by federal courts (Federal Employers' Liability Act [45 USCA §§ 51–59]).

5. Master and servant 🔑288(15).

Whether brakeman relying on employer's promise of reparation assumed risk in using known defective runway in unloading interstate shipment from freight car *held* for jury (Federal Employers' Liability Act [45 USCA §§ 51–59]).

> Circumstances disclosed that the brakeman was a man of at least 7½ years' experience in railroad work, and had on numerous occasions utilized two planks placed on depot platform and extending into railroad car in unloading car, and that on occasion on which brakeman was injured a steel apron had been placed on the two planks, leaving an opening about 3 feet long and ½ to 2 feet wide at the end of planks nearest depot platform, through which opening the brakeman fell, sustaining injuries; that the steel apron used at time of injuries was something entirely new and had been sent out for use at the depot on the day the accident happened; and that there was no evidence that the brakeman had ever used such an appliance before.

6. Master and servant 🔑220(7).

Servant does not assume risk even in using simple tools, after complaint and promise of reparation, except where work is obviously, imminently, and inevitably dangerous.

7. Appeal and error 🔑422.

That notice stated appeal was from judgment of nonsuit, whereas only judgment rendered was not of nonsuit, did not render appeal invalid.

> Facts disclosed that appellant intended to appeal from the judgment rendered by the trial court, so that the words "of nonsuit" could be regarded as surplusage.

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by William A. Hoogbruin against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals.

Reversed.

Superseding opinion of District Court of Appeal in 297 P. 61.

Bertrand J. Wellman, of Los Angeles, for appellant.

E. W. Camp, Robert Brennan, M. W. Reed, Leo E. Sievert, E. T. Lucey, and H. K. Lockwood, all of Los Angeles, for respondent.

CURTIS, J.

This action was originally appealed to the District Court of Appeal, Fourth District, which court, upon submission of the case, affirmed the judgment of the trial court. We granted a petition for a transfer thereof to this court, for the reason that we were not satisfied with that portion of the decision of the appellate court wherein it held that, as the appliance by the use of which the plaintiff was injured was of a simple construction, he had assumed the risk thereof, and was therefore precluded from recovering for his injuries, notwithstanding he had made complaint to the conductor of the defect in said appliance and was ordered by the conductor to use the same. The following portion of the opinion of the District Court of Appeal, however, we approve, and adopt the same as the opinion in part of this court. It is as follows:

This is an appeal by plaintiff from the judgment of the trial court made and entered after it had granted the motion of defendant for a directed verdict at the conclusion of the trial wherein evidence on the part of both plaintiff and defendant had been presented. The action was one for the recovery of damages for the injuries sustained by plaintiff by reason of the alleged negligence of defendant in failing to provide a safe place in which to work and safe appliances for use by plaintiff, who was an employee of defendant.

At the time when the injury of which plaintiff complains was sustained by him, he was employed by the defendant in the capacity of head brakeman on a freight train operating between San Bernardino, Cal., and San Jacinto, Cal., and while he was engaged in unloading certain merchandise from a freight car of said train onto a station platform at March Field in the county of Riverside, Cal. The merchandise which at the time was being unloaded by plaintiff was merchandise which had been shipped from some point in the state of Oregon. For the purpose of conveniently unloading freight from trains of the defendant at the March Field depot two planks had been used. These planks were approximately 7 feet long, 6 inches wide, and 2 inches thick. The ends of the planks were placed on the depot platform and the other ends extended about 6 inches into the freight car from which freight was to be unloaded, thus making a sort of runway. The planks were so placed that there was a distance of not to exceed 2 feet between their inner edges. The plaintiff had on a number of occasions made use of these boards in unloading freight at the March Field depot. However, the evidence discloses that complaint had been made by plaintiff and the rear brakeman to the conductor of the train in regard to the use of the planks and that plaintiff had asked for a bridge. On the day on which plaintiff sustained his injuries, a piece of boiler plate approximately 4 feet long, 3 feet wide, and ½ inch thick, and weighing about 75 pounds, was sent out by defendant to be placed on the planks. This boiler plate is generally referred to in the testimony of the witnesses as a steel apron. Plaintiff assisted in unloading it from the express car of the train onto the depot platform. This steel apron was then placed upon the two planks and it was at once apparent that it was not of sufficient length completely to cover over the aperture between the planks, and as it was finally placed, there remained an opening about 3 feet long and from 1½ to 2 feet wide at the ends of the planks near the depot platform. The testimony indicates that plaintiff thereupon objected to the use of the steel apron, declaring that he preferred to use the planks without the steel apron. The conductor, however, said that as long as the steel apron had been sent out they would use it, but that he would get another on the following day. Thereupon, the plaintiff procured a small merchandise truck from the depot and conducted it over the runway into the box car where it was loaded with about 250 to 300 pounds of merchandise. The plaintiff, walking backward, then pulled this truck so loaded, onto the runway and when the steel wheels of the truck came in contact with the steel apron the weight of the loaded truck shoved the plaintiff backward so that he fell in the aperture near the depot platform and sustained the injuries of which he complains.

The evidence discloses that at the time plaintiff was injured he was 28 years of age and had been employed on different railroads in various capacities for about 7½ years prior to his accepting employment with the defendant in the month of July, 1927.

[1-3] It is alleged in the first paragraph of plaintiff's complaint that the defendant is a corporation duly organized under the laws of the state of Kansas and engaged in the operation of an interstate steam railroad between the cities of Chicago in the state of Illinois and Los Angeles in the state of California. In the second paragraph of the plaintiff's complaint it is alleged that on August 8, 1927, the date on which plaintiff was injured, he was transferring freight from a car containing interstate shipments onto the station platform of the defendant at March Field in the county of Riverside. Neither of these allegations is denied by defendant, and the record further discloses that at the time plaintiff was injured he was engaged in transferring merchandise shipped from some point in Oregon from a freight car of defendant onto the station platform at March Field. We have here, therefore, the case of an employee of a railroad engaged in interstate commerce, who at

the time he was injured, was employed in interstate commerce. This state of facts brings the instant case squarely under the operation of the provisions of the Federal Employers' Liability Act (45 USCA §§ 51–59). And this act is the exclusive remedy, as was pointed out by the Supreme Court of California in the case of Hines v. Industrial Accident Commission, 184 Cal. 1, 192 P. 859, 14 A. L. R. 720.

Since the Federal Employers' Liability Act provides the exclusive remedy in a case of this character, the question of substantive liability is to be determined by the provisions of the act and federal decisions construing such provisions. That all state laws upon the subject of the employer's liability to the employee in interstate transportation by rail have been superseded by the federal act, since congress by its enactment took possession of the field of such liability, was unequivocally announced in the case of Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. Our own Supreme Court has likewise so declared in the case of Smithson v. Atchison, etc., Ry. Co., 174 Cal. 148, 162 P. 111, wherein numerous decisions of the United States Supreme Court were cited and it was clearly decided that in actions brought in the state courts under the provisions of the Federal Employers' Liability Act, the decisions of the Supreme Court are controlling in the construction of the act. This was also the holding of the California Supreme Court in the case of Hines v. Industrial Acc. Com., 184 Cal. 1, 192 P. 859, 14 A. L. R. 720. The same conclusion was reached by the Appellate Court of California for the Second Appellate District in the case of Werner v. Southern Pacific Co., 44 Cal. App. 76, 185 P. 1016. Authorities might be multiplied on this point, but perhaps it is nowhere more clearly stated than by the Supreme Court of Washington in the case of Bolch v. Chicago, etc., Ry. Co., 90 Wash. 47, 155 P. 422, 426, wherein the court said: "We shall not review the many decisions of the state court cited by respondent, since in any event we are bound by the federal decisions, and especially the recent decisions of the United States Supreme Court upon the subject."

[4, 5] Having arrived at the conclusion that in the instant case the Federal Employers' Liability Act furnishes the exclusive remedy and that the question of substantive liability is to be determined by it and that we are bound by the construction placed upon its provisions by the federal courts, we shall next consider whether the trial court erred in granting respondent's motion for a directed verdict at the conclusion of the trial. The solution of this problem involves a determination of whether under the facts delineated in the record it may be said as a matter of law that the appellant assumed the risk of using the particular appliance which it is claimed was defective and through whose use appellant received the injuries of which he complains. For the purposes of this decision it may be assumed that the appliance was defective, in that the so-called steel apron was not of sufficient length entirely to cover over the aperture between the planks that were placed to form a sort of runway between the freight car and the depot platform; that an opening about 3 feet in length and not more than 2 feet in width remained near the depot platform; that appellant observed the defectiveness of the runway and objected to the use of the steel apron, declaring that he preferred to use the planks as had theretofore been done without the steel apron; that the conductor of the train, who was appellant's superior, stated that since the steel apron had been sent down it would be used, but that another apron would be provided on the following day. Under this state of the facts it is earnestly contended by appellant that he did not as a matter of law assume the risk of using the defective runway and that the trial court erred in refusing to submit to the jury the question of whether or not appellant had assumed the risk.

The rule of the common law with respect to the assumption of risks of employment is declared by Mr. Justice Pitney in the case of Arizona Copper Co. v. Hammer, 250 U. S. 400, 39 S. Ct. 553, 556, 63 L. Ed. 1058, 6 A. L. R. 1537, as follows:

"It is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations requiring the employer to assume the risk under certain circumstances, the employee under others."

In support of this statement of the rule the court cites the case of Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, at page 640, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, where it is said:

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

It is the exception to or modification of the general rule providing that in those cases where there is a promise of reparation upon which the employee relies during such time as may be reasonably required for its performance upon which appellant relies and which he contends warrants a reversal of the judgment in the instant case.

In opposition to appellant's position, respondent contends that assuming that the record herein discloses clearly and unequivocally a promise of reparation by the employer and a reliance on such promise by the employee, nevertheless the appellant must fail in his appeal because the appliance of whose defectiveness he complains was a simple appliance with which he was entirely familiar and whose defects were patent and obvious to him. That he was aware of the defective condition of the runway can scarcely be said to be open to doubt inasmuch as the record discloses that appellant testified that he objected to the use of the steel apron, declaring that he preferred to use the planks without the apron.

It is to be further borne in mind that appellant was a man of at least 7½ years' experience in railroad work, a mature man, and that he had on a number of occasions utilized the two planks hereinabove described for the purpose of unloading freight at the place where he suffered the injuries of which he complains.

Taking all of these facts and circumstances into consideration, the question is presented as to whether this is a proper case for the application of the simple tool doctrine. The steel apron was something entirely new. It had been sent out for use at this particular station on the very day the accident happened. While the plaintiff was an experienced railroad man, there is no evidence that he had ever used such an appliance before or that he had ever seen one in use. As to whether this appliance, as made up of the two planks and the apron, was so simple in construction that the danger of using it was so obvious and imminent that an ordinarily prudent person would not undertake to do so presents a question not free from doubt. It is true that the plaintiff objected to its use, fearing that it might prove dangerous. On the other hand, the conductor, a person presumedly of greater experience, directed the plaintiff to use it in unloading the freight from the car. It is inconceivable that the conductor would have given this direction had he considered the appliance so defective in construction that the danger in using it was obvious and imminent. In order to relieve the employer from responsibility for injuries that befall an employee while remaining at his work, after he has complained of defective apparatus and the employer has agreed to make reparation and has directed the employee to continue his service, a very plain case must be made out against the employee before the court will be justified in holding as a matter of law that the employee has assumed the risk of his employment under such circumstances. It was so held in the case of Seaboard Air Line v. Horton, 239 U. S. 595, 599, 36 S. Ct. 180, 182, 60 L. Ed. 458, where the court declared the law in the following language:

"To relieve the employer from responsibility for injuries that may befall the employee while remaining at his work in reliance upon a promise of reparation, there must be something more than knowledge by the employee that danger confronts him, or that it is constant. The danger must be imminent,—immediately threatening,—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise. The danger of the explosion of the water glass, which normally should withstand the pressure to which it was subjected, but which might probably explode at some time near or remote, cannot be said, as matter of law, to have been so imminent as to import an assumption of the risk by Horton notwithstanding the employer's promise to replace the guard glass. It would require a much plainer case than this to justify taking the question from the jury."

In that case the defect in the appliance was the absence of a small guard glass to protect the engineer from injury in case of the explosion of the water glass. This guard glass was two or three inches wide, eight or nine inches long, and about half an inch thick. Without this guard glass the engineer was exposed to the danger of an explosion of the water glass. The court, however, held that this danger from explosion was not as a matter of law so imminent as to import an assumption of risk by the engineer in continuing in his work after being directed by his employer to do so and upon the reliance of his employer to procure a guard glass in the future. So, in the case here, the appliance consisting of the two planks had been used in the past without any fatal or serious results as far as the evidence in this case shows. This appliance with the addition of the steel apron could be used without necessarily inflicting any injury upon the employee. The two planks were in their accustomed place, and the hand truck used in unloading freight could be wheeled over them after the steel apron was put in place the same as it could before. The truck, of course, ran more freely over the steel surface after the apron was made a part of the appliance than it formerly did over the planks. It would perhaps require more care and greater caution to operate this appliance after the steel apron was put in place than before, but as it could, after the addition of the apron even in its defective form, be operated with safety, although greater care might be required in its operation, it may well be questioned whether the danger in its use was so "imminent and immediately threatening" that a prudent person would not attempt its use. At least the case is not so plain that the court can say as a matter of law that in using it under the circumstances shown, the plaintiff assumed the risk of his employment.

[6] The law is well established that, before a servant can be held to have assumed the risk in using even simple tools, after complaint to his employer and promise of reparation by the latter, the danger must be so obvious and imminent that no prudent person would undertake the service. 39 Cor. Jur. p. 790, § 989. Measured by such a standard, the conduct of the plaintiff under the facts shown cannot by any reasonable construction thereof, be held as a matter of law to have amounted to an assumption of the risks of his employment.

"Although the defense of assumption of risk is established as a part of the law and will be applied in all cases fairly within the rule, it is, nevertheless, not a favored doctrine, * * * and should not be extended beyond its reasonable limits." 39 Cor. Jur. p. 689, § 891. We think this statement of the law is directly applicable to the facts before us, and that it would indeed be an extremely harsh rule that would hold that the plaintiff in executing the orders of the conductor under the circumstances shown, had as a matter of law assumed the risks of his employment. He had never before operated an unloading appliance like the one in question. He objected to its use, but was assured by the conductor that a new one would be provided on the following day, and in the meantime the one furnished by the company would be used. He was entitled to rely in a large extent upon the conductor's superior experience and greater knowledge, and it seems unthinkable under these conditions that he would be held as a matter of law to have assumed the risk of using the defective appliance.

In the case of Atlantic Coast Line R. Co. v. Banks (C. C. A.) 288 F. 826, 828, under facts somewhat similar to those before us, the court said: "There is nothing in the case which would have justified the court below in holding that, as a matter of law, plaintiff assumed the risk of possible injury. He says he had never before handled any freight of the kind. He was entitled to rely upon his foreman's better knowledge, unless he could for himself see and appreciate the danger. Whether he could or should have done so was also a question for the jury." In Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 S. Ct. 435, 437, 63 L. Ed. 853, the court quotes with approval from the Supreme Court of Pennsylvania, Williams v. Clark, 204 Pa. 416, 418, 54 A. 315, and approves the law there stated as follows: "If the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous."

We particularly call attention to the closing words of this paragraph, "if the work was not inevitably and imminently dangerous." We think it sufficiently appears in this case from the facts stated above that the work which the plaintiff was called upon to perform was not as a matter of law either "inevitably or imminently dangerous."

In Ruling Case Law, we find the law on this subject stated as follows (volume 18, p. 704, § 187): "The fact that the employee acted pursuant to an immediate command is a cogent evidentiary fact bearing on this issue. Inasmuch as commands usually proceed from persons having superior knowledge, it may be presumed in case an employee is ordered to do certain work that the employer has superior knowledge of the perils attending performance; and in the absence of anything to the contrary, or where the case otherwise is in doubt, this presumption must prevail in behalf of the plaintiff." Concluding this subject, the author on page 705 has the following to say regarding nonsuits and directed verdicts in cases of this kind: "While there may be cases disclosing such manifest danger to the employee that the court may direct a nonsuit or verdict for the employer, it generally is held to be for the jury to say whether the employee, in acting pursuant to orders or assurances, knew and appreciated the peril. The tendency of the modern cases is to permit a recovery unless the employer's direction calls for nothing less than recklessness on the part of the employee, leaving no ground for difference of opinion as to the peril of acting pursuant thereto."

We might add to the above authorities many others from our federal and state courts expounding the same doctrine. These mentioned we think are sufficient to show that the courts have with reasonable uniformity held that a servant does not assume the risk of his employment after complaint and promise of reparation, except in those cases where the work is obviously, imminently, and inevitably dangerous. We are satisfied that the evidence before us does not present a state of facts where the dangerous character of the work was so obvious and imminent as to constitute this a proper case for the application of the simple tool doctrine.

We are not unmindful of the fact that there are many authorities from courts of the highest standing and repute holding contrary views from those above expressed, but in our judgment the rule which we have followed is more in harmony with the trend of modern decisions as well as recent legislation upon the respective rights and liabilities of employers and employees. In many instances, the doctrine of assumption of risk has been entirely repudiated by legislative enactment. The Federal Employers' Liability Act has, in certain character of actions, deprived an employer of such defense, but it has been held that its provisions in this regard do not extend to actions like the instant one. Seaboard Air Line v. Horton, 233 U. S. 492, 503, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Jacobs v. Southern Railway Co., 241 U. S. 229, 235, 36 S. Ct. 588, 60 L. Ed. 970. As we understand these cases, they hold that the common-law rule governing the defense of assumption of risk applies to all actions brought under the Federal Employers' Liability Act, except those brought against a common carrier for the violation of any statute enacted for the safety of employees to which the instant action does not belong.

It is somewhat singular that there is no case to be found in the reports of this state, at least none has been called to our attention and our research has failed to discover any case, which has applied the simple tool doctrine in passing upon the liability of an employer for injuries sustained by the employee. There are cases, however, to be found among the decisions of our appellate courts in which the facts might have justified the application of the rule, but which were decided without any reference to this rule of law, and in direct opposition to its terms.

In Nolthoff v. Los Angeles Gas, etc., Co., 161 Cal. 93, 118 P. 436, the employee complained that a certain sump hole filled with boiling water in a basement was not covered with a platform. The employer agreed to construct a platform covering the hole. The employee was injured and was nonsuited by the trial court. This court reversed the judgment and stated the rule in such cases to be as follows (page 97 of 161 Cal., 118 P. 436, 438): "The general rule is that, where an employee has full knowledge of the unsafe condition of the premises upon which he is working, he is deemed to assume the special risk incident to the employment under such conditions. [Citing authorities.] Upon this general rule is ingrafted a well-established exception that, where 'an employee notifies the master of a special risk, and objects to continuing the work under the existing conditions, and is induced to continue such work by a promise to remove the danger within a reasonable time, then for such time the employee is not presumed to assume such risk.'" (Citing authorities.)

In Hawley v. Los Angeles Creamery Co., 16 Cal. App. 50, 116 P. 84, the defendant operated a dairy and the plaintiff was the driver of its milk wagon drawn by a team of horses. The lines used by the driver in guiding and checking his team were defective. The driver notified the manager of the creamery of such defect. The manager promised to take care of the defect. A few days thereafter, while plaintiff was driving the team, the lines broke in the defective part. The team ran away and injured the driver severely. A judgment in his favor was affirmed by the District Court of Appeal and this court refused a further hearing of the case. The District Court of Appeal held, at page 53 of 16 Cal. App., 116 P. 84, 86, that "when, however, as in this case, the master, through a vice principal, has expressly promised to repair a defect, the servant can recover for the injury caused thereby within such period of time after the promise as it would be reasonable to allow for its performance. * * *" Diehl v. Swett-Davenport Lumber Co., 14 Cal. App. 495, 112 P. 561, was also a case in which the employee recovered judgment which was sustained on appeal. The defect was simply a hole in the floor of a wooden platform. The employer promised reparation. The employee was injured when his foot slipped into the hole and he was thrown against dangerous machinery and severely injured.

From the foregoing authorities we see no escape from the conclusion that the trial court was in error in directing a verdict in this case in favor of the defendant, and for that reason the judgment based upon such verdict must be reversed.

[7] We think there is no merit in respondent's contention that the plaintiff has failed to perfect a valid appeal from the judgment in this action. It is true that the notice of appeal states that the appeal is from the judgment of nonsuit. There was only one judgment rendered in this action, and it was not a judgment of nonsuit. But it is clear that

the plaintiff intended to appeal from the judgment rendered by the trial court. The words "of nonsuit" may well be disregarded as surplusage.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.

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116 Cal.App. 380

HEIMBURGE v. STATE GUARANTY CORPORATION et al.

Civ. 455.

District Court of Appeal, Fourth District, California.

Aug. 28, 1931.

Rehearing Denied Sept. 24, 1931. Hearing Denied by Supreme Court Oct. 26, 1931.

1. Covenants 🔑69(2).

Deed clause binding grantee to leave light well between property conveyed and grantor's building so long as grantor retained ownership *held* not covenant running with land (Civ. Code, §§ 1461, 1462).

> Language of agreement, which provided that grantee, "in the event of his building on said property," should leave light well between building constructed and adjoining building of grantor, and that agreement should be in effect only so long as grantor should retain ownership of adjoining building, and that covenant should not pass to grantee or successors in interest thereof, evidenced intention to bind parties to agreement, and not their successors in interest.

2. Covenants 🔑29.

Under covenant not running with land, *held*, no privity existed between grantee's remote successors in title and grantor's tenant under 99-year lease.

3. Covenants 🔑57.

Ordinarily, personal restrictions or covenants in deed or contract do not pass with land where no privity of estate or of contract exists (Civ. Code, §§ 1461, 1462).

4. Covenants 🔑70.

Doctrine of equitable easement running with land *held* inapplicable where agreement to leave light well between buildings was clearly personal between parties (Civ. Code, §§ 1461, 1462).

5. Covenants 🔑70.

Grantor's acquiescence, for twenty-five years, in obstruction of light by grantee's successors in title *held* evidence of parties' construction (Civ. Code, §§ 1461, 1462).

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

Action by Max Heimburge against the State Guaranty Corporation and others. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Frank H. Heskett, of San Diego, for appellant.

John H. McCorkle, of San Diego, and Orrick, Palmer & Dahlquist, of San Francisco, for respondents.

MARKS, J.

Appellant instituted this action seeking to abate an alleged nuisance and to recover damages alleged to have been occasioned thereby. At the close of appellant's case respondents made a motion for nonsuit which was granted. From the judgment entered, appellant has prosecuted this appeal.

This action grew out of a controversy over the construction to be placed upon certain provisions of a deed executed on November 18, 1898, between Alice Bennett Coffin, now Alice Bennett Gilmore, the grantor, and Frank P. Frary, grantee. The provisions of this deed which are in dispute are as follows: "It is also agreed that the grantee herein shall in the event of his building on said property leave a light well between the building constructed and the Lafayette block; the said light well to be four feet wide and to extend from the north side of the second window on the north wall to the south wall of said Lafayette block; and extending upward from the bottom of the second story windows in said Lafayette block. It is further understood that this agreement shall be in effect only so long as the grantor herein named shall retain the ownership of said Lafayette block, and this covenant shall not pass to the grantee or to successors in interest thereof. To have and to hold the above-granted and described premises unto said grantee his heirs and assigns forever."

Mrs. Gilmore originally owned lots A and B in block 46 of Horton's addition in San Diego. She sold the westerly portion of this tract (now owned by respondents) to Frary, retaining title to the easterly portion, which she still owns subject to a ninety-nine year lease. When she acquired title to these lots there was a four-story brick building upon that portion which she still owns and upon which appellant holds the ninety-nine year lease. The first floor of this building is occupied by stores, and the three upper floors are used as a hotel. There are outside windows in the westerly wall of this building on all three floors of the hotel. Appellant's interest in this property is deraigned through his lease.

On November 21, 1898, Frary sold his portion of the property to P. M. Johnson and J. E. Connell, who built a two-story building upon it. This was probably erected some time prior to the year 1904 and remained thereon until the year 1929. The front portion of this two-story building was built flush to their easterly property line for a distance of twenty-one feet thereby closing certain of the windows on the second floor of the westerly side of Mrs. Gilmore's hotel building. The buildings remained in this condition until the year 1929, when the two-story building was removed and a four-story building erected in its place by the State Guaranty Corporation. The easterly wall of this new building followed the same line as that of the two-story building erected by Johnson and Connell. Its northerly twenty-one feet, which is the front end of the building, was built flush to the property line closing the windows for that distance on the westerly side of the Gilmore hotel property. A light well four feet in width was left along the balance of the westerly wall of the hotel making an offset of four feet in the easterly wall of respondents' building corresponding with the light well left in the easterly wall of the Johnson-Connell building.

Appellant maintains that the erection of the northerly twenty-one feet of the easterly wall of the four-story building flush against the hotel property thereby closing the outside windows on the two upper stories was a violation of the provisions of the deed from Coffin (now Gilmore) to Frary, which we have quoted; and, further, that these provisions constitute a covenant running with the land whereby an easement was created with the Gilmore property as the dominant tenement and respondents' property as the servient tenement, which easement would prevent respondents from closing one vertical tier of the windows by the erection of its present building.

[1, 2] The sole question presented by the record before us is whether or not the provision of the deed from Coffin (now Gilmore) to Frary did create an easement which would pass with the title to the property or was a personal restriction or covenant between the parties to the deed.

The record shows that by the terms of the deed Frary agreed to leave a light well on his property "in the event of his building on said property." This deed also contained a pertinent provision that the agreement requiring Frary to construct this light well would remain in force only as long as Miss Coffin (now Gilmore) should retain ownership of the hotel property and that it should not pass to her grantees or successors in interest. It would seem to be immediately apparent from the language used by the parties to this deed that they intended to bind only themselves and not their successors in interest and that the provisions which we have quoted created merely a personal contract between them and not an easement or covenant that would attach to the property and pass to subsequent owners thereof. The following cases make this conclusion irresistible: Los Angeles Terminal Land Co. v. Muir et al., 136 Cal. 36, 68 P. 308, 309; Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 37 L. R. A. (N. S.) 5; Bresee v. Dunn, 178 Cal. 96, 172 P. 387; Pythian Castle Ass'n v. Daroux, 172 Cal. 510, 157 P. 594.

No privity of estate or contract exists between appellant and respondents. In the case of Los Angeles, etc., Co. v. Muir et al., supra, the plaintiff conveyed certain properties to the Catalina Yacht Club. The deed contained a provision as follows: "It is hereby covenanted and agreed by and between the parties hereto that, in consideration of this conveyance, no saloon business, or business of vending malt, vinous, or spirituous liquors, shall ever be carried on upon said lot; neither shall said lot be used for any business or store purposes, other than for hotel or lodging house." In deciding the case the Supreme Court used the following language: "The covenant inserted in the deed from the plaintiff to the Catalina Yacht Club for the lot mentioned therein is not one that runs with the land. It was not made for the benefit of the lot conveyed, but purported to impose a burden thereon by restricting its use; and, while a benefit will pass with the land to which it is incident, a burden will adhere exclusively to the original covenantor, unless a privity of estate or tenure subsist or was created between the covenantor and covenantee at the time when the covenant is made. [Citing cases.] Here there was no privity of estate between the parties, for by the same instrument which contained the covenant the fee was conveyed to the covenantor. Under the feudal system the transfer of every estate created privity of tenure between the parties, and hence both the burden and the benefit of all covenants made by either bound and profited the assignee of either as an incident to the land. 'But, when the statute of quia emptores abolished subinfeudation, this privity no longer existed in cases where a fee was transferred, and no reversion was left in the donor; and it became a rule that covenants which imposed any charge, burden, or obligation upon the land were held not to be incident to it, and therefore incapable of passing with it to an assignee. * * * But on the other hand, if the covenant were one intended to benefit the land, it was considered to be incident to and run with the land, and therefore whoever might become the owner of the land would also become entitled to the benefit of the covenant.' (Rawle, Cov. 314. So, our Civil Code (section 1462) provides, 'Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land;' and section 1461, Civ. Code, provides that 'the only covenants which run with the land are those specified in this title, and those which are incidental thereto.' The covenant here in question is one which not only does not, as matter of law, run with the land, but it purports on its face to be a personal covenant, not binding upon the assigns of the covenantor, nor inuring to the benefit of the successors or assigns of the covenantee; and it is quite clear that no action at law upon the covenant in question could be maintained by the plaintiff against the defendants, or either of them."

[3] Ordinarily, personal restrictions or covenants created by deed or contract do not pass with the land where there is no privity of estate or privity of contract. In the case of Pythian Castle Ass'n v. Daroux, supra, the Supreme Court held as follows: "The facts are simple and undisputed. M. Graf was the owner of lot 5 in the block bounded by H, Eighth, I, and Ninth Streets, in the city of Sacramento. He conveyed by deed on April 21, 1888, the south 90 feet of the east 40 feet of his lot to Knights of Pythias Hall Association of Sacramento, plaintiff's predecessor in interest. The deed, in which the grantor was designated as 'party of the first part' and the grantee as 'party of the second part,' contained the following language: 'And said party of the first part hereby covenants and agrees, and this deed is given and accepted upon the express understanding and agreement, that he will never himself erect any structure upon the south ninety feet of the west forty feet of said lot 5 within five feet of the land hereby conveyed, and that in case he has any bona fide offer to purchase of him said south ninety feet of the west forty feet of said lot 5 he will give said second party the preference to purchase the same at said bona fide offer.' Defendants by mesne conveyances and after the death of M. Graf became the owners of the south 90 feet of the west 40 feet of said lot 5, and they served upon plaintiff notice of their intention to excavate and build thereon. Appellant thereupon commenced this action to enjoin them from placing any structure on the easterly 5 feet of their lot. The only question involved in the case therefore relates to the meaning and force of the quoted language. There is no ambiguity in the words of the deed. The paragraph upon which appellant relies, is a purely personal covenant which does not purport to bind any one but the grantor, M. Graf. It does not run with the land, and does not place any sort of compulsion upon the present owners. By it M. Graf merely agreed to forbear from building any structure upon the easterly 5 feet of his remaining portion of lot 5 during his ownership, and to give a preference to his grantee of the south 90 feet of the east 40 feet to purchase the adjoining land in the event of a bona fide offer being made therefor by some intending purchaser. By no twisting or turning of the quoted language may any other meaning be derived from it. There is abundant authority to support the view of the trial court that the covenant pleaded is merely a personal one, and not enforceable against respondents."

[4, 5] In some cases, where justice and equity require it to be done, the courts have held that an equitable easement which runs with the land might be created by a personal restriction or covenant made between the owners of properties. This doctrine of equitable easements is set forth in the case of Los Angeles, etc., Co. v. Muir et al., supra, as follows: "Conceding, therefore, that personal covenants imposing restrictions upon the uses of land contained in grants thereof may in proper cases be enforced in equity, the question remains whether the facts of this case justify the relief granted by the court below. The plaintiff is the grantor in whose deed to the yacht club the covenants in question were inserted. As grantor it could determine the conditions or restrictions under which it would part with the title, and the covenants it would require of the vendee. It could have inserted a condition subsequent, the violation of which would involve a forfeiture of title, and such condition would have been effective against the assigns of the grantee, or it could have inserted a covenant which would have inured to the protection of plaintiff's grantee or successor in interest, and would have expressly bound the assigns of the yacht club. It did not do either, but contented itself with a covenant, in its terms purely personal, purporting to create a restriction upon the use of the property so long only as the vendee should retain the title, and by such agreement they would, at law, each be conclusively bound; and in determining any alleged equity arising out of this covenant or agreement, or its alleged violation, its legal effect must not be lost sight of, for, where a covenantor limits, by its terms the legal duration of his covenant, there must be a clear and convincing equity to justify its continuance beyond the time so limited. It cannot be assumed that it was intended by either party to the covenant that it should be continued for all time, or 'until the island should be swallowed by the sea.' The covenant was not that the yacht club would use it 'for hotel, lodging-house, or club purposes' for any time or at all; and, even if such had been the form of the covenant, surrounding conditions might so change that a court of equity would relieve the covenantor and the property from such restriction to its use, since public policy requires that land should not be unnecessarily burdened with permanent or long-continued re-

strictions depreciating the value of its use to the owner, as well as its selling value in the market; and, as there is no personal contract relation between the parties to this action, the plaintiff is not entitled to relief against the defendants unless the evidence shows with reasonable certainty that the use of the lot for ferry purposes would materially injure the remaining property of the plaintiff."

We cannot apply the doctrine of an equitable easement to this case. It affirmatively appears from the language used by Coffin and Frary in their deed that the covenant or restriction therein contained was personal to the parties and was not intended by them to run with the land. Appellant must rely upon this language and his rights are limited by it. To hold that the provisions of this deed created an equitable easement, it would be necessary for us to read into it an intention that is not only not apparent therefrom but is contrary to the express language used. We would have to impose a burden upon the subsequent owners of the Frary property which was neither contemplated nor desired by Frary or his grantor.

The apparent interpretation put upon the provisions of this deed by the conduct of Mrs. Gilmore and the subsequent owners of the Frary property furnishes a powerful argument against the contentions of appellant and in favor of the position assumed by respondents and the construction placed upon it by the trial court. The easterly wall of the two-story building erected upon respondents' property by Johnson and Connell was on the identical line now occupied by the easterly wall of the present building. The former building closed the windows of the second floor in the north end of the westerly wall of the Gilmore building. This old building remained upon the property closing these windows for a period of twenty-five years without active opposition or question from Mrs. Gilmore. Her acquiescence in this condition for this period of time is evidence of the construction put upon the language used in the deed and is a strong argument in favor of the conclusion that the closing of these windows was not considered by her a violation of the terms of her deed to Frary. If the closing of these windows on the second floor of the building was not a violation of the terms of the deed, then the closing of the corresponding windows on the third and fourth floors was not a violation of its terms. Under these conditions and the other circumstances surrounding this case we cannot apply the doctrine of an equitable easement to the situation here presented.

Judgment affirmed.

We concur: BARNARD, P. J.; FINNEY, Justice pro tem.

116 Cal.App. 616

SECURITY TRUST & SAVINGS BANK OF SAN DIEGO v. MATSON et al.

Civ. 414.

District Court of Appeal, Fourth District, California.

Sept. 15, 1931.

1. **Notaries 🔑11.**

Evidence sustained finding that obligee's negligence proximately caused loss on bond containing forged signature, precluding recovery for notary's negligence in acknowledging signature.

2. **Notaries 🔑11.**

In action against notary and surety on notary's official bond, notary could impeach her certificate of acknowledgment, misused through notary's negligence, where plaintiff's negligence proximately caused loss.

3. **Notaries 🔑11.**

Notary acknowledging signature on bond did not guarantee signature's genuineness to obligee whose negligence proximately caused loss (Pol. Code, § 801).

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

Action by the Security Trust & Savings Bank of San Diego against Blanche P. Matson and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Hamilton, Lindley & Higgins, of San Diego, for appellant.

Harvey H. Atherton, of San Diego, for respondents.

JENNINGS, J.

Plaintiff appeals from a judgment denying recovery in an action instituted by it to recover damages from a notary public and the surety on her official bond. The record discloses the following pertinent facts:

For approximately 2½ years prior to December 27, 1928, one Lewis H. Homer was an attorney in fact for respondent Indemnity Insurance Company of North America in the city of San Diego. During the month of December, 1928, the said Lewis H. Homer sought to procure from appellant the loan of $15,000, and offered to secure repayment of the loan by depositing with appellant a bond executed by the Indemnity Insurance Company of North America guaranteeing repayment of the loan. The deal was consummated and the loan made. The bond which was thus given purported to have been executed by Gordon L. Eby, also an authorized agent and attorney in fact of the respondent insurance company. The bond was not in fact executed by Gordon L. Eby, and his signature appearing thereon was forged. Attached to the bond was a notarial certificate in the usual form reciting that Gordon L. Eby, known to the notary to be the person whose name is subscribed to the within instrument as attorney in fact of the Indemnity Insurance Company of North America, had personally appeared before the notary and acknowledged that he had subscribed the name of the company as principal and his own name as attorney in fact. The certificate bore the seal of a notary public. The signature of the notary is a genuine signature. The evidence discloses that the notary, who had been employed as a stenographer in the office of Gordon L. Eby in San Diego, was not so employed at the time the bond was made. It also appears that it was the custom of the notary, during the time she was employed in Eby's office to keep in her desk, available for use by any one who had access thereto, a number of blank acknowledgments signed by her as notary. The evidence discloses that the notary did not possess a seal of her own, but used a blank notarial seal which was the property of the office. This seal remained in the office when she terminated her employment with Gordon L. Eby during the month of November, 1928. It is undisputed that although the signature of the notary appearing on the certificate attached to the bond is a genuine signature, the recital contained therein that Gordon L. Eby had appeared before her on December 27, 1928, and acknowledged that he had subscribed the name of the Indemnity Insurance Company of North America to the bond as principal and his own name as attorney in fact is untrue, and that Gordon L. Eby did not subscribe the company's name as principal or his own name as attorney in fact, nor did he acknowledge that he did. The conclusion is obvious that Lewis H. Homer, who was employed in the office of Gordon L. Eby, forged Eby's signature to the bond, secured possession of one of the blank notarial certificates bearing the signature of the notary, impressed it with the notarial seal which was in the office, and attached the certificate to the spurious bond, which he deposited with appellant to secure repayment of the loan made by appellant to him. The complaint alleges that the notary had been duly appointed and was acting as such on December 27, 1928; that her official bond had been duly approved by a judge of the superior court; that appellant made the loan to Lewis H. Homer in reliance upon the bond deposited as security; that it believed the bond was valid and genuine for the reason that the purported signature of Gordon L. Eby as attorney in fact appeared to have been acknowledged before the notary; that her certificate was genuine, and by reason thereof appellant believed the bond to which it was attached and the signature of Gordon L. Eby as attorney in fact were authentic and genuine and that it had good security for the loan; that Lewis H. Homer is insolvent and the loan obtained by him has not been paid, and, by reason of the genuine certificate of acknowledgment of the notary attesting the forged signature of Gordon L. Eby as attorney in fact, appellant has suffered damage to the extent of the unpaid loan.

The answer of respondents denies that the notary took the acknowledgment of Gordon L. Eby, that Eby had subscribed the name of the Indemnity Insurance Company of North America to the bond and his own name as attorney in fact, or that the notary had prepared the certificate or impressed the notarial seal upon it, or that she had attached the certificate to the bond or that she had known of the bond or the attachment of the certificate to the bond until many months after the transaction had taken place. It is alleged that the nature of the transaction was so unusual as to put appellant upon notice of its irregularity, and that by the exercise of ordinary prudence it could have ascertained that the signature of the attorney in fact was forged and the bond spurious. The answer also contains allegations that appellant had in its possession signature cards of Gordon L. Eby, and that for a number of years Gordon L. Eby had been a customer of appellant and a depositor in appellant's bank and had engaged in numerous transactions with said bank whereby his signature had become known to appellant's officers and employees, so that appellant by the exercise of ordinary care could have ascertained the forgery and that the acceptance of the spurious bond under the circumstances was gross negligence, and any damage resulting therefrom was caused by the negligence of appellant.

The trial court found that the bond was not in fact executed by Gordon L. Eby, but that the name of Gordon L. Eby was wrongfully signed to the bond by Lewis H. Homer without authority and was a forgery. The court further found that the signature of the notary was genuine, but that she did not take the acknowledgment of Gordon L. Eby and that she did not impress the notarial seal upon the certificate nor attach the separate slip of paper containing the purported acknowledgment to the bond, and that the notary did not know of the execution of the bond or the attachment of the purported certificate of acknowledgment to the bond until more than two months after the loan was made. The court also found that the notary was negligent in signing certificates of acknowledgment in blank and allowing them to remain in the office where she had been employed, but that her negligent action in this regard was not the proximate cause of appellant's damage. It was found that the loan by appellant to Homer upon the security of the bond was a very unusual transaction, and that appellant failed to use ordinary diligence in making the loan without investigating the surrounding circumstances and without making any effort to verify the representations of Homer. The court further found that appellant did not rely upon the certificate of acknowledgment attached to the bond, but required Homer to produce special written authority from the insurance company for the execution of the bond, and that the written authority which was produced was not in fact executed by the manager of the insurance company as it purported to be, but that the manager's signature to the written authorization was forged. From the findings thus made the court concluded that the appellant was not entitled to prevail and denied recovery.

Appellant contends that the judgment of the trial court is not sustained by the evidence; that the judgment is contrary to law; that the bank was not required as a matter of law to investigate the validity of the signature of respondent, Indemnity Insurance Company of North America, because, it is said, the notary's certificate is a guaranty of the authenticity of such signature.

[1, 2] Appellant's first contention may be disposed of readily. The record discloses the production of ample evidence to support every finding of fact which the trial court made.

With respect to the second contention, appellant urges that the trial court erred in permitting the notary to impeach her certificate of acknowledgment upon which appellant was entitled to rely and did rely. The logical effect of appellant's contention is therefore that a notary, who has negligently rendered it possible for a wrongdoer to misuse a certificate of acknowledgment, is liable although the person who dealt with such wrongdoer was himself guilty of negligence which was the proximate cause of the damage sustained. It is true that appellant's complaint was not based on the negligence of the notary, but the answer of respondents alleged contributory negligence on the part of appellant, and it was an important issue in the case. The defense of contributory negligence necessarily assumed negligence on the part of the notary. The trial court found that the notary was negligent, a finding amply sustained by the evidence. The evidence was likewise ample to sustain the court's finding that appellant was negligent and that its negligence was the proximate cause of the loss incurred by appellant. Such a state of facts precludes recovery by appellant. Hatton v. Holmes, 97 Cal. 208, 31 P. 1131; Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 P. 843; Riverside P. C. Co. v. Maryland C. Co., 46 Cal. App. 87, 90, 189 P. 808; Brown v. Rives, 42 Cal. App. 482, 489, 184 P. 32.

[3] Appellant's third contention is that no legal duty was imposed upon appellant to investigate the genuineness of the signature of respondent Indemnity Insurance Company of North America by its attorney in fact because the notary's certificate guaranteed the authenticity of such signature. This contention is closely related to appellant's second contention hereinbefore discussed, and amounts to a declaration that a notary is a guarantor of the genuineness of the signature of the individual who acknowledges that it is his signature although the person who takes the instrument bearing the notary's certificate may be grossly negligent and his negligence be the proximate cause of the loss suffered. There is no rule of law that imposes so severe a burden upon a notary. Section 801 of the Political Code of California imposes a liability upon a notary and the sureties on his bond for damages sustained through official misconduct or neglect. The action was tried on the theory that the notary was negligent in leaving about her desk blank forms of acknowledgment bearing her signature which made possible the misuse of such forms in the manner in which one such form was here used to the damage of an innocent third party. To such an action the contributory negligence of the third party is a defense, and, if made out by the production of competent evidence, is a complete answer. Oakland Bank of Savings v. Murfey, supra. The evidence produced at the trial showed that Gordon L. Eby, the attorney in fact of the insurance company, had been a customer of and depositor in the appellant bank for a number of years; that the bank had cards bearing his signature; that the forged signature appearing on the bond differed radically from the genuine signature; that the bank, although it questioned his authority to execute the bond in question, made no effort to communicate with him regarding his signature, trusted to the man to whom they were making a loan of $15,000 to send a telegram to the office of the insurance company in San Francisco, inquiring as to the authority of Eby to execute the bond, and, when later shown a letter purporting to be signed by the manager of the insurance company authorizing the execution of the bond, raised no further question and completed the transaction. It is further to be noted that the trial court found that the transaction, wherein the loan was made on the sole security of a bond of an insurance company guaranteeing repayment of the loan, was an unusual transaction, a finding supported not only by the evidence of appellant's action in questioning the authority of the attorney in fact to execute the bond, but by other evidence sufficient to sustain it. The recital of the facts indicates the correctness of the court's judgment.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

116 Cal.App. 563

THE ASTORIAN.

HARBOR SUPPLY CO. v. GIACONI et al.

Civ. 472.

District Court of Appeal, Fourth District, California.

Sept. 12, 1931.

1. Courts 🔑489(1).

Federal judicial powers include all cases of admiralty and maritime jurisdiction, exclusive of state courts, in actions strictly in rem (Code Civ. Proc. § 813 et seq.; Const. U. S. art. 3, § 2).

2. Admiralty 🔑10.

Actions in personam, involving supplies furnished ocean-going boat, with ancillary attachment proceedings against vessel, may be brought in state courts (Code Civ. Proc. § 813 et seq.; Const. U. S. art. 3, § 2).

3. Maritime liens 🔑28.

Under statute, no lien exists against vessel for supplies, unless furnished at request of owner, master, agent, or consignee (Code Civ. Proc. § 813, subd. 2).

4. Maritime liens 🔑28.

Lessee of ocean-going motorboat having option to purchase *held* not "owner" within statute creating lien for supplies; "ownership" implying title (Code Civ. Proc. § 813, subd. 2).

> Code Civ. Proc. § 813, subd. 2, provides that vessels are liable, and that liabilities constitute lien, for supplies furnished within state for use of vessels at request of their respective owners, masters, agents, or consignees.
>
> [Ed. Note.—For other definitions of "Owner," and "Ownership," see Words and Phrases.]

5. Shipping 🔑27.

Option to purchase, such as option to lessee of ocean-going motorboat to purchase boat on or before expiration of term, conveys no title to optionee.

6. Maritime liens 🔑28.

Liability of boat and of owners for supplies purchased by master arises from master's agency for owners (Code Civ. Proc. § 813, subd. 2).

7. Maritime liens 🔑28.

Lessee of ocean-going motorboat who, having hired master to navigate it, purchased supplies therefor, *held* not "master" within statute creating lien on boat (Code Civ. Proc. § 813, subd. 2).

> [Ed. Note.—For other definitions of "Master," see Words and Phrases.]

8. Maritime liens 🔑28.

Lessee of ocean-going motorboat operating it for his own use and profit *held* not owners' "agent" within statute creating lien on boat for supplies (Code Civ. Proc. § 813, subd. 2).

> [Ed. Note.—For other definitions of "Agent," see Words and Phrases.]

9. Maritime liens 🔑28.

Term "consignee," within statute creating lien against vessel for supplies, *held* to mean one to whom personalty is delivered for sale (Civ. Code, § 2110; Code Civ. Proc. § 813, subd. 2).

> [Ed. Note.—For other definitions of "Consignee," see Words and Phrases.]

Appeal from Superior Court, San Diego County; T. I. Fitzpatrick, Judge.

Action by the Harbor Supply Company against the motorboat Astorian, J. V. Giaconi, and others. Judgment for plaintiff, and defendants named appeal.

Reversed in part.

Loucks & Phister, of San Pedro, for appellants.

Liggett & Liggett, of San Diego, for respondent.

MARKS, J.

Respondent is a corporation whose principal place of business is in the city of San Pedro, Cal., where it is engaged in the business of supplying gear, tackle, and supplies to ocean-going boats. The defendants J. V. Giaconi, Mrs. K. M. Giaconi, and Peter M. Hanson were the owners of the ocean-going motorboat Astorian, which was engaged in fishing along the Pacific Coast from Alaskan to Mexican waters.

On or about October 1, 1929, J. V. Giaconi, acting as managing agent for the boat, leased it to Y. Ito for the period of one year at a cash rental payable monthly in varying amounts. It was agreed that Ito should, at his own cost and expense, keep the Astorian in good, operative condition, tight, staunch, well fitted and tackled, and that he would pay all expenses of the operation thereof including the gear and the supplies used during the term of the lease. He was given the option to purchase the boat on or before October 1, 1930, which he did not exercise. By the terms of the agreement he was prohibited from selling, mortgaging, or otherwise disposing of the Astorian and agreed not to permit it to be attached or taken upon execution.

Ito and J. V. Giaconi were brought together by John Vitalich, who was vice president and a director of the respondent corporation. All negotiations for the terms of the lease were conducted through Vitalich and the document itself was prepared in his office.

Shortly after October 1, 1929, Ito took possession of the Astorian. He was introduced to respondent by Vitalich and bought goods and supplies from respondent in San Pedro, which were of the total reasonable value of $1,968.18, upon which he paid the sum of $653.97, leaving a balance unpaid of $1,314.21, which forms the basis of this action.

Within a year from the time the supplies were furnished Ito, respondent brought this action to recover the unpaid balance of the bill. It also sought to have decreed that its claim was a lien upon the boat and that the boat be sold to pay the amount of the judgment, interest. and costs. The court rendered judgment against Ito for the principal of the unpaid bill together with interest and decreed the amount a lien upon the Astorian paramount to all other liens existing upon said boat prior to October 10, 1929. It further decreed the foreclosure of said lien against the defendants J. V. Giaconi and Y. Ito and ordered the Astorian sold in liquidation thereof. No attachment has been issued upon the boat. This appeal is taken by the defendant motor boat Astorian and the defendant and claimant J. V. Giaconi.

Appellants strongly urge that in so far as this action is against the Astorian and the judgment of the court decrees the claim of plaintiff a lien upon the boat and orders it sold to satisfy such lien, it is an action in rem, of which the courts of California have no jurisdiction.

[1, 2] It is well settled that the judicial powers of the federal government extend to all cases of admiralty and maritime jurisdiction (Constitution of the United States, art. 3, § 2), to the exclusion of the state courts, in actions strictly in rem. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. Actions in persona involving supplies furnished an ocean-going boat, with ancillary attachment proceedings upon the vessel, may be brought in the state courts. Rounds, etc., v. Cloverport, etc., Co., 237 U. S. 303, 35 S. Ct. 596, 59 L. Ed. 966. Such a proceeding is sometimes denominated as an action quasi in rem. Siler Mill Co. v. Nelson Co., 94 Wash. 477, 162 P. 590.

The respondent maintains that the action is brought under the provisions of section 813 et seq. of the Code of Civil Procedure and is not an action in rem, but an action in personam with ancillary proceedings for the attachment of the vessel, of which the state courts have jurisdiction. The appellants reply to this argument by urging that in so far as section 813, Code of Civil Procedure, attempts to give the state courts jurisdiction to proceed against a sea-going vessel and sell the same for supplies furnished, it is an action in rem of which the courts of California have no jurisdiction. In support of this contention they cite the case of The Moses Taylor v. Hammons, 4 Wall. 411, 18 L. Ed. 397, which reversed a decision of the Supreme Court of this state and held somewhat similar provisions of the Practice Act of California unconstitutional. They further cite the case of Stephens v. Weyl-Zuckerman & Co., 34 Cal. App. 210, 167 P. 171, which they seek to construe as a similar holding upon the present provisions of the Code of Civil Procedure.

From the view we take of the case we do not find it necessary to determine these questions raised by appellants. For the purpose of this decision we will assume, but not hold, that the provisions of sections 813 et seq., Code of Civil Procedure, in so far as they permit an action to be brought against the motorboat Astorian, its attachment and the establishment of a lien thereon, together with its sale to satisfy a judgment for supplies furnished, are constitutional and vest jurisdiction in the state courts to entertain such an action.

[3] The provisions of section 813 of the Code of Civil Procedure applicable to this case are as follows: "When vessels, etc., are liable. Their liabilities constitute liens. All steamers, vessels, and boats are liable: * * * 2. For supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees."

It is immediately apparent from the language here employed that the supplies which can form the basis of such a lien must be purchased at the request of either the owner, the master, the agent, or the consignee of the boat. Supplies purchased by a person not coming within one of these classifications could not furnish the grounds for any such lien.

The record discloses that the respective parties entered into a stipulation in the lower court, the material parts of which are as follows:

"That Y. Ito was not an owner and was never master of the said vessel; at least he was not an owner unless he had a sort of equitable ownership under a charter party which he had with Giaconi and the other owners; * * *

"That immediately thereafter, after the making of the charter party, the possession and control of the said vessel was delivered to the said Y. Ito, and the said Y. Ito thereupon employed a crew of two men and a master for the said vessel and commenced to use it; that Y. Ito thereafter purchased of and from the plaintiff various supplies such as are ordinarily and customarily used by fishermen in the lobster fishing business, such as groceries, hardware supplies, fishing tackle, boat equipment, rubber boots, and articles of similar character. * * *

"That all of the materials and supplies sued for herein were delivered by the Harbor Supply Company, this plaintiff, to the boat 'Astorian,' and they were all ordered by the said Y. Ito or his agents. * * *"

[4, 5] It appears from this stipulation that Ito was not the owner of the motorboat Astorian. He was simply the lessee thereof under the contract which we have referred to and had a mere option to purchase the boat. Ownership implies title. An option to purchase does not pass title to the optionee. Respondent stipulates lack of title in Ito, which excludes him from the classification of an owner.

[6, 7] The stipulation further provides that he was never master of the vessel, but hired a master to navigate it. The liability of a boat and its owners for supplies purchased by a master grows out of the doctrine of the agency of the master for the owners. As the master of the boat, during its possession by Ito, was not appointed by its owners, and as the supplies were not purchased by the master but by Ito, neither the owners nor the boat could be held for their purchase price under this classification. 24 R. C. L. 1135.

[8] The third classification of persons who may bind the owners and the boat are agents. We need only to bear in mind the facts of this case to conclude that Ito was not the agent of the owners. He was simply a lessee of the Astorian and operated it for his own use and profit.

Who may be considered a consignee of the owners of a boat presents a more interesting question. A "consignee" is defined by section 2110, Civil Code, as a person to whom freight is to be delivered. Of course, this definition cannot apply in the instant case. A "consignee" is also defined as follows: "A person to whom goods are shipped for sale; a purchaser to whom goods have been sent. It is undoubtedly true that a consignee is often a purchaser; but it is not necessary that he should have any interest in the goods consigned to him. The consignee belongs to that class of agents called factors, title to the property remaining in the consignor, with power in the consignee to sell the property on account of the consignor." 12 C. J. 527.

[9] It has also been held that a "consignee" is a person to whom personal property of any kind is delivered for the purpose of sale. Commonwealth v. Harris, 168 Pa. 619, 32 A. 92; Powell v. Wallace, 44 Kan. 656, 25 P. 42; Romeo v. Martucci, 72 Conn. 504, 45 A. 1, 99. 47 L. R. A. 601, 77 Am. St. Rep. 327.

It would seem that the latter definition of the term "consignee" as it is used in subdivision 2 of section 813, Code of Civil Procedure, is the only one which could be applicable to the facts of this case. Here it must be held to mean the person to whom personal property is delivered for the purpose of sale. The statement of this definition necessarily excludes Ito from coming within its terms. The boat was not consigned to him for the purpose of sale. He was prohibited from selling it by the express terms of the contract under which he gained its possession.

We have therefore concluded that Ito was neither the owner, master, agent, nor consignee of the motorboat Astorian as the terms are used in section 813 of the Code of Civil Procedure. The case cannot come within the provisions of the section we are considering, as a lien must be supported by a purchase of the supplies by one coming within one of the four classes mentioned in the section. Respondent cannot complain of this conclusion. Its vice president, who was one of its directors, was fully advised of the terms of the contract or charter party under which Ito had possession of the boat. If respondent desired to protect itself by a lien on the boat, it should have done so by proper precautions taken prior to the sale of the goods and merchandise to Ito.

Appellants urge that a large quantity, if not all of the supplies furnished by respondent to Ito were not ship's stores, but were used by Ito to barter for lobsters caught in Mexican waters. While this is probably true as to a considerable portion of these supplies, some of them at least were consumed on the boat. The record does not disclose what quantity was used for barter and what portion was consumed as ship's stores. Ito paid a portion of his bill. As far as the record goes, this payment may have covered the value of the goods used by him in barter.

That portion of the judgment declaring and decreeing a lien upon the motorboat Astorian and ordering its sale in satisfaction of the money judgment rendered against Ito is reversed.

We concur: JENNINGS, Acting P. J.; ALLISON, Justice pro tem.

116 Cal.App. 527

AMERICAN BLDG. MATERIAL SERVICE CO. v. WALLIN et al.

Civ. 4306.

District Court of Appeal, Third District, California.

Sept. 8, 1931.

1. **Mortgages 🔑151(3).**

Deed of trust is "lien or other incumbrance," within statute governing priority of mechanics' liens (Code Civ. Proc. § 1186).

> Code of Civ. Proc. § 1186 provides the liens provided for are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to time when the building, improvement, or other structure was commenced, work done, or materials were commenced to be furnished.
>
> [Ed. Note.—For other definitions of "Lien," see Words and Phrases.]

2. **Mortgages 🔑151(3).**

If trust deed is recorded before any work is done or materials are furnished, such deed is ordinarily prior to mechanic's lien (Code Civ. Proc. § 1186).

3. **Mortgages 🔑151(3).**

Where no general contract for construction of garage existed, materialman's lien did not attach until materials were delivered; hence trust deed recorded prior to that time was superior (Code Civ. Proc. § 1186, and § 1183 as amended by St. 1911, p. 1313).

> Such trust deed was superior, notwithstanding prior to recordation of the deed of trust, others had already performed labor and furnished materials used in construction of building.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the American Building Material Service Company against L. O. Wallin and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

James, Pace, Smith & Younkin and Everett H. Mills, all of Los Angeles, for appellant.

Howard F. Shepherd and Phil S. Burns, both of Los Angeles, for respondents.

PRESTON, P. J.

This is an appeal by plaintiff American Material Service Company, a corporation, from a judgment allowing priority of a deed of trust of defendant John R. McCoy and Title Guarantee & Trust Company over the mechanic's lien of plaintiff. The facts are briefly these:

Defendants L. O. Wallin, Fred W. Klein, and Frances Klein owned a lot in the city of Los Angeles. During the early part of 1926 they commenced the erection of a brick garage thereon. There was no general contract for the erection of said garage. During the course of the construction of this garage, the owners purchased from plaintiff and appellant certain building materials, consisting principally of rough lumber to be used in the construction of said garage. After the work had begun on the garage, but before appellant had sold or delivered any material, said owners executed a deed of trust upon said real property in favor of defendant John R. McCoy to secure the payment of a promissory note in the sum of $15,750, naming the defendant Title Guarantee & Trust Company as trustee. Said deed of trust was also recorded in the office of the county recorder *before appellant delivered any materials for said building.* Failing to receive payment for said material, appellant filed a lien for the amount due and thereafter instituted this action for the foreclosure of such lien.

The court found that the building was commenced prior to the recordation of the deed of trust, but that no materials were furnished by appellant until after said deed of trust was recorded, and, therefore, the lien of said deed of trust on said real property was superior to the mechanic's lien of plaintiff and appellant, and rendered judgment accordingly.

The court found, however, that other persons, firms, and corporations had furnished materials and performed labor upon said garage building *prior* to March 13, 1926, the date of the recordation of the deed of trust, and, also, found that there was no general contract for the erection of said garage building.

Appellant contends that, under the court's findings, its lien *would date back as of the date of the commencement of the work on said garage, and would, therefore, be prior and superior to the lien of said trust deed.* Consequently, only one question is presented for determination, which is: When did appellant's lien attach? Or, to state the question another way: Did appellant's lien attach when the building was *first commenced* or when appellant *first delivered* any lumber or other material *for the construction of said building?*

Section 1186 of the Code of Civil Procedure provides: "The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished."

[1, 2] It has been settled by a long line of decisions in this state that a deed of trust *is a lien or other incumbrance within the meaning of said section 1186.* Fickling v. Jackman, 203 Cal. 657, 265 P. 810. The general rule regarding priority of deeds of trust and mortgages over mechanics' liens is stated as follows: If recorded before any work is done or materials are commenced to be furnished, a deed of trust or mortgage is in the ordinary course of things prior to mechanics' liens. Brush v. E. R. Bohan & Co., 102 Cal. App. 457, 283 P. 126; Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898; S. F. Lumber Co. v. Yates, 54 Cal. App. 109, 204 P. 423; Fickling v. Jackman, supra; 25 Cal. Jur. 52.

In the case at bar, however, we have a different situation. Here the work on the building had commenced and others had already performed labor and furnished materials used in the construction of said building, when the deed of trust was executed and recorded, but appellant did *not furnish any material until after the recordation of the deed of trust, and no written contract for the construction of the building is involved.* The owner built the structure and dealt directly with the laborers and materialmen.

In the case of McClain v. Hutton, 131 Cal. 132, 61 P. 273, 63 P. 182, 622, the Supreme Court, in construing said section 1186, held that where the contract between the owner and contractor was invalid, by reason of the failure of the parties thereto to comply with section 1183 of the Code of Civil Procedure, liens for labor performed and materials furnished, related back only to the time the work was done and the materials commenced to be furnished, and the court held that such liens were subsequent and inferior to the lien of the mortgage filed for record after the building had been commenced but prior to the time the work was done and the materials commenced to be furnished.

The court in that case further held that under this provision (section 1186, Code Civ. Proc.) the cases must be divided into two categories, distinguished by the existence or nonexistence of a valid contract. In the former case (where there is a valid contract) the priority of the liens is to be determined by the date of the commencement of the building; in the latter, by the time the work was done, or the materials commenced to be furnished.

In Simons Brick Co. v. Hetzel, 72 Cal. App. 1, 236 P. 357, 359, in discussing the holding in McClain v. Hutton, supra, said: "As we understand this decision, the court held that where there was a valid contract, liens thereunder related back to the commencement of the building, but where the contract was invalid the liens related back only to the respective dates when the work was performed and the materials were commenced to be furnished. The reason of the rule thus enunciated we think is apparent. Under section 1183, as it stood at the time McClain v. Hutton was decided, the failure to record the contract rendered it 'wholly void, and no recovery could be had thereon by either party thereto; and in such case, labor done and materials furnished by all persons * * * except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof.' But, where the contract was duly filed for record, all liens against the building were based primarily upon the contract, and the labor and material covered by the liens were deemed to have been performed and furnished under said contract. The section therefore divided liens into two classes, those arising under a valid contract between the owner and the contractor, and those where the labor done and materials furnished were deemed to have been done and furnished at the personal instance of the owner. This latter class included all liens of subcontractors, materialmen, and laborers, when there was no valid contract of record, and each of these persons by section 1183 was given a lien by virtue of an implied contract between him and the owner. As far as his right to a lien was concerned, he occupied the same relative position to the owner as if the latter had not made any general contract whatever, but had personally and directly bought the materials and employed the labor used in the construction of the building. In such a case, each laborer and materialman would depend for his lien upon his individual agreement with the owner, and his right to a lien would only commence when he began labor upon, or commenced to furnish material for, the building."

It is true that since the decision in McClain v. Hutton, supra, and in 1911 (Stats. 1911, p. 1313) section 1183 of the Code of Civil Procedure was amended, and as there amended, was still in force at the time this action accrued and also at the time the complaint was filed. In its amended form it differs materially in its requirements from what it did prior thereto. As amended, it contains no provision that for the failure to record the original contract between the owner and the contractor, said contract shall be wholly void, or void at all or invalid. Neither does it contain any provision that when the contract is not filed the labor done and materials furnished shall be deemed to have been done and furnished at the personal instance of the owner, nor any similar provision. These omissions and changes, however, are not such as would, in our opinion, destroy or impair the reasoning in the cases of McClain v. Hutton, supra, and Simons Brick Co. v. Hetzel, supra, on the particular question involved in the case at bar.

The division of mechanics' liens into two classes is based on section 1186 of the Code of Civil Procedure and this section has not been amended since its enactment in 1872.

Appellant seems to rely upon the case of Sax v. Clark, 180 Cal. 287, 180 P. 821, as supporting its contention that its lien dates back to the commencement of work on the building. In that case, however, it does not appear whether there was a general contract or not and, therefore, it is of no assistance to us under the facts in the case at bar.

[3] From what we have said it follows that we are of the opinion that, as there was no general contract for the construction of the garage in question, appellant's lien did not attach until the materials were commenced to be delivered and said deed of trust, having been recorded prior to that time, is superior to the lien of appellant.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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116 Cal.App. 552

PEOPLE v. MOULTON.

Cr. 218.

District Court of Appeal, Fourth District, California.

Sept. 11, 1931.

Rehearing Denied Sept. 24, 1931. Hearing Denied by Supreme Court Oct. 8, 1931.

1. Embezzlement 🔑11(2).

Statute defining embezzlement and falsification of public accounts deals solely with protection and safe-keeping of public moneys (Pen. Code, § 424, subds. 1, 2).

Pen. Code, § 424, entitled "Embezzlement and falsification of public accounts," makes it an offense for any officer of state, county, city, town, or district of state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, to appropriate same without authority of law or any portion thereof to his own use or to the use of another, or to loan same or any portion thereof, or to make any profit out of, or to use the same for any purpose not authorized by law.

2. Criminal law 🔑29.

Fact that defendant might have been prosecuted under another statute is no defense.

3. Embezzlement 🔑11(2).

County assessor's deposit of tax moneys for current fiscal year in county treasury as tax moneys collected for preceding fiscal year *held* offense under embezzlement statute (Pen. Code, § 424, subds. 1, 2).

Defendant was charged with having collected tax moneys in question for the fiscal year 1930–31, and depositing the same in the county treasury under the representation that the same were for taxes collected for the fiscal year 1929–30, the years for which defendant was delinquent in his payments. Defendant contended that offense did not come within the provisions of Pen. Code, § 424, subd. 2, making it embezzlement to use public moneys for any purpose not authorized by law, but constituted offense under section 425, relating to officer's neglecting to pay over public moneys.

[Ed. Note.—For other definitions of "Embezzle; Embezzlement," see Words and Phrases.]

4. Embezzlement 🔑44(1).

In prosecution against county assessor for embezzlement, failure of evidence to disclose making of tax assessment *held* immaterial (Pen. Code, § 424, subd. 2; Pol. Code, § 3756).

5. Embezzlement 🔑44(1).

In prosecution against county assessor for grand theft of tax moneys, evidence *held* to support conviction (Pen. Code, § 424, subd. 2).

6. Embezzlement 🔑11(2).

County assessor's deposit of current tax funds in county treasury to credit of taxes for preceding fiscal year, though not part of another general embezzlement, would constitute misappropriation of public moneys (Pen. Code, § 424, subd. 2).

7. Embezzlement 🔑11(2).

Fraudulent misappropriation by public official of any property coming under his control by virtue of his trust to any unlawful purpose constitutes embezzlement (Pen. Code, § 424).

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

8. Embezzlement 🔑11(2).

To constitute embezzlement by public official, prior embezzlement need not be shown if public official uses funds intrusted to him in any way not authorized by law (Pen. Code, § 424).

Appeal from Superior Court, San Diego County; G. K. Scovel, Judge.

George W. Moulton was convicted of malfeasance in the use of public funds, and from the judgment and from an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., of San Diego, for the People.

ALLISON, Justice pro tem.

The defendant, the county assessor of the county of San Diego, was convicted on two counts of an indictment charging him with malfeasance in the use of public funds. The first of said counts charges that the said defendant did willfully, unlawfully, and feloniously use for purposes not authorized by law, public moneys in the amount of $21,599.69, which moneys were in his possession in his official capacity as county assessor of said county of San Diego. The second count upon which the defendant was convicted, being designated as count No. 4 in said indictment (counts 2 and 3 of said indictment having been dismissed), charges the defendant with the crime of grand theft of the sum of $2,974.22, which moneys were in his possession in his official capacity as county assessor. Appellant was sentenced to San Quentin for the term prescribed by law. This appeal is from the judgment of conviction and order denying defendant's motion for a new trial.

It appears from the record in this case that said defendant was, on and prior to the 21st day of April, 1930, delinquent in his payments to the county treasurer of San Diego county for tax moneys collected by him for taxes due and payable for the year 1929–30, in the sum of $21,599.69; that there came into his possession as such county assessor, the said sum of $21,599.69 of said tax moneys collected by him between the 1st day of March, 1930, and the 21st day of April, 1930, as taxes for the year 1930–31, and on or about the said 21st day of April, 1930, said defendant represented to the county auditor and county treasurer that said sum of $21,599.69 was the accumulation of tax moneys collected by him on and before the first Monday in March, 1929, for the year 1929–30, and at said time paid over and delivered said sum of money to the said county treasurer of San Diego county to be applied by said county treasurer on said delinquent sums from defendant to said treasurer aforesaid. Said county auditor and county treasurer, believing and relying upon said representations so received from said defendant, applied said sum of $21,599.69 to said delinquency. The fourth count of said information, being one of the counts upon which the defendant was convicted, charges the defendant with grand theft in the sum of $2,974.22. The indictment, which is in the language of the Code section defining the offense, was framed upon the authority of section 424 (subdivisions 1 and 2) of the Penal Code, which provides as follows:

"424. Public officers. Embezzlement and falsification of accounts. Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who either:

"1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or,

"2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law," etc.

[1] Subdivisions 3, 4, 5, 6, and 7 of said section deal with offenses other than the offense charged in the indictment. Section 424 of the Penal Code deals solely with the protection and safe-keeping of public moneys as defined by said section, and with the duties of public officers charged with its custody and control, and with no other kind of public property. People v. Dillon, 199 Cal. 1, 248 P. 230, 234.

[2, 3] It is urged by the defendant that the offense does not come within the provisions of subdivision 2 of said section 424, and he argues that his neglect or failure to pay over the moneys as required by said section 424 may constitute a violation of section 425 of the Penal Code, but not a violation of subdivision 2 of section 424. Section 425 of the Penal Code reads as follows: "425. Officers neglecting to pay over public moneys. Every officer charged with the receipt, safe-keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony."

In support of his contention he urges that because the money in question was paid to the county treasurer, who was duly authorized to receive the same, that it was used for a purpose authorized by law and not in violation of subdivision 2 of section 424. It is to be borne in mind that the defendant is charged with having collected the tax moneys in question for the fiscal year 1930–31 and deposited the same in the county treasury under the representation that the same were for taxes collected for the fiscal year 1929–30. He is not charged with neglecting to pay over the tax money received by him in 1929, but with making the improper and unlawful use of the 1930–31 tax money to cover his shortage of 1929 and 1930.

It is true that the embezzling of the tax moneys of 1929–30 was a violation of section 425 of the Penal Code and a criminal prosecution may have been had thereon. However, it cannot be contended that said section occupies the entire legislative field with respect to safekeeping of public moneys and the duties of public officers with reference thereto. If this conviction is sustainable under section 424 it will not be rendered void by reason of the existence of section 425 of the Penal Code. See People v. Dillon, supra. It is no defense under one statute that the defendant might have been prosecuted under another. Bishop on New Criminal Procedure, § 612, subd. 4.

[4] The defendant insists that there is no evidence that an assessment of personal property was ever made; therefore no taxes became due, and in some manner this absence of proof of an assessment relieves the defendant of the charge against him. We are unable to follow the defendant to this conclusion. The moneys collected by the defendant as county assessor were taxes on personal property not secured by a lien on real estate. These collections were in fact made by him for the fiscal year 1930–31 after March 1, 1930. Section 3756 of the Political Code provides in part that the taxes on all personal property, unsecured by real estate, shall be due and payable immediately after the assessment of said personal property is made, but in any event the personal property tax on unsecured personal property is delinquent on the first Monday in December of each year at 6 o'clock p. m.

The defendant as county assessor is charged with the offense of using public moneys for purposes not authorized by law. The money was paid to him as such county assessor and was in his charge and keeping. Whether an assessment was actually made or not, is of little consequence so far as this charge is concerned. He accepted the money as a public official upon whom the law imposed the duty, among other things, of collecting and properly disbursing the moneys so collected. The question of the legality of the tax is in no wise involved in the matters before us.

[5] It is also contended that the evidence is insufficient to sustain the charge of grand theft as contained in count 4 of the indictment; that the evidence does not disclose a violation of subdivision 2, section 424 of the Penal Code. It appears that after the auditor checked all of the records of the 1929–30 personal property tax assessment rolls and the records of receipts issued against the amounts of money deposited with the treasurer by the defendant, there was on May 1, 1930, a shortage of $2,974.22, and that thereafter on the 5th day of May, 1930, the defendant, as such assessor, deposited the said sum of $2,974.22 with the treasurer to be credited on the 1929–30 account and that this amount was in fact collected on the 1930–31 personal property taxes. It seems that these facts were amply sustained by the records of the defendant's office.

[6] It is contended by the defendant that the deposit of funds in the county treasury could not in any sense be deemed a misappropriation unless such deposit was a part of another general embezzlement. A similar question was presented in the case of People v. Forman, 67 Cal. App. 693, 701, 228 P. 378, 380, in which the court, in disposing of the point, said: "Appellant was not charged with the embezzlement of the smaller amounts but with the misappropriation, on November 5, 1923, of the sum of $6,468.54, in lawful money of the United States. Therefore there is no merit in the point last made."

[7, 8] A crime of embezzlement is made out when it is shown that a public official fraudulently appropriates to any use or purpose not in the due course and lawful exercise of his trust, any property which he has in his possession or under his control by virtue of his trust, and it need not be shown that a prior embezzlement existed if the public official used the funds intrusted to him in any way other than as authorized by law. In People v. Rowland, 12 Cal. App. 6, 17, 106 P. 428, 432, the court said: "So, as stated, if in the case here, the money was either secreted within the meaning of the statute, or used to cover up some other shortage, or actually taken from the vaults of the bank and used in some transaction with which the bank had no connection, the crime is, in either event, proved."

In the case of People v. Dillon, supra, the court said:

> "The safe-keeping of public moneys has, from the first, been safe-guarded and hedged in by legislation most strict and severe in its exactitudes. It has continuously been the policy of the law that the custodians of public moneys or funds should hold and keep them inviolate and use or disburse them only in strict compliance with the law. The public treasury or depository of public funds was created solely as an agency for the receipt and disbursement of public funds with reference to public business and not as a place of exchange for the transaction of private business in the sense that banks and other commercial institutions are created or chartered. * * *
>
> "It is not for us to consider the wisdom of the statute. It cannot be said to be invalid on the ground that it is unreasonable or harsh. An officer accepts his office with a knowledge of his duties, and in the instant

case there was little excuse for the defendant to have been misled into the error he committed. Certainly there was no provision of law or rule of moral right that could have justified him in making the uses of public moneys which the evidence shows he made. The wisdom of the Legislature in requiring custodians of public moneys to hold them inviolate is both a protection to the public and to the officer, as it tends to remove from him the temptations that beset those who have large sums of money in their possession free from immediate demands."

Other errors are assigned, but in our opinion they are without merit and considering the record as a whole we believe that there is no prejudicial error appearing therein warranting a judgment of reversal.

The judgment and order are affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

116 Cal.App. 518

HERRON v. SMITH BROS., Inc.

Civ. 7450.

District Court of Appeal, First District, Division 2, California.

Sept. 8, 1931.

Rehearing Denied Oct. 8, 1931. Hearing Denied by Supreme Court Nov. 6, 1931.

1. Negligence ⊂⇒**61(2).**

Negligence of tunnel contractor in providing insecure dam and leaving conduit under stream open *held* "proximate cause" of death by flooding of employee of another tunnel contractor concurring with negligence of employer in leaving tunnel unprotected to cause disaster.

> "Proximate cause" has been defined as act or omission immediately causing or failing to prevent injury; act or omission occurring or concurring with another, which, had it not happened, injury would not have been inflicted; dominant cause, not one which is incidental to that cause.
>
> [Ed. Note.—For other definitions of "Proximate Cause," see Words and Phrases.]

2. Death ⊂⇒**99(5).**

$7,500 damages for death of 23 year old son awarded mother having life expectancy of 21½ years and receiving $300 yearly support from son *held* not excessive.

3. Appeal and error ⊂⇒**932(1).**

Where appellant failed to print evidence on question of damages, appellate court cannot presume against verdict that reasonable probability that plaintiff suffered pecuniary loss in amount of verdict was not shown.

4. Appeal and error ⊂⇒**932(1).**

Where appellant failed to print evidence on issue of damages for loss of son, appellate court may presume jury allowed full sum as anticipated pecuniary benefits, not for loss of society, comfort, or protection.

5. Death ⊂⇒**64.**

Jury in determining damages for loss of son is not bound by exact estimates of mortality tables or past income of son, but could consider expectancy that son's income and contributions to mother might have increased.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by Emma L. Herron against Smith Bros., Inc. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hartley F. Peart, of San Francisco, Raymond Salisbury, of Oakland, and Tinning & Delap, of Martinez, for appellant.

Forrest M. Pearce, L. R. Weinmann, and W. E. Licking, all of Oakland, and Mortimer B. Veale, of Antioch, for respondent.

NOURSE, P. J.

Plaintiff sued for damages for the death of her son, who was drowned while employed in the construction of a tunnel for the East Bay municipal utility district. The demurrer of the district was sustained, and the cause went to trial before a jury, which returned a verdict against the defendant, Smith Bros., Inc., for $7,500. This defendant has appealed under section 953a, Code of Civil Procedure.

Working under a contract with the utility district, Smith Bros. was engaged in constructing a tunnel under the Contra Costa county hills as a part of the district's aqueduct system. This tunnel, known as the Lafayette tunnel, ran from the town of Lafayette in a westerly direction to the easterly bank of San Pablo creek. At the same time the firm of Grier & Mead was engaged under similar contract on the construction of another tunnel, which ran from the Claremont district in the city of Oakland in an easterly direction to a point a short distance west of the westerly bank of San Pablo creek. To connect the two tunnels for the general purposes of the water system, a concrete diversion or screening chamber was under construction by Smith Bros. under a separate contract. This chamber was located west of the westerly bank of San Pablo creek at an elevation of several feet below the bed of the creek, and was planned to connect with the Lafayette tunnel by a concrete tube which this defendant constructed across the creek and below the stream bed. About two weeks before the accident Grier & Mead drove a four-foot tunnel from the easterly end of the Claremont tunnel into the excavation made by Smith Bros. for the diversion chamber and used this four-foot tunnel to pump water from the seat of their operations into the diversion chamber until this practice was discontinued by order of the utility district.

In the construction of the diversion chamber and of the connecting tunnel under the stream bed the defendant broke through both of the natural banks of the stream to a level far below that of the stream bed. Protection was afforded those working in the Lafayette tunnel by the erection of a dam consisting of sacks filled with earth. On November 25, 1926, a heavy rainstorm caused a sudden flood of water to flow down San Pablo creek; the water quickly washed out the earth dam on the east bank, overflowed the excavation and works of the diversion chamber, and, escaping into the Claremont tunnel, drowned ten men employed upon that contract.

On this appeal but two points are raised, that the negligence of the appellant was not the proximate cause of the death, and that the damages are excessive. The argument on the question of proximate cause is predicated on the claim that Grier & Mead were trespassers who negligently constructed an opening between the Claremont tunnel and the diversion chamber and that their negligence was the direct and proximate cause of the injuries. The respondents rest their case upon the admitted negligence of the appellants in substituting an insecure and unstable dike or coffer dam for the natural bank of the stream, and in permitting the easterly portal of its conduit under the bed of the stream to remain open and exposed immediately below this insecure dam; upon the further showing that all these acts were done by appellant with full knowledge of the opening into the Claremont tunnel, of the probability of flood waters in the stream, of the incompleted condition of the diversion chamber, and of the uninterrupted passage for the flow of flood waters from the stream into the Claremont tunnel; and that these conditions were allowed to remain notwithstanding repeated warnings of the danger given to appellant.

Proximate cause has been defined as: "That act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted; * * * the dominant cause, not the one which is incidental to that cause, its mere instrument." 22 R. C. L. p. 111. This definition has been approved in a long line of decisions, but it would serve no purpose to cite them here. In Sawdey v. R. W. Rasmussen et al., 107 Cal. App. 467, 290 P. 684, 689, the District Court say: "The mere fact that one of several concurring causes may not have been reasonably anticipated is not enough to shield from liability him who sets in motion the other; for it is well settled that the negligence complained of need not be the sole cause of the injury. It is enough to show that it is a proximate concurring cause; that is, one that was so efficient in causation that, but for it, the injury would not have occurred." In Rauch v. Southern Cal. Gas Co., 96 Cal. App. 250, 255, 273 P. 1111, 1113, the District Court quoted with approval from Thompson's Commentaries on the Law of Negligence, vol. 8, p. 21, as follows: "One of the most valuable tests to apply to determine this question is to determine whether a responsible human agency has intervened sufficient of itself to stand as the cause." And again (page 20): "An intervening agency which merely concurs with the cause counted on as a proximate cause of the accident does not prevent the latter from becoming the proximate cause for the purposes of the action."

[1] Applying these principles to the case at hand, we cannot escape the conclusion that, conceding the negligence of Grier & Mead in leaving the adit to the Claremont tunnel unprotected, such negligence was not "sufficient of itself to stand as the cause" of the injuries, but the negligence of the appellant in the particulars stated was a "proximate concurring cause," and that these acts of negligence were so continuous in their nature that the concurrent wrongful act of Grier & Mead precipitating the disaster must be regarded as not independent, but as conjoining with the original act to create the disastrous result. Merrill v. L. A. G. & E. Co., 158 Cal. 499, 505, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Rauch v. So. Cal. Gas Co., 96 Cal. App. 250, 256, 273 P. 1111.

[2-5] On the issue of the amount of the verdict, the argument is that the verdict of $7,500 is excessive because the highest estimate of the yearly contributions of the deceased for the support of his mother was $300; that her life expectancy according to mortality tables was 20½ years; that, assuming that she should live for this full period, the total contributions would equal $6,180. Then it is said that, because of the roving character of the son's employment, there was no reasonable probability that the mother would suffer from the loss of his society, comfort, or protection. The mother was 49 years of age at the time of her son's death; the son was 23. He was able-bodied, thrifty, and sober, and had been engaged as a laborer in heavy construction jobs at daily

wages from which he had contributed to his mother an average of $25 a month. Appellant cites Parsons v. Easton, 184 Cal. 764, 773, 195 P. 419, 422, holding that, because the evidence there failed to show "a reasonable probability" that the plaintiff suffered pecuniary loss through the deprivation of the "society, comfort, and protection" of the deceased, "no great sum could reasonably be given as damages" on that account. The case is not authority here for two reasons—the appellant has failed to print any of the evidence on the issue, and we cannot therefore presume against the verdict that such reasonable probability was not shown; for the same reason we cannot presume that any portion of the verdict covered loss of society, comfort, or protection, but we may fairly and reasonably presume in support of the verdict that the jury allowed the full sum of $7,500 as anticipated pecuniary benefits. If this were done, the verdict would not do violence to any rule of law to which we have been cited. The jury was not bound by the exact estimates of the mortality tables or by the estimates of past income of this 23 year old son. It could take into consideration the expectancy that, as the age of the son increased, he might accumulate a greater income and thus increase his contributions to the support of his mother. Griffey v. Pac. Elec. Ry. Co., 58 Cal. App. 509, 517, 209 P. 45.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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116 Cal.App. 523

COMPTON v. NORTHWEST ENGINEERING CO. et al.

Civ. 4293.

District Court of Appeal, Third District, California.

Sept. 8, 1931.

1. New trial ⟹163(1).

Court could not modify formal order denying new trial, absent inadvertence or mistake (Code Civ. Proc. § 473).

2. New trial ⟹163(2).

Absent appeal, order denying plaintiff's motion for new trial, after judgment for defendant, was conclusive.

3. Appeal and error ⟹931(7).

Where defendant's liability upon respondeat superior theory was issue, upon judgment for defendant it must be assumed that issue was determined adversely to plaintiff.

4. New trial ⟹155.

Where plaintiff obtained judgment against two of three defendants, denial of plaintiff's motion for new trial against successful defendant was not premature because unsuccessful defendants had separate motion for new trial pending.

5. Appeal and error ⟹1173(1).

On defendant's appeal from order granting plaintiff and codefendants new trial, order, as regards codefendants, could stand, although reversed as to plaintiff.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by P. A. Compton against the Northwest Engineering Company and others. From an order purporting to grant a new trial after previous order made denying plaintiff's motion for new trial, the named defendant appeals.

Reversed in part, with directions.

Fletcher G. Flaherty, of San Francisco, and Robert Brennan and E. T. Lucey, both of Los Angeles, for appellant.

Bertrand J. Wellman, Rydalch & Mullen, and H. S. Clewett, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order purporting to grant a new trial after a previous order had been duly made and entered denying plaintiff's motion for a new trial. The appeal is presented to this court upon a bill of exceptions. It is contended the court was without jurisdiction to change its original order denying a new trial.

The plaintiff lost a hand in operating a drag line excavating machine. In a suit for damages, the complaint alleged that the injury was sustained through the negligence of the defendant Hildebrand, who was engaged in demonstrating the machine as the agent of the appellant, Northwest Engineering Company, and of the codefendant Collins-Kay Machinery Company. The cause was tried with a jury. Separate verdicts were rendered. It was held that plaintiff was entitled to take nothing from the appellant, Northwest Engineering Company. The plaintiff was, however, awarded a verdict of $25,000 against the remaining defendants, Collins-Kay Machinery Company and Hildebrand. A judgment was entered accordingly on February 16, 1928. In due time the plaintiff served and filed upon the defendant Northwest Engineering Company a notice of intention to move for a new trial. This motion was argued and submitted on March 30th. Three days later the court made and entered an unqualified order that "plaintiff's motion for a new trial heretofore submitted is by the court denied."

Subsequent to the filing of plaintiff's motion for a new trial, the defendants Collins-Kay Machinery Company and Hildebrand, against whom the judgment for damages was entered, served and filed a separate notice of intention to move for a new trial. On April 10th this last-mentioned motion for a new trial was argued and submitted. The next day the court made and entered the following minute order: "Defendants' motion for a new trial heretofore submitted is now by the court granted as to all defendants, and (the) order of April 2, 1928, denying plaintiff's motion for new trial, having been prematurely entered is hereby vacated, and plaintiff's motion for new trial is hereby granted."

[1, 2] The court certified that the bill of exceptions "is true and correct and contains record of all proceedings subsequent to the entry of judgment herein. * * *" From this bill of exceptions it appears that no motion to modify or set aside the first order denying plaintiff's motion for a new trial was ever made pursuant to section 473 of the Code of Civil Procedure, or at all. It also affirmatively appears that the original order denying plaintiff's motion for a new trial was duly and regularly made and entered, and that it was not prematurely entered. The two motions for new trial were separate and distinct. The first one was instituted by the plaintiff. It was served upon the defendant Northwest Engineering Company, in whose favor a valid binding judgment had been previously rendered and entered. The motion for a new trial was duly argued and submitted. The court had jurisdiction to hear and determine this motion. On April 2d the court did formally make and enter an order denying this motion for a new trial. By the formal denial of this first motion for a new trial, the court exhausted its jurisdiction in that regard. It was thereafter powerless to modify or change this order denying a new trial against the Northwest Engineering Company, except for inadvertence or mistake in the entry thereof. 20 Cal. Jur. 204, § 134; Bloomquist v. Haley, 204 Cal. 258, 268 P. 364; People v. Martin, 199 Cal. 240, 248 P. 908; Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Vale v. Maryland Casualty Co., 101 Cal. App. 599, 281 P. 1058; Arnold v. Superior Court, 71 Cal. App. 298, 234 P. 912. It was not contended the motion was denied through inadvertence or mistake. No motion to modify or set aside this order was ever made upon this ground pursuant to section 473 of the Code of Civil Procedure, or at all. The court merely recites in its last order that the first one was "prematurely entered." This statement of the court to the effect that the first order was prematurely made is without support in the record. In truth, the record which is presented by the bill of exceptions appears to affirmatively indicate that the order was duly and regularly made, and that it was not prematurely entered. In the absence of an appeal, that order denying plaintiff's motion for a new trial was therefore final and conclusive.

[3, 4] The only apparent theory upon which the plaintiff's motion for a new trial might have been granted was that the evidence may disclose the fact that the defendant Northwest Engineering Company was the employer and principal of the defendant Hildebrand, through whose negligence in demonstrating the machine the plaintiff was injured. This would be upon the theory of respondeat superior, in accordance with the allegations of the complaint. This was a direct issue in the case. A verdict was rendered and a judgment entered in favor of this defendant, Northwest Engineering Company. It must be assumed this issue of appellant's liability was determined adversely to the plaintiff. The interest and alleged liability of this appellant was separate and distinct from that of the other codefendants. A denial of plaintiff's motion for a new trial against this appellant did not necessarily have any bearing upon the liability of the other defendants against whom a judgment for damages was rendered. It may, therefore, not be said that the denial of plaintiff's motion for a new trial was premature merely because the defendants against whom a judgment for damages had been rendered also had pending a separate motion for new trial.

[5] The notice of appeal is from the order of court granting plaintiff's and defendants' motions for new trial, and the order setting aside the former order of April 2d which denied plaintiff's motion for a new trial. This final order from which this appeal was taken may be readily segregated so as to permit it to stand in so far as it grants defendants' motion for new trial. Corbett v. Corbett (Cal. App.) 298 P. 819. This appellant is not concerned with the judgment which was rendered against its codefendants. Neither of these defendants against whom the judgment was rendered has appealed from the order granting a new trial. The balance of the order from which the appeal was taken, to the effect that the former order denying plaintiff's motion for a new trial is vacated, and plaintiff's motion for a new trial is granted, is in excess of the court's authority and void. This last-mentioned portion of the order is therefore ineffectual with respect to plaintiff's motion for new trial and should be eliminated from the order.

The order of April 11, 1928, is reversed to the extent that it purports to set aside the former order of April 2, 1928, and purports to grant a new trial as against this appellant. The trial court is directed to modify that order accordingly.

We concur: PRESTON, P. J.; PLUMMER, J.